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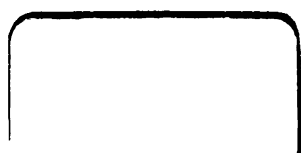
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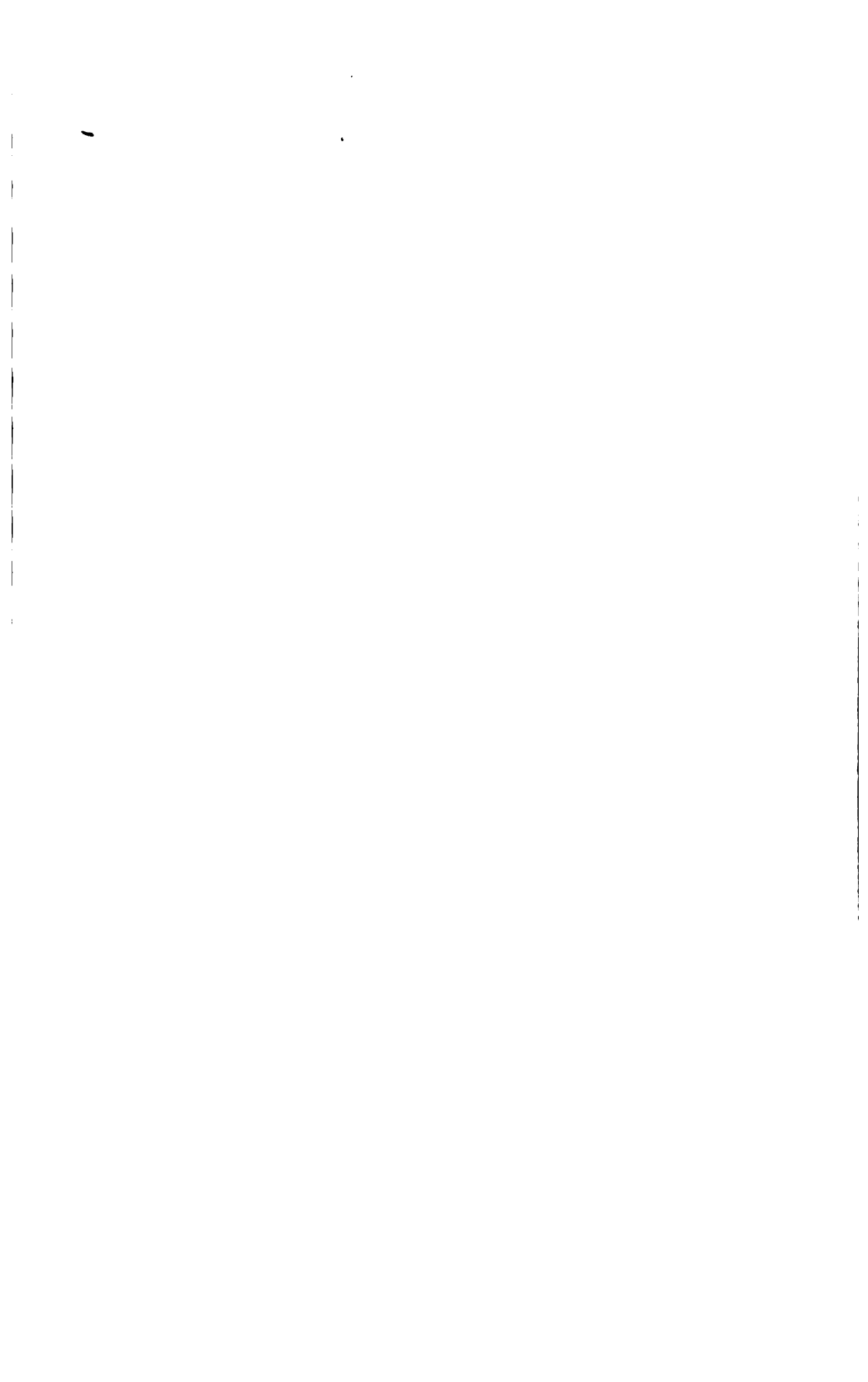
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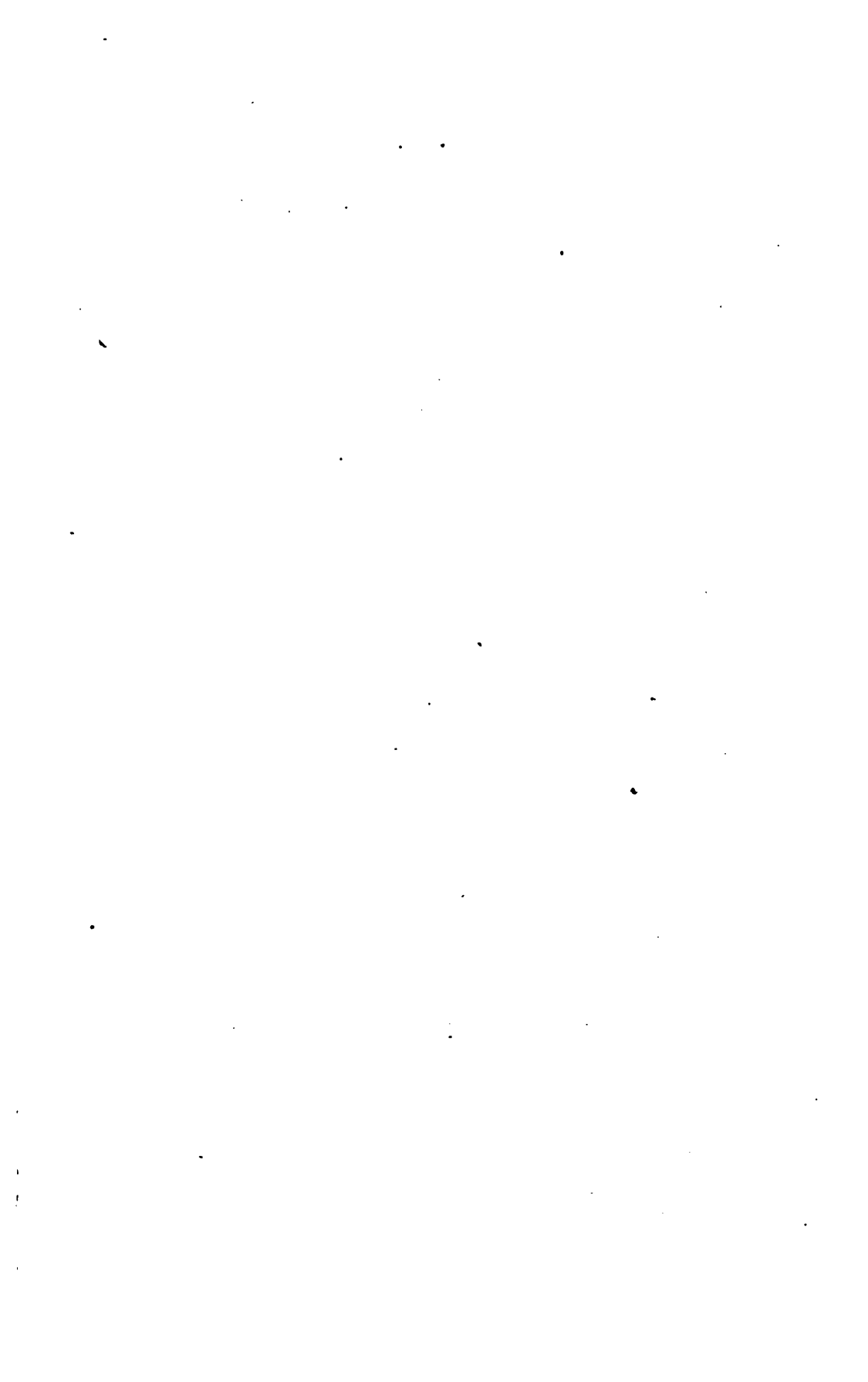
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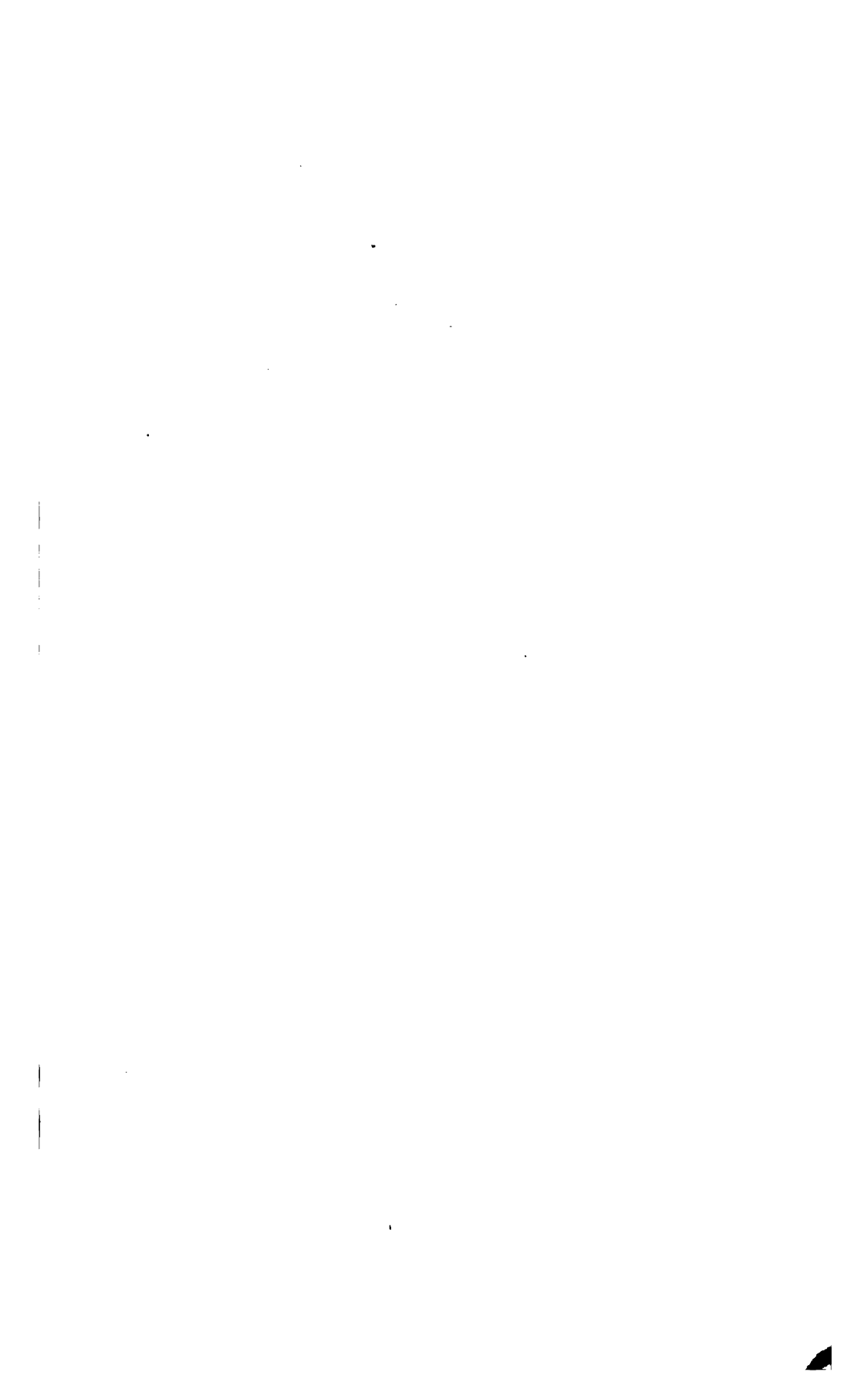
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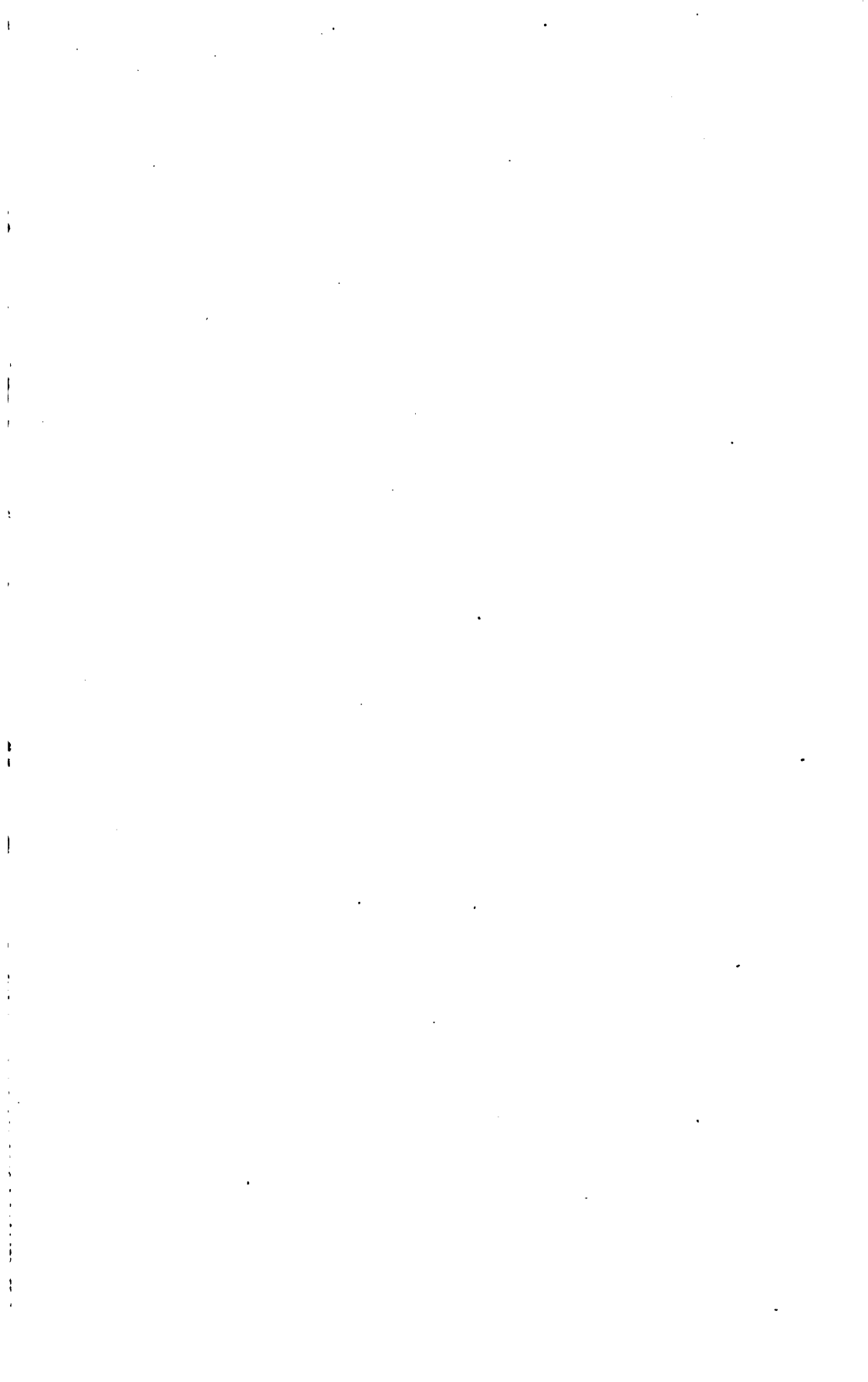
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THE LAWYERS REPORTS ANNOTATED

BOOK LIV.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.
FARNHAM, EDITORS.

ROCHESTER, N. Y.

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LAWYERS' REPORTS

ANNOTATED.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

LAFAYETTE BRIDGE COMPANY, *Plff.*
in Err.,
v.

Gena OLSEN, Admx., etc., of John Olsen,
Deceased.

(47 C. C. A. 367, 108 Fed. 335.)

1. One engaged in constructing a bridge owes to his employees the duty of furnishing material for the temporary structure, which is reasonably sufficient to bear the weight to which it will be subjected; and for that purpose he is required to make proper inspection of the material furnished, to ascertain its soundness.
2. The duty owing by one engaged in constructing a bridge, to his employees, of inspecting the material furnished for the temporary structure to see that it is

reasonably sufficient for its intended use, is not performed by directions to the workmen to pick out the best of mingled suitable and unsuitable material furnished.

3. An action for injuries to an employee of one engaged in constructing a bridge, which were caused by the breaking of defective material used in the temporary structure, cannot be taken from the jury where there is no evidence of inspection on the part of the master to ascertain whether or not the material furnished was suitable, and evidence produced indicates that proper inspection would have disclosed the defect.
4. The jury may make use of their own knowledge and experience, in considering conflicting evidence of experts upon the question whether or not proper inspection of material furnished by an employer for the temporary structure of a bridge which he was

Note.—*Vice principalship as determined with reference to the character of the act which caused the injury.*

I. Introductory.

II. Master liable for any negligence which involves the breach of one of his personal duties.

- a. Generally.
- b. Various forms in which the master's responsibility is stated.
- c. Subsidiary consequences deduced from the general principle.
- d. Rationale of the doctrine of nondelegable duties.
- e. Master sometimes liable both on account of the character of the negligent act and the official position of the negligent servant.
- f. Doctrine of nondelegable duties applicable to artificial persons.
- g. Servants of contractors, when precluded from availing themselves of the doctrine in actions against their masters.
- h. Delegation of personal duties to an independent contractor, effect of.
- i. Same subject continued; opposing doctrines discussed.
- j. Massachusetts doctrine not identical with that of other states.
- k. Servants may act in a dual capacity.
- l. Pleading.
- m. Burden of proof.
- n. Propriety of instructions.
- o. Functions of court and jury.

III. What duties are deemed to be nondelegable.

- a. Duties imposed by statute.
 1. Quality of duty unchanged by statute.
 2. Quality of duty altered.

III.—continued.

- b. Duty to see that the unintelligent instrumentalities of the work are reasonably safe; general rule stated.

- c. Duty to see that the unintelligent instrumentalities of the work, as originally supplied, satisfy the legal standard of safety.

1. Defective railway track and appliances.
2. Inadequacy of safeguards against dangers from explosive substances.
3. Defective appliances for protecting servants engaged in excavating.
4. Defects in bridges, trestles, etc.
5. Defects in scaffolds, stagings, etc.
6. Defects in other structures.
7. Unguarded machinery.
8. Unguarded openings in floors, etc.
9. Defective pipes.
10. Defective appliances for loading and unloading vehicles.
11. Defective locomotives.
12. Defective railway cars.
13. Defective ladders.
14. Defective ropes, rigging, etc.
15. Defective hoisting apparatus.
16. Other defects in machinery.

- d. Duty to see that the unintelligent instrumentalities are maintained in a suitable condition for the work to be done.

1. Defective railway tracks.
2. Dangerous conditions alongside railway tracks.
3. Defects in other kinds of tracks.
4. Defective footpaths.

building would have disclosed a defect which caused an injury to an employee.

5. A foreman authorized to purchase, inspect, and direct the use of lumber for the temporary structure of a bridge which his employer is engaged in constructing represents the master in respect to the duty of inspecting to ascertain if the lumber used is reasonably suitable for the purpose intended, so as to render the master liable for injuries to other employees due to failure to perform that duty.
6. The court on appeal will not interfere with the discretion of the trial court as to the extent of the cross-examination of witnesses, where a just verdict has been rendered and the testimony objected to could not have improperly affected the result.

(April 30, 1901.)

III. d—continued.

5. Inadequacy of safeguards against dangers from explosive substances.
6. Inadequacy of protection for servants engaged in evacuation work.
7. Inadequacy of protection for servants working in mines.
8. Defects in bridges.
9. Defects in scaffolds, platforms, etc.
10. Defects in other structures.
11. Defective method of loading cars.
12. Pitfalls.
13. Want of adequate protection against injuries from falling bodies.
14. Want of adequate means to keep railway cars stationary when not in use.
15. Defective locomotives.
16. Defects in railway cars.
17. Defects in other vehicles.
18. Defective boilers.
19. Defective hoisting apparatus.
20. Defective adjustment of the parts of machinery.
21. Other defects in machinery.
- a. Difference between the extent of a master's responsibility for original supply and subsequent maintenance.
- f. Duty to see that worn-out or otherwise defective parts of instrumentalities are replaced by suitable substitutes.
- g. Duty to furnish proper medical treatment to sick or injured servants.
- h. Duty to hire suitable servants.
- i. Duty to employ servants sufficient in number for the work in hand.
- j. Duty to frame rules and regulations for the conduct of the business.
- k. Duty to bring regulations to the knowledge of employees.
- l. Duty to carry out regulations, how far absolute; generally.
- m. Duty to carry out regulations with respect to the movements of trains.
1. Doctrine that train despatchers are vice principals; generally.
2. Train despatchers represent the company as to special orders suspending regular timetables.
3. Doctrine that train despatchers are not vice principals.

ERROR to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois to review a judgment in favor of plaintiff in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by **Jenkins**, Circuit Judge:

The defendant in error brought suit to recover damages for the death of her intestate, John Olsen, who was drowned in the Illinois river through falling from a temporary bridge or scaffolding while in the service of the Lafayette Bridge Company. The declaration contains six counts. The first four counts substantially charge that

III. m—continued.

4. Liability of railway companies for the negligence of servants who transmit the orders or see that they are carried out.
- n. Duty to impart information as to permanent dangers normally incident to the work at the time it is entered upon.
- o. Duty to impart information as to permanent dangers superadded to the environment after the work has begun.
- p. Duty to warn as to dangers of the transitory class occasionally supervening during the progress of the work.
- q. Duty to inspect instrumentalities; generally.
- r. Duty to inspect instrumentalities at the time they are first brought into use.
- s. Duty to inspect instrumentalities during the time they are kept in use.
- t. Duty to inspect instrumentalities belonging to another person, but temporarily used by the master.
- IV. Nonliability of the master for negligence of co-servants in respect to the details of the work.
- a. Generally.
- b. Supervision of details not a master's duty.
- c. Merely transitory perils; master not bound to protect the servant against.
- d. Dangers caused by the progress of the work; master not bound to protect servant against.
- e. Preparation or care of instrumentalities; master not responsible for, where these functions are a part of the work to be done.
- f. Negligent use of safe appliances by fellow servant; master not responsible for.
- g. Rationale of doctrine exempting master from liability for negligence in carrying out the details of the work.
- h. Pleading.
1. Declaration.
2. Plea.
- i. Instructions.
- j. Functions of court and jury in passing upon evidence.
- k. Explanation of classification of the cases cited in the ensuing sections.
- V. Negligence of co-servant involving merely the use of the instrumentalities; master not responsible for.

the Lafayette Bridge Company, in charge of and engaged in constructing a bridge across the Illinois river near the city of Spring Valley, negligently suffered the bridge to be in bad and unsafe condition, and to be erected in an unsafe manner; that the bridge and the scaffolding used in its construction rested upon planks of insufficient size and strength, and insufficiently braced or supported to bear the weight placed upon them, by reason whereof one of the planks was broken, and Olsen, then pursuing a car laden with material for the bridge, was cast into the waters of the Illinois river, and killed. The fifth count, charging incompetency of the foreman, need not be stated, as no evidence was adduced to support it. The sixth count charges that

the bridge company furnished for the scaffolding to be used in the erection of the bridge unsound, knotty, imperfect, weak, and insufficient planks and boards for the construction of the scaffolding, or temporary structure, to support the permanent structure of the bridge while in course of erection; and that one of the planks used broke, causing Olsen to be cast into the waters of the river and drowned. Concerning the principal facts of the case there is not much dispute, and they are, in the main, stated correctly in the briefs. In the spring of 1898 two spans of a bridge extending north and south over and across the Illinois river near Spring Valley were washed out. The bridge company contracted to put in a temporary structure for immediate use,

V.—continued.

- a. Orders respecting the use of the instrumentalities.
 - 1. Generally.
 - 2. Order accompanied by an assurance of safety.
- b. Choice of particular methods of work.
- c. Disposition of the force of employees available for the work in hand.
- d. Assigning servants to work for which they are unfitted.
- e. Negligence in sending servants into abnormally dangerous places without warning.
- f. Failing to warn servants as to dangers arising from the execution of the details of the work.
- g. Absences from the post of duty.
- h. Selecting an imperfect appliance from the stock available.
- i. Failing to use the instrumentalities furnished by the master.
- j. Negligence in failing to discard a defective for a suitable instrumentality.
- k. Using instrumentalities in a manner not contemplated nor authorized by the master.
 - 1. Giving of signals.
- m. Negligence in carrying out the express orders or regulations of the master.
 - 1. Cases of the nonobservance or inadequate observance of general rules.
 - 2. Cases of negligence in carrying out specific orders.
- n. Failure to give instructions.
- o. Negligence in manipulation of the instrumentalities during the progress of the work.
 - 1. Handling railway cars and locomotives.
 - 2. Operating hand cars.
 - 3. Improperly placing the loads on railway cars and other vehicles.
 - 4. Unloading railway cars or other vehicles.
 - 5. Manipulating switches.
 - 6. Failing to prevent the movement of heavy pieces of machinery.
 - 7. Operating hoisting machinery.
 - 8. Operating machinery in saw-mills.
 - 9. Operating a fire hose.
 - 10. Starting machinery without warning.
 - 11. Moving heavy articles.

V. o.—continued.

- 12. Causing or allowing heavy objects to fall.
 - 13. Failing to prevent explosions.
 - 14. Work of blasting.
 - 15. Failing to keep floors clean.
 - 16. Exposing the servant to excessive heat.
 - 17. Failing to keep place of work properly ventilated.
 - 18. Failing to keep place of work properly lighted.
 - 19. Exposing servant to peril from uncovered hatchways or other dangerous openings.
 - 20. Handling ships in docks.
 - 21. Navigating ships.
 - 22. Driving horses.
 - p. Negligence in the transmission of the master's orders to other servants.
- VI. Negligence of co-servant in respect to the preparation or structural modification of instrumentalities or their parts; when not imputed to the master.
- a. Introductory.
 - b. Negligence which produces structural unsafety of a temporary character.
 - 1. Defects in railway tracks.
 - 2. Displacement of guards provided for dangerous machinery.
 - 3. Dangers supervening in excavation work; trenches, mines, quarries, etc.
 - 4. Dangers arising from the changing condition of buildings and other structures while in course of erection or repair.
 - 5. Dangers incident to the demolition of buildings.
 - c. Negligence in failing to adjust or secure instrumentalities or their parts while in use.
 - d. Negligence in the preparation of temporary structures or other instrumentalities as a part of the work; general rule.
 - 1. Application of the rule in case of scaffolds, stagings, etc.
 - 2. Application of the rule in the case of other instrumentalities.
 - e. Rationale and limits of a master's exemption from liability for the adjustment or preparation of instrumentalities.
 - f. Special circumstances not affecting the extent of the master's liability.
 - 1. Superior rank of the delinquent employee.

and then to replace the two spans washed out with two spans of a steel bridge. In May, 1898, the bridge company constructed the temporary bridge, supported on rows of piles driven into the bed of the river, with a flooring of 3x12 inch pine boards. In July, 1898, the construction of the new bridge was commenced. The temporary bridge was removed, with the exception of the rows of piles, and possibly the crossbeams fastened across the top of each row. The planks were piled upon the uninjured part of the original bridge for use in making the floor of the permanent bridge. From this pile of planks, estimated at 230, were taken such as were needed to construct the false work or scaffolding, which was a temporary structure built upon the rows of piles, and the span of the new steel bridge rested upon it during the process of construction and until

put together so as to become self-supporting, when the false work and piles were to be removed. In the construction of the permanent bridge the steel work was hauled upon the temporary bridge to the point where it was to be used on a hand car pushed upon one of the spans of the new bridge. Each span was about 200 feet in length, and consisted of 10 panels, each panel being 19 feet 10 inches in length. At the time of the accident the north span, including the laying of the floor, and the steel work of four panels of the south span, had been completed. Work was then being done on the second panel from the north end of the south span. The flooring of the temporary structure on that part of the bridge had been necessarily torn up. A track was made on which to run the car upon which the steel was hauled to the point where it was to be used. In

VI. f.—continued.

2. *Similarity or dissimilarity of the work in which the delinquent and injured servants were engaged.*
3. *Completion of appliance before plaintiff began to work.*
- g. *When the delinquency is deemed not to be in respect to the details of the work.*
 1. *Appliance furnished by the master in person.*
 2. *Implied undertaking to supply instrumentality in a completed condition.*
 3. *Suitable materials not furnished.*
 4. *Servants not left free as to the selection of the materials.*
 5. *Permanent character of the instrumentality relied upon.*
 6. *Adjustment treated as a non-delegable function.*
 7. *Operation not one of the transitory class.*

VII. *Negligence of co-servants whose duty it is to keep the instrumentalities in proper condition; when not imputed to the master.*

- a. *Theory that a master is never liable for negligence in regard to inspection and repairs.*
- b. *Theory that the liability of the master depends on the subject-matter of the inspection or repairs neglected.*
 1. *Inspection and repair of railway tracks.*
 2. *Inspection and repair of rolling stock.*
 3. *Inspection of rolling stock belonging to other companies.*
 4. *Inspection and repair of other kinds of machinery.*
 5. *Inspection incidental to the details of blasting work.*
 6. *Inspection of loads on railway cars.*
- c. *Master liable where the delinquent servant was engaged in a different class of work.*
- d. *Negligence in failing to replace an unsound by a sound appliance, when master not liable for.*
- e. *All employees engaged in repairing regarded as co-servants of each other.*

VIII. *Doctrine as to the details of work not a protection to the master when his own negligence or that of a vice*

VIII.—continued.

principal was an efficient cause of the injury.

- a. *Master liable where he or his vice principal directed the details of the work.*
- b. *Master liable where his own negligence intervenes as a proximate cause between a delinquent co-servant's negligence and the injury.*
- c. *Master liable where his own antecedent negligence and a subsequent delinquency of a co-servant are both efficient causes of the injury.*
- d. *Illustrative cases as to concurrent negligence.*
 1. *In respect to an order or other official act of a vice principal by virtue of his rank.*
 2. *In regard to the nonperformance of a statutory duty.*
 3. *In respect to a defective road-bed or railways.*
 4. *In respect to defective switches.*
 5. *In respect to dangerous objects close to railway tracks.*
 6. *In respect to defective bridges.*
 7. *In respect to the improper making up of trains.*
 8. *In respect to the want of proper lighting of the place of work.*
 9. *In respect to uncovered machinery.*
 10. *In respect to defective scaffolds.*
 11. *In respect to other abnormal dangers of the place of work.*
 12. *In respect to defective railway cars.*
 13. *In respect to defective locomotives.*
 14. *In respect to defective hand cars.*
 15. *In regard to defective machinery of other kinds.*
 16. *In respect to the employment of suitable servants.*
 17. *In respect to the failure to employ an adequate number of servants.*
 18. *In respect to a defective system.*
 19. *In respect to seeing that regulations are duly carried out.*
 20. *In respect to the failure to notify as to abnormal dangers.*
- e. *Master's liability determined with reference to the question whether the co-servant's delin-*

the panel where the accident occurred there were two planks upon which the I-beam rested on the west or down-stream side. They were designed to extend the distance between two bents, about 17 feet; but for a distance of about 8 feet from the north piling there was but one plank, the top plank extending only to a point 8 feet from the north piling, the other end of it extending over a portion of the panel immediately south. On the evening before the accident the car was loaded with two steel chords each 19 feet long, and each of the weight of 925 pounds, placed lengthwise on the car. The car was 8 feet long and 4 feet wide, and weighed 300 pounds, and was pushed to the edge of the completed span, and there left for the night. Upon resuming work in the morning, four or five men, including the foreman and Olsen, began to push it along

the track to the place desired. When the car had gone a distance of about 15 feet, the lower one of the planks supporting the I-beam which in turn supported a portion of the track and load, broke, causing the track to sag, producing displacement of the track and boards at that point. Immediately afterwards Olsen was seen in the river, coming near to the surface of the water, but he sank again, and was drowned, his body being recovered about an hour afterwards. The plank that broke was defective, having in it a curl in the grain of the wood at the point where it broke which weakened it, and rendered it insufficient to support the weight placed upon it. It had been in use in the floor of the temporary bridge, and was a 3x12 inch pine plank, and new when put into the temporary floor, where it had been in use from two to three months. It had been

VIII. e.—continued.

- quency did or did not break the chain of causation.*
1. *No break in the chain of causation.*
 2. *Chain of causation deemed to have been broken.*
 - a. *Legal cause of the injury held not to be an official act of negligence on the part of a vice principal.*
 - b. *Defects in structures or other dangers of the place of work.*
 - c. *Defects in machinery.*
 - d. *Unfitness of the delinquent co-servant.*
 - e. *Inadequate number of servants.*
 - f. *Defective regulations.*

I. Introductory.

In a note recently published in this series the cases bearing upon the representative capacity of employees, in so far as it is predicated upon the nature and extent of the control exercised by them over the injured person, were reviewed and analyzed at considerable length.

The following dissertation is intended to show the results of the application of another theory which produces results sometimes coincident with, and sometimes different from, those which are obtained by the application of the principles there discussed,—the theory, namely, that the question whether a delinquent servant was or was not a vice principal as regards the injured person is ultimately determinable by the character of the act which caused the injury.

The test of liability is not the safety of the place or appliance at the time of the injury, but the character of the duty, the negligent performance of which caused the injury. *Sofield v. Guggenheim Smelting Co.* (1900) 64 N. J. L. 605, 50 L. R. A. 417, 46 Atl. 711.

The true rule "makes the character of the act or omission wherein the negligence exists the test of the master's responsibility therefor." *McElligott v. Randolph* (1891) 61 Conn. 157, 22 Atl. 1094.

The test must always be whether the negligent act or omission was in discharge of the master's, or the servant's duty. *Curley v. Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731.

Whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be considered is whether the negligence complained of relates to anything which 54 L. R. A.

it was the duty of the principal to do. *Ross v. Walker* (1891) 139 Pa. 42, 21 Atl. 157, 159.

The controlling consideration in determining whether an alleged negligent fellow servant occupied the position of vice principal is whether the act performed, or duty omitted, is one which is charged by the master upon the servant. *New Pittsburgh Coal & Coke Co. v. Peterson* (1893) 136 Ind. 898, 35 N. E. 7. Master held not liable for the negligence of a foreman in starting machinery while the plaintiff was working in an elevator which he had been ordered to clean.

See also the extracts given in II. b, *infra*.

It may be observed in this place that the formal adoption of the principle is of comparatively recent date, the first case in which it was explicitly enunciated being *Elke v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 18 Am. Rep. 545.

In *Wright v. New York C. R. Co.* (1862) 25 N. Y. 562, the question whether the negligence of an agent intrusted with the function of hiring a servant was that of a vice principal was apparently viewed as debatable.

The practical effect of the theory is that the defense of common employment is excluded or allowed to prevail according as the delinquency in question was or was not a breach of what the law regards as a "direct, personal, and absolute obligation, from which nothing but performance can relieve" the master. The phrase as quoted is taken from *Prevost v. Citibank's Ice & Refrigerating Co.* (1899) 185 Pa. 617, 40 Atl. 88.

The subjoined cases, arranged according to states, are designed merely to indicate the present territorial limits of this theory, so far as it has actually received judicial recognition. The separate lists of authorities do not pretend to be exhaustive as regards each particular jurisdiction.

Federal Courts.

Hough v. Texas & P. R. Co. (1879) 100 U. S. 213, 25 L. ed. 612; *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Union P. R. Co. v. Daniels* (1894) 152 U. S. 684, *sub nom.* *Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 904, 16 Sup. Ct. Rep. 843; *Western Coal & Min. Co. v. Ingraham* (1895) 17 C. C. A. 71, 38 U. S. App. 1, 70 Fed. 219; *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525; *Woods v. Lindvall* (1891) 1 C. C. A. 34, 4 U. S. App. 49, 48 Fed. 73; *Texas & P. R. Co. v. Thompson* (1895) 17 C. C. A. 524, 30 U. S. App. 549, 70 Fed. 944, 17 C. C. A. 526, 30 U. S. App. 553, 71 Fed. 531; *Atchison, T. & S.*

taken out with the rest of the planking, and placed at the north end of the bridge in a pile, for use as occasion might require. Olsen had assisted in removing and piling up these boards and in taking the planks from the pile and laying them upon the structure. The material was furnished by the bridge company. The work was in charge of one Luke, who was the sole representative in the state, of the bridge company, hiring, paying, and discharging the men, doing all the buying and all the paying. Olsen was a common laborer, principally engaged as a teamster and roustabout. He did not work on the temporary structure, the uncompleted part of the bridge, but, under the direction of Luke, assisted in hauling the planks to the point desired. It is assigned for error that the court erred in its refusal to direct a verdict for the defendant; that it erred in

the admission of evidence; that it erred in its refusal to instruct and in its instructions to the jury, as sufficiently stated in the opinion of the court.

Argued before *Woods* and *Jenkins*, Circuit Judges, and *Bunn*, District Judge.

Messrs. George F. Haywood and *W. T. Irwin*, for plaintiff in error:

Olsen was a fellow servant of the foreman of defendant.

An employee may be, while engaged in the performance of a particular work, both a vice principal and a fellow servant. With reference to some of his work and duties he may be a vice principal, and while doing other work under the same employment and on the same piece of work he may be a fellow servant.

Reed v. Stockmeyer, 20 C. C. A. 381, 34

F. R. Co. v. Mulligan (1895) 14 C. C. A. 547, 84 U. S. App. 1, 67 Fed. 569.

Alabama.

Walker v. Bolling (1853) 22 Ala. 294; *Tyson v. South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8.

Arkansas.

Little Rock & M. R. Co. v. Barry (1893) 58 Ark. 198, 25 L. R. A. 386, 23 S. W. 1097; *Fones v. Phillips* (1892) 39 Ark. 17, 43 Am. Rep. 264.

California.

Sanborn v. Madera Flume & Trading Co. (1886) 70 Cal. 261, 11 Pac. 710; *Beeson v. Green Mountain Gold Min. Co.* (1880) 57 Cal. 20; *Ellledge v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720; *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Daves v. Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708; *Nixon v. Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803. In the last-cited case it was said that the cases of *McKune v. California Southern R. Co.* (1885) 66 Cal. 302, 5 Pac. 482, and *Brown v. Sennett* (1885) 68 Cal. 225, 9 Pac. 74, were perhaps inconsistent with the doctrine that the character of the duty performed by a supervising officer is the test by which it is determined whether he is a vice principal or a mere servant, and had been criticised and doubted, if not overruled.

Colorado.

Wells v. Coe (1886) 9 Colo. 159, 11 Pac. 50; *Grant v. Varney* (1895) 21 Colo. 329, 40 Pac. 771; *Denver Tramway Co. v. Crumbaugh* (1897) 23 Colo. 363, 48 Pac. 503.

Connecticut.

Darrigan v. New York & N. E. R. Co. (1885) 52 Conn. 285, 52 Am. Rep. 590; *McElligott v. Randolph* (1891) 61 Conn. 157, 22 Atl. 1094; *Wilson v. Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653.

Delaware.

Murphy v. Hughes (1898) 1 Penn. (Del.) 250, 40 Atl. 187; *Foster v. Pusey* (1888) 8 Houst. (Del.) 168, 14 Atl. 545.

District of Columbia.

Mackey v. Baltimore & P. R. Co. (1890) 8 Mackey, 282; *Baltimore & P. R. Co. v. Elliott* (1896) 9 App. D. C. 341.

Florida.

Duval v. Hunt (1884) 34 Fla. 85, 15 So. 876.

Georgia.

Cheaney v. Ocean S. S. Co. (1893) 92 Ga. 726, 19 S. E. 33.

Idaho.

Palmer v. Utah & N. R. Co. (1887) 2 Idaho, 290, 13 Pac. 425.

Illinois.

Chicago & N. W. R. Co. v. Swett (1867) 45 Ill. 197, 92 Am. Dec. 206; *Chicago, B. & Q. R. 54 L. R. A.*

Co. v. McLallen (1876) 84 Ill. 109; *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Chicago & E. I. R. Co. v. Kneirim* (1894) 152 Ill. 458, 39 N. E. 324; *Chicago & A. R. Co. v. Maroney* (1897) 170 Ill. 520, 48 N. E. 953; *Norton v. Volzke* (1895) 158 Ill. 402, 41 N. E. 1085; *Chicago & A. R. Co. v. Scanlan* (1897) 170 Ill. 106, 48 N. E. 826; *Edward Hines Lumber Co. v. Ligas* (1898) 172 Ill. 315, 50 N. E. 225.

Indiana.

Atlas Engine Works v. Randall (1885) 100 Ind. 293, 50 Am. Rep. 798; *Cleveland, C. C. & St. L. R. Co. v. Ward* (1897) 147 Ind. 256, 45 N. E. 325, 46 N. E. 462; *Capper v. Louisville, E. & St. L. R. Co.* (1885) 103 Ind. 305, 2 N. E. 749; *Indiana Car Co. v. Parker* (1885) 100 Ind. 181; *Justice v. Pennsylvania Co.* (1892) 130 Ind. 321, 30 N. E. 803; *Robertson v. Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 555; *Kerner v. Baltimore & O. S. W. R. Co.* (1897) 149 Ind. 21, 48 N. E. 364; *New Pittsburgh Coal & Coke Co. v. Peterson* (1893) 136 Ind. 398, 35 N. E. 7; *Ohio & M. R. Co. v. Peary* (1891) 128 Ind. 197, 27 N. E. 479; *Cincinnati, H. & D. R. Co. v. McMullen* (1889) 117 Ind. 489, 20 N. E. 287.

Iowa.

Brann v. Chicago, R. I. & P. R. Co. (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; *Fink v. Des Moines Ice Co.* (1892) 84 Iowa, 321, 51 N. W. 155.

Kansas.

Kansas P. R. Co. v. Salmon (1875) 14 Kan. 512; *Atchison, T. & S. F. R. Co. v. Moore* (1883) 29 Kan. 632; *Kelley v. Ryus* (1892) 48 Kan. 120, 29 Pac. 144; *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 502, 15 Pac. 484; *Missouri P. R. Co. v. Dwyer* (1886) 36 Kan. 58, 12 Pac. 352; *St. Louis & S. F. R. Co. v. Weaver* (1886) 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408.

Kentucky.

McLeod v. Glinther (1882) 80 Ky. 399; *Louisville, C. & L. R. Co. v. Cavens* (1873) 9 Bush, 559; *Kentucky C. R. Co. v. Carr* (1897) 19 Ky. L. Rep. 1172, 43 S. W. 193.

Louisiana.

Stucke v. Orleans R. Co. (1898) 50 La. Ann. 188, 23 So. 342; *Ferris v. Hershheim Bros.* (1899) 51 La. Ann. 178, 24 So. 771.

Maine.

Shanny v. Androscoggin Mills (1876) 66 Me. 420.

Massachusetts.

Ford v. Fitchburg R. Co. (1872) 110 Mass. 240, 14 Am. Rep. 598; *Wheeler v. Wason Mfg. Co.* (1883) 135 Mass. 294. See, however, *IL. J. infra.*

U. S. App. 727, 74 Fed. 186; *Northern P. R. Co. v. Hamby*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Northern P. R. Co. v. Charles*, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; *Texas & P. R. Co. v. Rogers*, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; *O'Brien v. American Dredging Co.* 53 N. J. L. 291, 21 Atl. 324; *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159; *Willis v. Oregon R. & Nav. Co.* 11 Or. 257, 4 Pac. 121; *Bailey, Personal Injuries, Relating to Master & Servant*, §§ 38, 46.

The foreman was assisting in the particular work that the other men were doing at the time of the accident. During the entire construction, not only of the false work, but

of the permanent bridge, he worked as a laborer with the other men.

J. M. Luke was not an official of the company, but a foreman limited to the particular piece of work upon which he was at any one time engaged. He had charge of a gang of laborers, and he worked with them. He was a fellow servant of plaintiff's decedent at the time the defective plank was put into use, and during the work upon the bridge from that time up to and including the time of the injury of plaintiff's decedent.

Ross v. Walker, 139 Pa. 42, 21 Atl. 157, 159; *Road v. Stockmeyer*, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; *Wood, Mast. & S.* pp. 897-899; *Balch v. Haas*, 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974; *Coulson v. Leonard*, 77 Fed. 538; *Beesley v. F. W. Wheeler & Co.* 103 Mich. 196, 27 L. R. A. 260, 61 N. W. 658; *Yager v. The Receiv-*

Michigan.

Shumway v. Walworth & N. Mfg. Co. (1894) 98 Mich. 411, 57 N. W. 251; *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Schroeder v. Flint & P. M. R. Co.* (1894) 103 Mich. 218, 29 L. R. A. 321, 61 N. W. 663; *Van Dusen v. Letellier* (1889) 78 Mich. 492, 44 N. W. 572; *Fox v. Spring Lake Iron Co.* (1891) 89 Mich. 387, 50 N. W. 872.

Minnesota.

Brown v. Winona & St. P. R. Co. (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; *Lindvall v. Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Tierney v. Minneapolis & St. L. R. Co.* (1885) 38 Minn. 311, 58 Am. Rep. 35, 23 N. W. 229; *Carlson v. Northwestern Telegraph. Exchange Co.* (1896) 63 Minn. 428, 65 N. W. 914.

Missouri.

Long v. Pacific R. Co. (1877) 65 Mo. 225; *Condon v. Missouri P. R. Co.* (1883) 78 Mo. 367; *Bowen v. Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230; *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Schaub v. Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924; *Herdler v. Buck's Stove & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115; *Coonts v. Missouri P. R. Co.* (1894) 121 Mo. 652, 26 S. W. 661.

Montana.

Kelley v. Cable Co. (1887) 7 Mont. 70, 14 Pac. 633.

Nebraska.

Chicago, B. & Q. R. Co. v. Kellogg (1898) 54 Neb. 127, 74 N. W. 454.

New Hampshire.

Jacques v. Great Falls Mfg. Co. (1891) 66 N. H. 482, 13 L. R. A. 824, 22 Atl. 552.

New Jersey.

Maher v. Thropp (1896) 59 N. J. L. 186, 35 Atl. 1057.

New Mexico.

Cerrillos Coal R. Co. v. Deserant (1897) 9 N. M. 49, 40 Pac. 807; *Following Northern P. R. Co. v. Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590.

New York.

Filke v. Boston & A. R. Co. (1873) 53 N. Y. 549, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.* (1879) 73 N. Y. 38, 29 Am. Rep. 97; *Hofeagle v. New York C. & H. R. Co.* (1874) 55 N. Y. 608; *Benzing v. Steinway* (1886) 101 N. Y. 549, 5 N. E. 449; *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369; *Loughlin v. State* (1887) 105 N. Y. 159, 11 N. E. 371; *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 418, 25 L. R. A. 396, 37 N. E. 466; *Crispin v. Babbitt* (1880) 81 N. Y. 521, 37 Am. 54 L. R. A.

Rep. 521; *Mann v. Delaware & H. Canal Co.* (1883) 91 N. Y. 495.

North Carolina.

Chesson v. John L. Roper Lumber Co. (1896) 118 N. C. 59, 23 S. E. 925.

North Dakota.

Ell v. Northern P. R. Co. (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222; *Cameron v. Great Northern R. Co.* (1898) 8 N. D. 124, 77 N. W. 1016.

Oregon.

Anderson v. Bennett (1888) 16 Or. 515, 19 Pac. 765; *Mast v. Kern* (1898) 34 Or. 247, 54 Pac. 950.

Pennsylvania.

Ross v. Walker (1891) 139 Pa. 42, 21 Atl. 157, 159; *Prescott v. Ball Engine Co.* (1896) 170 Pa. 459, 35 Atl. 224; *Lebbering v. Struthers* (1893) 157 Pa. 312, 27 Atl. 720.

Rhode Island.

Mulvey v. Rhode Island Locomotive Works (1883) 14 R. I. 204; *Hanna v. Granger* (1894) 18 R. I. 507, 28 Atl. 659; *Di Marcho v. Builders Iron Foundry* (1898) 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

South Carolina.

Jenkins v. Richmond & D. R. Co. (1893) 39 S. C. 507, 18 S. E. 182; *Gunter v. Graniteville Mfg. Co.* (1882) 18 S. C. 270, 44 Am. Rep. 573; *Carter v. Oliver Oil Co.* (1891) 34 S. C. 211, 13 S. E. 419; *Whaley v. Bartlett* (1894) 42 S. C. 454, 20 S. E. 745; *Wilson v. Charleston & S. R. Co.* (1897) 51 S. C. 79, 28 S. E. 91.

South Dakota.

Gates v. Chicago, M. & St. P. R. Co. (1892) 2 S. D. 422, 50 N. W. 907.

Texas.

Houston & T. C. R. Co. v. Marcelles (1883) 59 Tex. 334; *Texas & P. R. Co. v. O'Fiel* (1890) 78 Tex. 486, 15 S. W. 83; *Texas & P. R. Co. v. Kirk* (1884) 62 Tex. 227; *Galveston, H. & S. A. R. Co. v. Smith* (1890) 76 Tex. 611, 13 S. W. 562.

Utah.

Trihay v. Brooklyn Lead Min. Co. (1886) 4 Utah, 468, 11 Pac. 612; *Chapman v. Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551.

Vermont.

Davis v. Central Vermont R. Co. (1882) 55 Vt. 64, 45 Am. Rep. 590, Overruling *Hard v. Vermont & C. R. Co.* (1860) 32 Vt. 473; *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 380.

Virginia.

Moon v. Richmond & A. R. Co. (1884) 78 Va. 745, 49 Am. Rep. 401; *Torian v. Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339; *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 81 S. E. 614; *Richmond Granite Co. v. Bailey* (1896) 92 Va. 554, 24 S. E. 232.

ers, 4 Hughes, 192, 88 Fed. 773; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916; *Pierce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Texas & P. R. Co. v. Rogers*, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; *Kelley v. Norcross*, 121 Mass. 508; *Benn v. Null*, 65 Iowa, 407, 21 N. W. 700.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes an injury to another employee, but upon the character of the act in the performance of which the injury arises.

Washington.

Ogle v. Jones (1897) 16 Wash. 319, 47 Pac. 747.

West Virginia.

Jackson v. Norfolk & W. R. Co. (1897) 48 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258; *Cooper v. Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37.

Wisconsin.

Brabbits v. Chicago & N. W. R. Co. (1875) 88 Wis. 289; *Hulehan v. Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 520, 32 N. W. 529; *Cadden v. American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800; *McMahon v. Ida Min. Co.* (1897) 95 Wis. 308, 70 N. W. 478.

In some respects the test thus furnished has greatly simplified the subject, and tempered the harshness of the doctrine of common employment. But, on the other hand, it has created several new and extremely embarrassing problems, and has even, by being treated as the only admissible gauge of liability, operated so as to narrow the servant's rights of recovery.

See note to *O'Neil v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 593-599.

As to the difficulty which is frequently experienced in distinguishing between the cases referable to this conception and those based upon the official position of the delinquent, see *Id.* 587.

II. Master liable for any negligence which involves the breach of one of his personal duties.

a. Generally.

The principle stated in the preceding subdivision will, in the first place, be considered under the form which it assumes when it is treated as constituting a reason for excluding the defense of common employment.

For the purposes of the application of that principle it is assumed that an implied incident of the contract of employment is that the master undertakes, as regards the servant, certain obligations which are spoken of as "personal" duties (*Schaub v. Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924); "positive duties" (*Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Hess v. Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743); "personal, positive" duties (*Lewis v. Seifert* (1887) 116 Pa. 628, 647, 11 Atl. 514); "duties which the master owes personally and absolutely to his servants" (*Lindvall v. Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020); "duties which a master owes, as such, to a servant entering his employment" (*Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 54 L. R. A.

Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; *Beesley v. F. W. Wheeler & Co.* 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 668; *Wood, Mast. & S.* pp. 897-899.

The rule that the employer must furnish his employees a reasonably safe place to work has no application in the case at bar. In this case the employees of the defendant were employed to make the place upon which they were to work.

Bedford Belt R. Co. v. Brown, 142 Ind. 666, 42 N. E. 359.

Olson assisted the foreman in laying the track by selecting the plank.

Where the danger is equally open to the observation of both the master and the servant, both are upon common ground, and the master is not liable, as a general rule, for resulting injuries.

Evansville & R. R. Co. v. Henderson, 134

40 L. ed. 994, 16 Sup. Ct. Rep. 843; or "absolute, personal, duties" (*Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525).

The existence of such duties being predicated, it follows, as a necessary corollary from the quality ascribed to them, that the master must, at his peril, see that they are discharged with reasonable care, whether he undertakes their performance himself, or employs an agent to perform them in his stead. The judicial statements of the doctrine thus deduced are couched in extremely varied phraseology, but may be conveniently classified under a few main groups. So far as the actual liability of the employer is concerned, it is, of course, quite immaterial from which standpoint the position of the inspector is considered, and, as might be expected, a court is apt to pass from one form of expression to the other in the course of the same discussion. They all connote the conception that, of the duties imposed by the law upon an employer, "he cannot relieve himself except by performance." *Atchison, T. & S. F. R. Co. v. Seeley* (1894) 54 Kan. 21, 37 Pac. 104.

b. Various forms in which the master's responsibility is stated.

In one group of statements prominence is given to the conception that the character of the negligent act is, in every case, the test of vice principalship. The question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not done in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 387, 37 L. ed. 772, 781, 13 Sup. Ct. Rep. 914.

Whether the master is liable for the negligence of a servant intrusted with the discharge of one of the absolute, personal duties which the law imposes on him, is determined in any given case by the nature of the act in the performance of which he was guilty of the negligence. If he was engaged in discharging an absolute duty of the master, the latter is liable; otherwise he is not. *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525.

In every case the position of vice principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged upon the master and dele-

Ind. 636, 33 N. E. 1021; *Abbott v. Lake Erie & W. R. Co.* 150 Ind. 498, 50 N. E. 729.

If there was negligence on the part of the foreman in the use of this plank, there was also negligence on the part of the defendant Olsen, who helped to select it.

Texas & P. R. Co. v. Rogers, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; 2 *Bailcy, Personal Injuries, Relating to Master & Servant*, p. 1179, ¶ 3472; *Boettger v. Scherpe & K. Agri. Iron Co.* 124 Mo. 87, 27 S. W. 466.

The defendant is not liable where the injury is caused by a latent defect which cannot be observed by ordinary care or examination.

Bannon v. Sanden, 68 Ill. App. 164; 12 Am. & Eng. Enc. Law, p. 924, note 3; *Wood, Mast. & S.* §§ 368, 382; *Sack v. Dolese*, 137 Ill. 132, 27 N. E. 62; *Chicago, R. I. & P. R.*

Co. v. Lonergan, 118 Ill. 48, 7 N. E. 55; *Illinois C. R. Co. v. Sanders*, 166 Ill. 278, 46 N. E. 709; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 421.

The employer is required to exercise only ordinary care in furnishing the servant reasonably safe machinery and appliances with which to work. He is not required to furnish machinery and appliances of the best character, or that are absolutely safe.

Sack v. Dolese, 137 Ill. 132, 27 N. E. 62; *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill. 48, 7 N. E. 55; *Illinois C. R. Co. v. Sanders*, 166 Ill. 278, 46 N. E. 799; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 421.

Messrs. A. R. Greenwood and Henry S. Robbins, for defendant in error:

There was no error in the refusal to direct a verdict for defendant.

Phoenix Mut. L. Ins. Co. v. Doster, 106 U.

gated to the servant. In other words, whether the servant has been put in the place of the master as to the particular service performed or omitted. If he has, and his act or omission, while in that particular service, involves a duty owing by the master to the servant, the master is liable for injury resulting from such act or omission, if the injured servant is free from negligence, and has not assumed the hazard. *New Pittsburgh Coal & Coke Co. v. Peterson* (1894) 136 Ind. 398, 35 N. E. 7.

Whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be first considered is whether the negligence complained of relates to anything which it was the duty of the principal to do. If it does, then the principal is liable; for he must see at his peril that his own obligations to his workmen are properly discharged. If he does not he is not liable; for all his workmen are liable to each other for the consequences of their negligence, respectively, and he does not insure them against each other by the mere fact of employing them. *Ross v. Walker* (1890) 139 Pa. 42, 21 Atl. 157, 159.

The test as to whether an employee is the representative of the master is not whether such employee has the power to employ or discharge hands or to purchase or change machinery, for, while these are some of the duties of the master, they are not all of his duties, and hence an employee who is not intrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master. *Gunter v. Graniteville Mfg. Co.* (1882) 18 S. C. 270, 44 Am. Rep. 573.

The question as to whether the relation of fellow servants exists in a given case is, in our opinion, determined by an inquiry into the nature of the service at the particular time in question. If, at the time the offending servant performed the act by which another servant was injured, he was in the performance of a duty which the master owed to his servants, he was not a fellow servant; for the rule is fundamental that the master cannot rid himself of the duty he owes to his servants by delegating his authority to another, and if he attempts to do so, the person to whom he delegates the power to act is a vice principal, and not a fellow servant.

On the other hand, if at the time of the alleged negligence the servant was not engaged in the performance of a duty which the master owed to his servants, but was in the discharge of a duty which the servant acting owed to the master, he will be held to be a fellow servant with others engaged in the same common business. *L. R. A.*

ness, and the master will not be liable for any injury inflicted upon such fellow servant by reason of his negligence. *Justice v. Pennsylvania Co.* (1892) 130 Ind. 321, 30 N. E. 803.

A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and order its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employees,—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation. *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 218, 25 L. ed. 612, 615.

In another group of statements an affirmation of the crucial importance of the character of the negligent act appears in connection with an assertion that the rank, title, or official position of the offending servant, and the degree of control exercised by him over the plaintiff, are not material factors in the determination of the master's liability.

The true rule is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed. *Filke v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545. Quoted in *Crispin v. Babbitt* (1880) 81 N. Y. 521, 37 Am. Rep. 521.

In *Fuller v. Jewett* (1880) 80 N. Y. 46, 36 Am. Rep. 575, the court, after citing earlier cases, proceeded thus: "We understand the principle of these cases to be that acts which the master, as such, is bound to perform for the safety and protection of his employees cannot be delegated so as to exonerate the former

S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Warner v. Baltimore & O. R. Co.* 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748.

The doctrine of fellow servants does not preclude recovery by defendant in error.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *New England R. Co. v. Conroy*, 175 U. S. 324, 44 L. ed. 182, 20 Sup. Ct. Rep. 85; *Woods v. Lindvall*, 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62; *F. C. Austin Mfg. Co. v. Johnson*, 32 C. C. A. 309, 60 U. S. App.

661, 89 Fed. 677; *Chicago & A. R. Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449; *Cadden v. American Steel Barge Co.* 88 Wis. 409, 60 N. W. 800; *Arkerson v. Dennison*, 117 Mass. 407; *Brown v. Todd*, 48 App. Div. 546, 61 N. Y. Supp. 963; *Kelly v. Erie Tel. eg. & Teleph. Co.* 34 Minn. 321, 25 N. W. 706.

There was no error in the admission of evidence.

Johnston v. Jones, 1 Black, 209, 17 L. ed. 117; *Wills v. Russell*, 100 U. S. 621, 25 L. ed. 607.

There was no error in the court's charge to the jury.

Sioux City & P. R. Co. v. Stout, 17 Wall. 664, 21 L. ed. 749; *Gulf, C. & S. F. R. Co. v. Ellis*, 4 C. C. A. 454, 10 U. S. App. 640, 54 Fed. 481; *Bradbury v. Laurence*, 91 Me.

from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent, or servant, or of a subordinate or inferior agent or servant to whom the doing of the act, or the performance of the duty, has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with one who sustains the injury. The act or omission is the act or omission of the master irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise to secure the safety of his employees. It is sometimes difficult to determine what is the master's duty, within the rule. But when it is ascertained that the negligence by which an employee is injured relates to this duty, then there is no middle ground, and the case cannot be determined upon any distinction founded upon the particular grade, office, or function of the negligent servant or agent."

The true test whether an employee occupies the position of a fellow servant to another employee, or is the representative of the master, is not to be found from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employee is injured: or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master. *Schroeder v. Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 863.

The test whether or not an employee by whose negligence another employee was injured was a fellow servant of the latter is not "a difference in rank, or the power to control and direct or discharge from service the employee injured," but "whether the act or omission resulting in injury involved a duty owing by the master to the injured employee." *Robertson v. Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655.

For failure or negligence in the discharge of these personal duties of the master resulting in injury, the master is liable whether he acts in person or by other servants. If he acts by servants in such cases, it makes no difference as to the grade of the servant. The servant is identified with the master. The master's duties are cast upon him, and for his default the master is liable; and in these cases the doctrine of "fellow servants," so called, has no application what-
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ever. *Schaub v. Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924.

It is not the law that the mere fact that an appliance furnished by the master to his servants to be used by them in the prosecution of their work has been constructed by one who has been a fellow servant engaged in the same kind of work with the servant who is injured exonerates the master from liability from the consequences of a defectiveness of the appliance. On the contrary, the law is that the duty of the master to furnish reasonably safe tools, machines, and appliances to his servants, to be used by them in the prosecution of the work assigned to them, is absolute in its nature and personal to the master, to the extent of using due care to accomplish the end named. As this duty is personal to the master, it is entirely immaterial to what grade of servants or employees he delegates its performance. He may delegate it to his general agent, who has the general superintendence of his work and the duty of employing and discharging hands, and the entire control over their movements and operations; or he may delegate it to one of the common laborers who are to use the appliance. He may delegate it to a trained mechanic, or he may select a laborer utterly without skill. In either case, as the duty is personal to him, he becomes responsible for its proper performance to the extent of using reasonable care and diligence to the end that it is properly performed. In any of these cases the particular agent, employee, or servant, to whom he delegates this duty, becomes, for that reason, and as to it, his vice principal, and is taken out of the category of fellow servants in respect of any other servants who are injured through the defectiveness of the appliance. *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398.

For other examples of the same turn of expression, see *Stockmeyer v. Reed* (1893) 55 Fed. 259; *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466; *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Lindvall v. Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Carlson v. Northwestern Teleph. Exchange Co.* (1896) 63 Minn. 428, 65 N. W. 914; *Kerner v. Baltimore & O. S. W. R. Co.* (1897) 149 Ind. 21, 48 N. E. 364; *Capper v. Louisville, E. & St. L. R. Co.* (1885) 103 Ind. 305, 2 N. E. 749; *Pelce v. Oliver* (1897) 18 Ind. App. 87, 47 N. E. 485; *Jenkins v. Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182; *Galveston, H. & S. A. R. Co. v. Smith* (1890) 76 Tex. 611, 13 S. W. 562; *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258;

457, 40 Atl. 332; *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610; *Rogers v. The Marshal*, 1 Wall. 644, 17 L. ed. 714; *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. 94; *Northern P. R. Co. v. Charles*, 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 579.

Jenkins, Circuit Judge, delivered the opinion of the court:

We have held in *Reed v. Stockmeyer*, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186, that it is the duty of the master to use ordinary care to furnish appliances reasonably safe for the use of servants,—such as, with reasonable care on his part, can be used without danger save such as is incident to the business in which such instrumentalities are employed; that it is also the duty of the master to use like care to pro-

vide a safe place in which the laborer may perform his work, and to keep it in a suitable condition. These duties may not be foregone, and, when delegated to be performed by another, that other is a vice principal, and *quoad hoc* represents the principal, so that his act is the act of the principal. That other may have a dual character,—vice principal with respect to the duty due from the master to the servant, and co-servant with respect to his acts as a workman. In case of injury, the question of the liability of the master turns rather on the character of the act than on the relations of the servants to each other. If the act is in the discharge of some positive duty owing by the master to the servant, then negligence therein is the negligence of the master; otherwise, there should be personal wrong on the part of the master to render

Ell v. Northern P. R. Co. (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222; *Daves v. Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708, Following *Collier v. Steinhart* (1875) 51 Cal. 116.

In another group of statements it is laid down that the mere employment of a competent person to perform the duty which was omitted is not sufficient to absolve the master from responsibility. *Van Dusen v. Letellier* (1889) 78 Mich. 492, 44 N. W. 572.

In another group we find a simple affirmative of the representative character of the employee who is intrusted with the performance of one of the nondelegable duties.

If, instead of personally performing these personal obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employee, as to that service, stands in the master's stead with relation to other persons. *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588.

At common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employee stands in the place of the master, and becomes a substitute for the master,—a vice principal,—and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. *Atchison, T. & S. F. R. Co. v. Moore* (1883) 29 Kan. 632.

It is clear, upon principle, that where the duty rests directly on the master, and he authorizes an agent or servant to perform that duty, he is bound to answer to a servant injured by the negligent performance of the duty. *Indiana Car Co. v. Parker* (1885) 100 Ind. 181.

One who is placed in charge of a force of men, and whose duties are limited to carrying on the work or directing it, whether actively assisting therein or not, and who is invested with no authority, and charged with no duty, in furnishing places or appliances for the work or in the employment or retention of employees, is himself usually a mere coemployee. His duties require him to use, or superintend and direct the

using of, places and appliances and to control employees furnished by the master. If, however, he is given additional authority, and is charged with the duty of furnishing places to work and appliances for the work, and is authorized to employ and discharge operatives, he is, as to such things, not a coemployee, but speaks and acts as the master. *Nall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 280, 28 N. E. 183, 611.

If the master has delegated to a servant or employee the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondent superior* applies. *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

Where injuries are caused by negligence of a servant who is charged with the performance of duties which by law it is incumbent on the master to perform, in legal contemplation his negligence is the negligence of the master. *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71.

In *Riley v. West Virginia C. & P. R. Co.* (1885) 27 W. Va. 145, the correct rule on this subject, as deduced from the more recent and better-considered American cases, was said to have been that stated in *Wood on Master & Servant*, § 438, as follows: "Whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and, to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other matters he is a mere co-servant; and the question is not, whether the master reserved any oversight or discretion to himself, but whether he did in fact clothe the middleman with power to perform his duties to the servant injured."

See also *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 869; *Loughlin v. State* (1887) 105 N. Y. 159, 11 N. E. 371; *Lindvall v. Woods* (1880) 41 Mich. 212, 4 L. R. A. 793, 42 N. W. 1020; *Mackey v. Baltimore & P. R. Co.* (1890) 8 Mackey, 282.

In another group of statements the nondelegable quality of the master's personal duties is emphasized. That is to say: "No duty required of him [the master] for the safety and protection of his servants can be transferred so as to exonerate him from such liability." *Northern P. R. Co. v. Herbert* (1884) 116 U. S. 642,

him liable. These principles we understand to be established by the ruling of the ultimate tribunal. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Charless*, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85. This duty of the master owing to the servant is not absolute, but relative, measured by the nature and character of the employment and the nature of the location and the surroundings. In the case at bar the work to be done was accompanied by danger arising, not only from location, but from the great weight to be supported. In furnishing plank to be used for such support, the master owed to the servant the positive

duty of furnishing material reasonably fit for the purposes of the contemplated use. In the reasonable discharge of his duty he should ascertain if the plank furnished were reasonably sufficient to bear the weight to which they were to be subjected. That was matter of technical knowledge and experience, which could not be left to the judgment of a common laborer. It was also the duty of the master to have proper inspection of the lumber furnished, to ascertain its soundness, for upon that depended its breaking strength and its ability to sustain the ordinary working strain to which it would be subjected. It was incumbent upon the master, under the circumstances of this case, and in view of the peculiar defectiveness of the plank that broke, to have shown that such inspection was had before the employment of the material in work in which

29 L. ed. 755, 6 Sup. Ct. Rep. 590, Affirming (1882) 3 Dak. 38, 13 N. W. 349.

The nonfulfilment of a positive duty cannot be excused by the delegation of its performance to another. *Pennsylvania R. Co. v. La Rue* (1897) 27 C. C. A. 363, 55 U. S. App. 20, 81 Fed. 148.

An employer is not relieved from responsibility to an employee who has been injured in consequence of his failure to make the working place reasonably safe, by proof that he employed a competent superintendent or foreman, supplied him with necessary appliances, and gave him all needful instructions for the purpose. *Baird v. Relly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884.

No duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade, so as to exonerate the servant from responsibility to a co-servant who has been injured by its non-performance. *Mann v. Delaware & H. Canal Co.* (1883) 91 N. Y. 495.

A master is never exonerated by the negligent omission of subordinates to perform duties which are imposed on him in his character as master, resulting in injury to his employees. *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918.

In *Ford v. Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101, the court, after stating that a want of care on the master's part may appear from various derelictions of specific duties, said: "These are the master's duties, and responsibility cannot be evaded by their delegation to agents. As to such acts the agent occupies the master's place, and the latter is deemed present and liable for the manner in which they are performed."

The duty of the master to exercise reasonable care that the machinery, appliances, and place to work supplied to the servant are reasonably safe is personal, and cannot be delegated to another so as to relieve the master from liability for its nonperformance. *Edward Hines Lumber Co. v. Ligas* (1898) 172 Ill. 315, 50 N. E. 225, Affirming (1897) 68 Ill. App. 523.

The master "cannot avoid the liability by deputing another to perform these duties in his stead." *Brown v. Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484.

While the master may delegate the [i. e., a personal] duty to other employees, he cannot thereby escape liability for its nonperformance. *Cadden v. American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800.

Similarly the courts have spoken of an "obligation not satisfied by devolving it upon a sub-

ordinate." *Baird v. Relly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884.

Of "duties to those serving him which he cannot devest himself of by any delegation to others." *Indiana Car Co. v. Parker* (1885) 100 Ind. 181, quoting from an essay by Judge Cooley in 2 Southern Law Review, N. S. 114 (p. 123).

Of "a duty which the master cannot rid himself of by casting it upon an agent, officer, or servant employed by him." *Indiana Car Co. v. Parker* (1885) 100 Ind. 181.

Of "duties of which the master cannot relieve himself by any delegation." *Quincy Min. Co. v. Kitts* (1879) 42 Mich. 34, 3 N. W. 240.

Of "a primary duty of which the master cannot relieve himself by clothing some general agent with the power, and charging him with the duty, of making performance for him." *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 811, 53 Am. Rep. 85, 23 N. W. 229.

For other examples of the same form of statement, see the following cases: *Comben v. Belleville Stone Co.* (1894) 59 N. J. L. 226, 36 Atl. 473; *Indiana Car Co. v. Parker* (1885) 100 Ind. 181; *Brazil Block Coal Co. v. Young* (1899) 117 Ind. 520, 20 N. E. 423; *Johnson v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 73, 14 S. E. 432; *Van Steenburgh v. Thornton* (1895) 58 N. J. L. 160, 33 Atl. 889; *Renning v. Steinway* (1886) 101 N. Y. 549, 5 N. E. 449; *Union P. R. Co. v. Daniels* (1894) 152 U. S. 684, *sub nom.* *Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, Affirming (1890) 6 Utah, 357, 23 Pac. 762; *Chicago G. W. R. Co. v. Healy* (1898) 30 C. C. A. 11, 57 U. S. App. 518, 86 Fed. 245; *Pike v. Chicago & A. R. Co.* (1890) 41 Fed. 95; *Smith v. Hillside Coal & I. Co.* (1898) 186 Pa. 28, 40 Atl. 287; *Balhoff v. Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592; *Carlson v. Northwestern Teleph. Exchange Co.* (1896) 63 Minn. 428, 65 N. W. 914; *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Addicks v. Christoph* (1899) 62 N. J. L. 786, 43 Atl. 196; *Galveston, H. & S. A. R. Co. v. Smith* (1890) 76 Tex. 611, 13 S. W. 562.

In another group of statements the language takes the shape of a declaration that co-service will not defeat the action, where the delinquent was discharging one of the personal duties of the master.

If an employee sustains an injury through the negligence of a coemployee, while such coemployee is performing the duties of the master, the master cannot defeat his recovery on the ground that they are fellow servants. *Wilson v. Charleston & S. R. Co.* (1896) 51 S. C. 79, 28 S. E. 81.

The negligence of a fellow servant or coemployee, acting as such, will not authorize a re-

life was at stake if the material was defective. So far as the record discloses, no such inspection was had. The plank in question had a curl in the grain of the wood at the point where it broke, rendering it wholly unfit to support the weight placed upon it. Mr. Modjeski, a witness for the plaintiff in error, and a consulting engineer of considerable experience, states, with reference to the defective plank, a portion of which was produced as an exhibit: "The curl would very much diminish the strain the board would bear. It is curled on both edges. It looks as though the fiber was discontinued entirely." He further asserted that ordinarily the defect or curl would probably pass unnoticed; that he did not think a foreman in constructing the false work for the bridge would notice the defect; that there was a break in the plank which could be seen by close observa-

tion; that the defect might be observed by close inspection; that "I think that a man whose business it was to construct scaffolding upon which the lives of men depended, and whose duty it was to see that he got sound lumber, would see the curl of the lumber with the naked eye." The engineer of the bridge company testified that a man of ordinary care would very likely not have observed the defect, although "it is a question hard to answer, unless you have it all here" (referring to the fact that but part of the broken plank had been produced); that planks sometimes have such defects that cannot be observed except upon careful inspection. If the duty of inspection was delegated to the foreman in charge of the work, it was not performed. He instructed common laborers to select the plank, and to pick out the best. Such selection, however,

covery in any case, although the fellow servant or coemployee may be a superior officer, an agent or a foreman; but, if the superior agent is charged with the performance of the master's duty, then, in so far as that duty is concerned, his acts and his negligence are the acts and the negligence of the master, and not simply those of a coemployee or fellow servant. *Krueger v. Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 52, 11 N. E. 957. Compare *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188, 28 So. 342.

The elementary conception underlying this form of statement is observable in the declaration that a servant does not assume the risks of negligent acts of this class on the part of the injured servant. *Monmouth Mtn. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, 86 N. E. 117, Affirming (1892) 45 Ill. App. 411.

Commenting upon the last two of these alternative modes of statement in *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 201, 59 Am. Rep. 68, 11 N. E. 77, the court said: "As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest that, if it is held that these are all fellow servants, and that the corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery and of keeping it in repair, to one or more principal servants, such as superintendents or managers, the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation, or its principal officers, knew that the subordinate servants were incompetent, or that the machinery used was defective. To avoid this result, some courts have held that superintendents or managers are not fellow servants with the men employed to work under them, or that servants employed in one department of the business are not fellow servants with those employed in another. Other courts have held that they are all fellow servants, but that the master cannot avoid his obligation to see to it that reasonable care shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and retaining competent servants, by employing a servant to do these things for him; and that, if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible."

c. Subsidiary consequences deduced from the general principle.

From the principle that the master's liability is a peremptory inference of law, when the evidence is such that the master is responsible."

dence shows that the injury was caused by a violation of one of his nondelegable duties, several consequences follow:

If a master has no representative to discharge the nondelegable duties which he does not undertake to discharge in person, he is no less culpable than where the representative actually appointed for that purpose performs his functions negligently. *Wilson v. Willimantic Linen Co.* (1888) 50 Conn. 433, 47 Am. Rep. 653; *Prescott v. J. Ottman Lithographing Co.* (1897) 20 App. Div. 397, 46 N. Y. Supp. 812.

The master is none the less responsible because he did not know that his agent was habitually careless and unfit for his position. *Whaley v. Bartlett* (1894) 42 S. C. 454, 20 S. E. 745.

The mere fact that a vice principal had given orders which, if they had been executed, would have averted the catastrophe from which injury resulted, will not discharge his employer from liability. Empty orders will not suffice. *Matise v. Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400.

"All the cases," said the court in *Wilson v. Willimantic Linen Co.* (1888) 50 Conn. 433, 47 Am. Rep. 653 (appliance left incomplete), "hold that it is not enough for the master to order safe machinery to be constructed, but he must exercise reasonable care to see that the machinery is in fact safe after the order has been executed. It would be an easy matter for a master to escape liability if an order to construct safe machinery would be sufficient. That would be equivalent to exculpating him entirely from all liability in this regard."

Compare also *Flike v. Boston & A. R. Co.* (1878) 58 N. Y. 549, 13 Am. Rep. 545, where a brakeman, who had been hired to fill a vacancy, did not arrive, and the train was sent out with an insufficient number of hands. See III. 1, *infra*; *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585 (assistant road-master sent section foreman to repair defective track, but did not see that his orders had been carried out properly); *Galasso v. National S. S. Co.* (1893) 27 App. Div. 169, 50 N. Y. Supp. 417, Rehearing denied in 51 N. Y. Supp. 136; *Fuller v. Jewett* (1880) 80 N. Y. 46, 38 Am. Rep. 575, Affirming s. c. *sub nom.* *Stevenson v. Jewett* (1878) 16 Hun, 210 (here it was expressly said by the court of appeals that the superintendent of repairs was not negligent, as he had given proper orders, and the immediate cause of the injury was the failure of the mechanics to do their work properly); *McNamara v. Brooklyn City R. Co.* (1895) 11 Misc. 667, 32 N. Y. Supp. 913; *Martel v. Ross* (1899) Rap. Jud. Quebec, 16 C. S. 118.

The fact that the delinquent was not the sole

is not the inspection which duty to the servant required. The common laborer might form some judgment between two sticks of timber, and select the better one as they appeared to his uninformed and inexperienced mind; but he could not discover that which required for its ascertainment technical knowledge of woods and the ripened judgment of an expert. There is no evidence of inspection by principal or by vice principal; and, failing therein, the master is chargeable with knowledge of such defects as would have been ascertained by proper inspection by a competent person. The evidence produced by the master renders it probable that proper inspection would have discovered the defect. It was a question to be submitted to the jury whether the duty of inspection and the duty to furnish suitable material had been performed. The request to

direct a verdict was therefore properly overruled.

The plaintiff in error preferred three requests to charge the jury, which are substantially to the effect that, if the bridge company had furnished an abundance of suitable material and appliances from which the foreman and other workmen engaged in the construction of the bridge could select such as was needed for the several parts of the temporary structure, then the defendant had performed its duty, and is not liable for any mistake in judgment by the foreman or other servants in the selection of suitable material out of the mass provided for use, although the plank in question was defective. There is one objection common to the three requests which renders them improper. Each of them excludes the question of the duty of the de-

person to whom the performance of a nondelegable duty was intrusted as respects the plaintiff will not avail the master. *Cole Bros. v. Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074 (the court remarked that the master "cannot shield himself from liability by dividing his duties and laying them on various subordinates").

The foreman of the shop of a railway company is no more a fellow servant of a watchman injured by the explosion of a defective boiler than is the master mechanic who has general supervision of the repairs. "Each within his sphere is the agent of the company." *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524.

Similarly, in *Brabbits v. Chicago & N. W. R. Co.* (1875) 38 Wis. 289, the contention was rejected that the defendant, although it might have been held liable if the nonrepair of the defective engine which caused the injury had been due to the negligence of its master mechanic, could not be required to answer for similar negligence on the part of the shop foreman. "Each in his sphere," said the court, "was the agent of the defendant, charged with the performance of certain duties which the latter owed to the public and to its servants, and, on principle, it seems quite immaterial that one of them was subordinate to the other, or that he operated in a narrower field. The relations between them were not unlike those usually existing between the master mechanic and general manager or superintendent, or between the latter and the board of directors. The functions of a railway company must be performed by numerous servants or employees, and among these there must necessarily be a gradation of authority, arranged with reference to the business of the company. Where two of these are charged with the same duty, no good reason is perceived why the company should be held liable for the failure of one to perform such duty, and not for the failure of the other. In this case the master mechanic and foreman were each charged with the duty of causing all defective engines to be repaired; and the failure of either to do so, after notice that an engine is out of repair and unsafe, is negligence. On what principle can it be successfully maintained that the failure of the master mechanic to do so is to be imputed to the defendant as negligence, while the same failure by the foreman is his own negligence, and not that of the defendant? I confess my inability to answer the question. . . .

It would be monstrous to allow the defendant to relieve itself from all liability for a breach of that duty by simply charging one of its inferior officers or servants with its performance. We hold, therefore, that the instruction was correct,—that notice to the foreman was notice to

the defendant; that the negligence of the foreman was the negligence of the defendant; and that the latter is liable to the plaintiff for the injuries received by him because of such negligence."

The nondischarge of a personal duty is not excused by proof that the master enunciated a rule requiring employees to make a personal examination of appliances before trusting them. *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918; *Bookrum v. Galveston, H. & S. A. R. Co.* (1900; Tex. Civ. App.) 57 S. W. 919.

A custom to perform a personal duty through the agency of fellow servants is equally ineffectual to shield the master, if it is neglected. *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

In *Boelter v. Ross Lumber Co.* (1899) 103 Wis. 324, 79 N. W. 243, a servant was held not to be precluded from recovering for an injury sustained through the giving way of a wheel of the loaded wagon on which he was riding, due to the negligence of a fellow servant who failed to observe a custom that the teamsters should look after their own wagons.

See, however, VII. *infra*.

As to the effect of delegating personal duties to an independent contractor, see II. h, *infra*.

d. *Rationale of the doctrine of nondelegable duties.*

The establishment of the above doctrine has undoubtedly been brought about by a recognition of the fact that, unless the master's liability for the acts of a vice principal were admitted, the rule that dangers caused by the master's negligence are not among those assumed by the servant would be rendered nugatory.

In *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720, it was urged by the counsel for the defendant that the omission to repair the defect which occasioned the injury was the result of the negligence of the person whose duty it was to see that certain planks across the highway were kept in a safe and proper condition, and that the accident was therefore caused by the carelessness of a fellow servant. The answer of the court to this contention was as follows: "This argument leaves out of sight the real ground on which the liability of the defendant rests. If the argument is well founded, then it would follow that, as a corporation can act only by agents or servants, it would escape all responsibility for every species of injury caused by defective machinery and apparatus, or badly constructed tracks, or insufficient bridges, and other similar causes. So, an individual could avail himself of a similar immunity, if he con-

fendant in a work of this character to have proper inspection of the lumber furnished. It is not sufficient discharge of the master's duty that sufficient good material should be mingled with bad material in a common mass. As we have pointed out, the duty of inspection could not be put aside or delegated for performance to ignorant and inexperienced men. If the defect were obvious, the master failed in duty in permitting the use of the defective plank. If proper inspection would have disclosed the defect, although it was not apparent to the uneducated eye, there is imputed to the master knowledge of that which a proper inspection would have furnished. If the defect were latent, and not discoverable upon proper inspection, the master would not be responsible, for his failure to inspect worked no harm. The requests to charge wholly ig-

nored this duty of the master, and their rejection is therefore unavailing.

In submitting to the jury the question whether the defect was such as to charge the master with notice of it, and referring to the fact that only a part of the defective plank which was broken was exhibited, and to the testimony of expert witnesses that had examined the part of the plank in evidence, the court charged the jury that they had a right, from all the circumstances in the case, and from their inspection of the piece exhibited, to determine what, in all probability, the other side or end of the plank would show if produced; that the jurymen had a right to use their experience of lumber of this kind, and supply, as far as that experience and their good judgment went, the missing portion of the plank; that they were not restricted to the testimony of

ducted his business exclusively by agents or servants. But the rule of law does not lead to any such absurd result. The liability of the master or employer in such cases is founded, as has been already said, on the implied obligation of his contract with those whom he employs in his service. This requires him to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfil this obligation, whether it arises from his own want of care or that of his agents to whom he intrusts the duty. But it does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient."

In *Gilman v. Eastern R. Co.* (1866) 18 Allen, 433, 90 Am. Dec. 210, after laying down the rule that the duty to have suitable instruments, whether persons or things, is nondelegable, the court proceeded: "To hold otherwise would be to exempt a master who selected all his machinery and servants through agents or superintendents, from all liability whatever to their fellow servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business. In the case of a corporation the president and directors, at least, cannot be deemed mere servants, but must be considered as representing the corporation itself."

If the master suffers machinery, from wear and tear or otherwise, to become so bad that the hazard is greatly increased, this increased hazard is not one of the negligent acts of the fellow workmen, for such acts are merely part of the ordinary risks incident to the employment. The increased hazard thus produced is the act of the master, and he thus enhances the risks which the servant agreed to take. He cannot thus shift his responsibility by urging that the workman whom he employed was negligent. To hold that the master could do so would be to hold that he was under no obligation in respect to appliances or machinery. *Bridges v. St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 392.

It appears that part of the administrative functions of the corporation were confided to subagents and employees. Such practice may be, and probably is, necessary in the control and government of so large a corporation as a railroad usually is. But the performance of such delegated power by the subagent or employees is the act of the corporation, and the corpora-

tion is responsible for its faithful and prudent performance to the same extent as if the service were performed by the highest officer of the corporation. *Tyson v. South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8.

In *Brown v. Gilchrist* (1890) 80 Mich. 56, 45 N. W. 82, counsel went so far as to argue that, because the delinquent employee had absolute control and direction in and about the business, the defendants could not be held responsible, and urged that "there is absolutely no ground . . . for any claim that either of the defendants was present or superintending or directing in person the erection of this scaffold, or the selection of the materials of which it was composed." The comment of the court was as follows: "That is, because the defendants had delegated the authority to Mr. Reed to select proper materials, and to direct, control, and superintend the erection, they should escape liability. If this were the rule, then the more they remained away from their business,—the greater power and authority they gave a foreman or manager to select material, employ men to build a safe and proper scaffold, upon which other servants, who had no knowledge of the manner of its construction, were to be invited to work,—the less the liability."

See also *Union P. R. Co. v. Erickson* (1894) 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347; and the passages quoted *infra*, from the opinion in *Indiana Car Co. v. Parker* (1885) 100 Ind. 181.

But there is some discrepancy in the explanations of its logical basis which are found in the books. The most satisfactory standpoint seems to be obtained by considering it to be an application of the general principle of jurisprudence, that anyone upon whom a duty of an absolute quality is imposed must, at all events, see that it is adequately discharged, whether he undertakes its performance in person, or employs a deputy for that purpose. See 1 Beven, Neg. pp. 493 et seq.; *Shearm. & Redf. Neg.* §§ 14, 176.

That is to say, the care which a master is bound to use he can exercise through another only at his own risk. *Van Steenburgh v. Thornton* (1895) 58 N. J. L. 160, 33 Atl. 880.

The duty to exercise reasonable care to see that the place furnished for a servant to work in is reasonably safe is a positive obligation towards the servant; and the master is liable for any failure to discharge that duty, whether he undertakes that performance personally or through another servant. *Hess v. Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743.

Compare also the statement that the fact that the insecure condition of a railroad track is remotely due to the negligence of some servant who failed to report its condition and put it

witnesses; that they might use their own intelligence, and their own experience with lumber, and the knowledge which they brought with them into the jury room; and that it was their duty to use that information as much as the information they got from the witnesses. The question then being considered was whether the defect was obvious, and whether proper inspection of the plank would have disclosed the defect. Experts in woods had testified upon the subject, and there was possibly some conflict in their evidence, although, as we read their testimony, there was not much dispute that a proper inspection by an expert competent to judge of the sustaining strength and the character of woods would have discovered the defect; but, assuming the conflict, we think it competent for a jury, in judging of the opinions of experts, to bring to the ques-

tion the application of their own knowledge and experience. The experts testified to their opinions. The force of such opinion is to be determined by the jury, and they might properly bring to bear, in considering the value which they should place upon the opinions expressed, their own good sense, judgment, and experience.

In *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028, where witnesses had testified to the value of professional services, the court, by Mr. Justice Field, said: "To direct them [the jury] to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not dif-

fer in repair will not excuse the company from liability. *O'Donnell v. Allegheny Valley R. Co.* (1889) 59 Pa. 289, 98 Am. Dec. 336 (the word "remotely" seems, however, to be used with some want of accuracy here. If the negligence of the servant is "remote" in the ordinary sense in which that term is used in discussions as to causation, it would clearly not be an element in the case at all, instead of being one which merely did not prevent liability from attaching).

It is manifest that, if the decisive elements are the nonperformance of an obligation and the legal significance of the resulting conditions, as betokening care or the absence of care, the fact that those conditions may have been immediately due to the act of a human agent becomes an element in the investigation as entirely neutral and unimportant as if the master had brought them about by his own management of an inorganic instrumentality or of one of the lower animals. This point of view is distinctly apparent in the statement that, where the cause of action relied on is an alleged failure of the defendant to use reasonable care to provide safe materials for the plaintiff's work, the question to be decided is whether the defendant failed in that specific duty, and it is of no consequence how the materials furnished became dangerous, whether by the act of a fellow servant or otherwise. *Neveu v. Sears* (1892) 155 Mass. 803, 29 N. E. 472.

Some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 387, 37 L. ed. 772, 781, 13 Sup. Ct. Rep. 814.

The applicability of this elementary conception, however, is not always brought out as clearly as might be desired in the passage in which judges have undertaken to state the

grounds of the master's liability. Thus, it is sometimes said that a servant who is intrusted with the discharge of one of the so-called non-delegable or nonassignable duties is an agent, not a servant, such agency being regarded as a deduction from the fact that the rule which imputes to servants an acceptance of the risks of a fellow servant's negligence ceases, under the supposed circumstances, to be operative because the reasons upon which its existence depends are not properly applicable. But the extract quoted below shows that the consideration by which the implication usually indulged as to such an acceptance of the risks is deemed to be overridden is really the absolute quality of the duties discharged by the agent.

In *Indiana Car Co. v. Parker* (1885) 100 Ind. 181, the court said: "where the duty is one owing by the master, and he intrusts its performance to an agent, the agent's negligence is that of the master. As the master is charged with the imperative duty of providing safe and suitable appliances, this duty he must perform, and if he intrusts it to an agent, and the agent performs it in his place, the agent's act is that of the master. In authorising an agent to perform such an act, the principal is, in legal contemplation, himself acting when the agent acts, for he who acts by an agent acts by himself. This principle does not conflict with any of the general rules we have stated, for the agent assumes, by authority, the master's place, and does what the law commands the master to do. He is, for the occasion and in the eyes of the law, the master. If it be true that the agent's act is the master's act, then it must be true that the negligence involved in the act is that of the master himself. The rule which absolves the master from liability for the negligence of the fellow servant has no application whatever where the agent stands in the master's place. The reason of the rule fails, and where the reason fails, so does the rule itself. The reasons which support the rule are that servants take the risks of the employment upon which they enter, and that public policy requires that fellow servants should each be an observer of the conduct of the other. *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339. The first of these reasons completely fails when it is brought to mind that the servant does not assume the risk arising from unsafe and unsuitable machinery and appliances. The second as surely and completely fails when we affirm, as under all the authorities affirm we must, that the duty to provide safe appliances rests upon the master, and not on any servant, for, surely, servants are not bound to be observers of the master's conduct. It is, therefore, not at all

fer in principle from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed, and it was only in that way that they could arrive at a just conclusion."

In *The Conqueror*, 168 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510, damages were claimed for the detention of a boat, and it was urged that the amount of the damage should be determined by the testimony given as to the value of the use of the boat. The court, by Mr. Justice Brown, observed: "While there are doubtless authorities holding that a jury . . . has no right arbitrarily to ignore or discredit the testimony of

unimpeached witnesses so far as they testify to facts, . . . no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please, giving it credence or not, as their own experience or general knowledge of the subject may dictate. . . . The ultimate weight to be given to the testimony of experts is a question to be determined by the jury, and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses."

In the 14th, 15th, 16th, and 17th paragraphs of the charge, to which exceptions were taken, the court below dealt with the question of the character which the foreman assumed with respect to the selection of this plank, and whether selection of it by him would be selection by the company, and his

difficult to clearly discriminate and broadly mark the difference between a case where it is the master's duty, as master, that is neglected, and a case where it is the fellow servant's duty, as servant, that is negligently performed. A servant has a right, himself exercising ordinary care, to rely upon his master's care and diligence. He is not bound to watch his master as he is his fellow servant. The rights are reciprocal, the master has his duty as the servant has his. When the master's duty is negligently done, he it is who is guilty of a breach of duty although he acted through the medium of an agent. If the master were permitted to escape his duty by shifting it to an agent, the practical result would be his entire absolution from the duty which the law imposes. The law will not permit this result, for it will not permit a duty to be evaded, but will require performance by the person upon whom it has fixed it."

Another explanation treats the master's liability as the result of the fact that the employees who discharge nondelegable duties are not in the same department as the employees who use the various instrumentalities which are the subject-matter of those duties.

The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turn in each, as the convenience of the employer may require. *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598. Quoted with approval in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612.

All those by whom a corporation performs its work are its servants, and thus fellow servants each with the other. But the relation in which those who together manage the train for the purpose of performing transportation stand each to the other is quite different from that which they bear to those who perform the work of its construction and repair; and they have a right to expect the suitable instrumentalities and appliances which it is the duty of the master to furnish. *Elmer v. Locke* (1883) 135 Mass. 575.

That doctrine (the nonliability of the master for the negligence of a fellow servant) was never applied unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered

the same general employment. The rule adopted by the Federal courts, and by most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not therefore, as to each other, fellow servants. In such case the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence. *Roux v. Blodgett & D. Lumber Co.* (1893) 94 Mich. 607, 616, 54 N. W. 492.

Those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not therefore, as to each other, fellow servants. In such case the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence. *Sadowski v. Michigan Car Co.* (1890) 84 Mich. 100, 47 N. E. 598.

To provide machinery, and keep it in repair, and to use it for the purpose intended, are very distinct. They are not employments in the same common service leading to the same common results. The one may be said to begin where the other ends. *Shanney v. Androscoggin Mills* (1876) 66 Me. 420.

In *St. Louis & S. F. R. Co. v. Weaver* (1886) 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408, the roadmaster, the division roadmaster, and the section foreman and his assistants were in one line of duty, while the trainmen were in another and a different line of duty, and each set within its own line of employment represented the master as to the other set; and the members of one set were not the mere fellow servants with the members of the other set. The principal ground upon which the doctrine has been established that the master is not liable for any negligence that might take place as between mere fellow servants is, that such fellow servants work together in the same line of employment, are intimately acquainted with each other, and, knowing each other better than the master could possibly know any one of them, they take all risks of negligence on the part of their fellow servants; that if any servant chooses to work with a known incompetent or negligent fellow servant, without informing the master, he himself should take all the risks and consequences of his fellow servant's negligence and incapacity, the master being required only to use rea-

negligence in the selection the negligence of the company; or whether he stood in the light of a fellow servant, and therefore the master would not be responsible for his act. The court charged that under the circumstances the foreman stood in the stead of the company, and his act in that respect was the act of the company; "that, if it were within his opportunity to prevent the use of this plank, and from his neglect this plank went into the structure of the false work, then that negligence is imputable to the company, the same as if the company were itself present, and had taken the plank he actually took, and placed it in the structure." The court further charged that, if the jury were satisfied "that the plank in question was defective, and that the defect was obvious, and that it being placed there in this false work was negligence of the foreman, and that the foreman had an opportunity or had knowledge of its having been

placed there, and that the foreman had all the powers which I have named, and which are not disputed, the company would be responsible for his neglect." It may not be denied that in the argumentative part of the charge leading up to the instruction stated there are some things stated of doubtful correctness, and, if given in a charge to a jury, when the question of principal or vice principal hung in the balance, we should hesitate to sustain them. It must be remembered, however, that there is here total failure of evidence that the master had procured this lumber to be inspected; that by authority of the master the lumber was purchased by, and used under the direction of, this foreman in this work. The duty of inspection would seem from the evidence to have been delegated to the foreman. There is no evidence that that duty was performed by him. In respect thereof he stood for the master, and was vice principal, and was not

sonable and ordinary care and diligence in the original employment and the subsequent retention of only such servants as are competent and habitually careful. *Dow v. Kansas P. R. Co.* (1871) 8 Kan. 642, 646. But where employees work in different lines of employment, one having no means of knowing anything about the business or qualifications of the other, and being wholly unacquainted with the other, they cannot be said to be fellow servants within the meaning of the foregoing rule; and this state of things fairly represents the condition of a railroad section foreman and an engineer on a freight train, and the relation existing between them. Therefore, where a railroad company delegates, directly or indirectly, to a section boss or section foreman the duty of keeping a certain section of the railroad in proper condition and repair, and to warn trainmen in case of danger, and the section boss fails to perform his duty in these respects, and a trainman is injured by reason of such negligence, the railroad is responsible.

There is a certain incongruity in holding that the duty to exercise reasonable care in providing reasonably safe appliances and machinery is a personal one, which cannot be delegated, and at the same time holding that if the failure to exercise such reasonable care was the neglect of a fellow servant of the party injured, then the master is not liable; and it seems more correct to say that agents who are charged with the duty of supplying machinery and appliances are not, when so doing, in the true sense, to be regarded as fellow servants of those who are engaged in the use of the same. *Edward Hines Lumber Co. v. Ligas* (1898) 172 Ill. 315, 50 N. E. 225, commenting on *Fraser v. Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785.

In *Cadden v. American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800, the court, after declaring that the defendant must answer for the negligence of the workmen employed to build a scaffold, for the reason that the duty they were performing was nondelegable, continued thus: "The scaffold builders were not in the true sense of the rule relied on fellow servants with the plaintiff, who was using the scaffold, but were charged with the duty of the master to the servant, and were therefore engaged in a distinct and independent department."

In *Atchison, T. & S. F. R. Co. v. Seeley* (1894) 54 Kan. 21, 37 Pac. 104, an employee intrusted with the duty of inspecting cars was declared not to be in the same branch of the service as a brakeman, though the rest of the argument was 54 L. R. A.

based on the theory that the duty of inspection was nonassignable.

In *Gray v. Brassey* (1852) 15 Sc. Sess. Cas. 2d series, 135, one of the cases approved is *Bartonsbill Coal Co. v. Beld* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767. The complaint was held good for the reason that it showed the injury to have been received owing to the negligence of a servant in another department with which the plaintiff had no concern, *viz.*, that of furnishing machinery.

To pronounce such a standpoint to be erroneous would scarcely be justifiable in view of the body of authorities by whom it has been adopted. But it is certainly open to some objection. But the conception of a difference of department is also suggestive of that class of cases in which the delinquent and injured servants were engaged in spheres of work so disconnected that neither can be deemed to have assumed the risks of the other's negligence. See note to *Sofeld v. Guggenheim Smelting Co.* (1900; N. J. L.) 50 L. R. A. 439-442.

Merely for the purpose of securing greater verbal precision, therefore, it seems desirable that the conception should be reserved for the settlement of these cases alone. Moreover, if the phrase is used to describe these two distinct kinds of relations between delinquent and injured servants, we are confronted by the logical difficulty that the degree of disconnection which will prevent this implication may, it is manifest, exist no less between two servants who are using instrumentalities than between one servant belonging to this category and another who is discharging nondelegable duties with respect to those instrumentalities. This objection is not obviated by the fact that sometimes those relations may be such that it may be equally possible and proper to refer the master's liability, either to the idea of a difference of department, as that phrase is commonly understood, or to the idea of the nondelegability of the duty omitted.

In *Chicago & A. R. Co. v. Maroney* (1897) 170 Ill. 520, 48 N. E. 953, affirming (1896) 67 Ill. App. 618, the appellate court decided in the plaintiff's favor on the ground that the carpenters who built a scaffold were not associated with the plaintiff, a mason, who used it; while the supreme court sustained the action on the ground that the carpenters were discharging a non-delegable duty.

In *Chicago & N. W. R. Co. v. Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661, the court upheld a verdict for the plaintiff, using the following language: "This car was placed upon the road

coservant with those employed upon the structure. The charge to which objection is taken makes the question of liability to depend upon the question whether the defect was obvious, and the defective plank placed in the false work through the negligence of the foreman. If any just exception can be taken to this charge, it is that it was too favorable to the bridge company. It was not bound only in the event that the defect was obvious. It was chargeable with such knowledge as a proper inspection would have given. The defect may not have been obvious to the untrained eye and the unskilled laborer, or to the foreman; but to one experienced in woodcraft, as the evidence shows, the defect might have been discovered, and, if discoverable, the master is chargeable with the knowledge which inspection would have given.

Certain evidence was objected to upon the

by someone superior to appellee in authority, and he was acting under such authority. The jury might reasonably infer that those placing it on the road knew its condition. He had no choice but to obey orders, and was compelled by those above him in authority to ascend the car and again descend and uncouple the car from the engine when required. He was not and could not be, responsible for the defect. Nor should he be held liable for the defective car, as he neither furnished it nor placed it upon the track. Nor should he be held responsible for the acts of those who did, as fellow servants, as the fault was not that of such a servant engaged in the same department of the common business. It was the act of a superior in another department."

In *Moon v. Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401, a section foreman was held not to be a fellow servant of trainmen on the double ground that he was in a different department, and that he was responsible for the proper discharge of the nonassignable duty of keeping the track in safe condition.

e. Master sometimes liable both on account of the character of the negligent act and the official position of the negligent servant.

The performance of the nondelegable duties is not infrequently intrusted to some employee who controls a larger or smaller number of subordinates. It follows, therefore, that if such an employee causes injury to one of his subordinates, by delinquency in respect to one of those duties, and the nature and extent of the control exercised by him are such as to constitute him a vice principal, the master's liability may be inferred indifferently from their official position, or from the character of the negligent act. This situation may present itself both in jurisdictions where the mere exercise of control is deemed to confer representative capacity (see, for example, the following decisions in favor of servants injured by the negligence of their foreman in the matters indicated by the memoranda appended to the citations: *Bowen v. Chicago, B. & K. C. R. Co.* [1888] 95 Mo. 268, 8 S. W. 230; [bridge not repaired]; *Union P. R. Co. v. Fray* [1890] 43 Kan. 750, 23 Pac. 1039 [derrick not repaired]; *Browning v. Wabash Western R. Co.* [1893] 124 Mo. 55, 24 S. W. 731, Affirmed [1894] in 27 S. W. 644 [brakestaffs removed from freight cars]; *Taylor v. Missouri P. R. Co.* [1891: Mo.] 16 S. W. 206 [defective coupling furnished]; *Banks v. Wabash Western R. Co.* [1890] 40 Mo. App. 458; *Richmond Granite Co. v. Bailey* [1896] 92 Va. 554, 24 S. E. 232 [rule 54 L. R. A.

ground that it was not cross-examination. It is largely a matter of discretion with the trial court to determine the extent to which a cross-examination will be permitted, and we are not disposed to interfere with that discretion where it is manifest—as we think it here is—that a just verdict has been rendered, and that the testimony objected to could not have improperly affected the result. The exception to that part of the charge bearing upon the testimony so adduced is too general, failing to indicate the ground of objection. *Stewart v. Morris*, 37 C. C. A. 562, 96 Fed. 703; *Columbus Constr. Co. v. Crane Co.* 40 C. C. A. 35, 98 Fed. 946, 41 C. C. A. 189, 101 Fed. 55; *Adams v. Shirk*, 43 C. C. A. 407, 104 Fed. 54.

We have considered the other objections urged, and do not find them of sufficient merit to warrant discussion of them.

The judgment is affirmed.

abrogated); and in jurisdictions where such capacity is admitted only in the case of agents managing an entire business or a distinct department thereof. See the cases cited in the note to *O'Neil v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 566, 559, 572.

f. Doctrine of nondelegable duties applicable to artificial persons.

Although a categorical affirmation of such a point might seem scarcely necessary, there is specific authority for the doctrine that a corporation is no less responsible than a natural person for the proper performance of an employer's absolute duties, although it is impossible for it to discharge those duties otherwise than through agents. *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598; *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612; *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369.

Instructions are erroneous which declare that a corporation is not liable for the negligence of any of its officers except its board of directors. *Krueger v. Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 957.

A limited company created under the provisions of the English companies act and similar statutes is also as much liable as an individual for its failure to perform any of the duties which a master owes to employees. *Wright v. Dunlop* (1893) 20 Sc. Seas. Cas. 4th series, 363.

Indeed, it may fairly be said that a more reasonable view of the situation which exists in cases where a corporation is concerned is that the impossibility of exercising personal control is a ground for holding such artificial bodies liable rather than for applying a less rigorous standard of responsibility. See *Brann v. Chicago, R. I. & P. R. Co.* (1890) 53 Iowa, 585, 36 Am. Rep. 243, 6 N. W. 5.

Manifestly if they could escape liability for the breach of an absolute duty on the plea that their agent was a fellow servant or coemployee of the party injured, they could never be held at all. See *Moon v. Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401; *Flike v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545.

Compare also the cases cited in the preceding subdivision.

g. Servants of contractors, when precluded from availing themselves of the doctrine in actions against their masters.

A contract for work to be done may be so

NEW YORK COURT OF APPEALS.

Olive MALTBIE, Admx., etc., of William
Maltbie, Deceased, *Resp't.*,
v.

Alvin J. BELDEN *et al.*, *Appts.*

(167 N. Y. 307.)

1. A servant employed in deepening a canal assumes the risk of the fall of standing trees, in complying with the request of his foreman to assist in extinguishing a fire spreading through swamp and underbrush towards property of the employer on the canal bank, the danger of which is as obvious to him as to any other person engaged in saving the property.
2. A foreman and a servant engaged in deepening a canal are fellow serv-

worded that the principal has the right to prescribe the manner in which its various details are to be executed. If the contractor is thus required to act, according to the principal's directions, the workmen are deemed to be so far the servants of the principal that the contractor is released from the duty to furnish them with suitable materials. But there is no such exemption where the provisions of the contract are merely that the work shall be executed under the supervision of an officer of the government, who shall prescribe the order in which the materials are to be placed, that no material shall be placed in the works without his knowledge, that the contractor will remove from the work any person not acceptable to the agents of the government, and that all material, supervision, and labor furnished by him shall be subject to the approval of the engineer officer in charge. *Callan v. Bull* (1896) 113 Cal. 503, 45 Pac. 1017.

h. Delegation of personal duties to an independent contractor, effect of.

It is apparent that the rule discussed in the note to *Walkowski v. Penokee & G. Consol. Mines* (1898: Mich.) 41 L. R. A. p. 71,—that a master is not negligent in omitting to test appliances if he purchases them from a reputable dealer or manufacturer,—virtually creates an exception *pro tanto* to the operation of the doctrine of nondelegable duties; for although the rationale of the decisions there cited is the absence of negligence, the rule virtually amounts to an assertion that a master may, to some extent, evade responsibility for the nonperformance of one of those duties, *viz.*, that of supplying proper instrumentalities, by procuring them from an independent contractor. Singularly enough, this aspect of the rule does not seem to have thus far attracted the attention of the courts.

As regards the cases involving the liability of a master for the default of an independent contractor in discharging a nondelegable duty, they are so conflicting as to render it impossible to formulate any definite doctrine upon the subject. In England the only decision directly in point seems to be one in which Denman, J., sitting alone, held that a servant could not recover where a staging which gave way under him had been put up by a competent contractor. *Kiddle v. Lovett* (1885) L. R. 16 Q. B. Div. 605, 34 Week. Rep. 518.

If such failure in duty be regarded as one of management, the doctrine laid down in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, would obviously have freed 54 L. R. A.

ants in attempting to extinguish a fire spreading over adjacent land towards property of the master on the canal bank, so that the master is not liable for injuries to the servant from the negligence of the foreman in failing to warn him of the impending fall of burning trees.

(June 4, 1901.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Onondaga County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

the master from liability, even if the deputy had been another servant. See notes to *O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 564.

But the learned judge seems to have intended to enunciate a general principle, and would, so far as appears, have rendered a similar decision if the point had been taken that the delinquency which led to the injury was one having reference to original construction or the furnishing of appliances. If this be really the scope of the decision it would seem to be incorrect upon any reasonable construction of the opinion of the law lords in the case just mentioned. See notes to *O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 571, 572.

In Scotland the natural conception of a positive duty has been followed out to its logical conclusion in a case where it was laid down that, if the defect in an appliance (here a scaffold) could have been discovered by the exercise of reasonable care, a master is answerable for injuries caused by its unsafe condition, even though the master, not being properly skilled himself, may have intrusted the work of furnishing the appliance to a competent contractor. *Macdonald v. Wylie* (1898) 1 Sc. Sess. Cas. 5th series, 339.

In one of the circuit courts of appeals the doctrine has been laid down, without qualification, that a master is not relieved of a positive personal duty by letting work to a contractor. *Toledo Brewing & Malting Co. v. Bosch* (1900) 41 C. C. A. 482, 101 Fed. 530 (plaintiff was injured by the fall of a heavy beam due to the negligence of the contractor's servants in leaving it loose while repairs were being made).

In a Georgia case, in which no opinion is reported, the court has embodied its views in a syllabus which lays it down that a railroad company permitting another company to use a section of its main line to reach a terminal point is liable to one of its own employees for personal injuries from the negligence of the latter company in running its train over such section. *Central R. & Bkg. Co. v. Passmore* (1892) 90 Ga. 203, 15 S. E. 760, following *Macon & A. R. Co. v. Mayes* (1873) 49 Ga. 355, 15 Am. Rep. 678.

In Illinois it has been held that persons who, under a license from the master, put in new burners in a brick kiln for the purpose of testing their advantages, are in the position of vice principals so far as relates to making such apparatus suitable and safe for the employees, or giving notice of increased danger. *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285. One of the grounds on which the decision proceeded was that the

The facts are stated in the opinion.

Mr. William Nottingham, for appellants:

The plaintiff's intestate, involuntarily entering upon this hazardous work at the request of his foreman, Seeley, assumed all the risks incidental thereto, of which the falling of burning trees and limbs was plainly one of the most direct and obvious.

Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; *Reinig v. Broadway R. Co.* 49 Hun, 269, 1 N. Y. Supp. 907; *Gaertner v. Schmitt*, 21 App. Div. 403, 47 N. Y. Supp. 521; *Arnold v. Delaware & H. Canal Co.* 125 N. Y. 15, 25 N. E. 1064; *Dorney v. O'Neill*, 34 App. Div. 497, 54 N. Y. Supp. 235; *Hutchinson v. Charles F. Parker & Co.* 39 App. Div. 133, 57 N. Y. Supp. 168, 58 N. Y. Supp. 190; *Kennedy v. Manhattan R. Co.* 145 N. Y. 288, 39 N. E. 956; *Leary v. Boston & A.*

R. Co. 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Wormell v. Maine C. R. Co.* 79 Me. 397, 10 Atl. 49; *Wheeler v. Berry*, 95 Mich. 250, 54 N. W. 876.

It is a matter of common knowledge that burning trees or timber are likely to fall, and that no one can state just when that will happen. The deceased is presumed to have been aware of all these facts and natural laws and their consequences. They were among the obvious perils which he assumed when he went upon this land to put out the fire.

Hannigan v. Lehigh & H. River R. Co. 157 N. Y. 244, 51 N. E. 992; *Carlson v. Monitor Iron Works*, 38 App. Div. 38, 55 N. Y. Supp. 992; *Freeman v. Dennison Mfg. Co.* 40 App. Div. 99, 57 N. Y. Supp. 478; *Monvi v. Friedline*, 33 App. Div. 217, 53 N. Y. Supp. 482; *Oahill v. Hilton*, 106 N.

licensees were discharging a positive duty owed by the master to his servants.

And still more recently it has been held that an employee could recover for injuries due to defects in the appliances of a contractor.

In Missouri it has been declared that a master cannot relieve himself of the duty of exercising ordinary care to provide reasonably safe appliances for his servants, by the employment of superintendents or independent contractors to provide such appliances. *Herdler v. Buck's Stove & Range Co.* (1896) 186 Mo. 3, 37 S. W. 115; *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S. W. 347; *Bartley v. Troilicht* (1892) 49 Mo. App. 214 (elevator fell into disrepair), Citing *Northern P. R. Co. v. Herbert* (1886) 116 U. S. 647, 29 L. ed. 758, 6 Sup. Ct. Rep. 590.

It was further held in the *Bartley* Case that the fact that an elevator was leased with a building will not absolve the lessee from liability for injuries to his elevator boy by its fall, caused by the lessee's failure to use reasonable care to keep it in repair.

Sackewitz v. American Biscuit Mfg. Co. (1899) 78 Mo. App. 144, holds that there is a sufficient correspondence between a petition alleging that, while the plaintiff was in defendant's employment, she was required to work in a place rendered unsafe by the negligent acts of men engaged in repairing the building, and proof that plaintiff was injured by the negligent acts of one who had entered into a contract with defendants to repair the building.

Under a statute giving a right of action against the owner, agent, or operator of a mine, for injury caused by failure to furnish props, the owner is liable, even though the mine is operated by another under a contract with the owner,—especially where such contract provides that the latter shall furnish timber for props. *Leslie v. Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308.

In New Jersey it has been held that a servant injured by an elevator which is in course of construction by an independent contractor on the master's premises cannot recover. *Conway v. Furst* (1895) 57 N. J. L. 645, 32 Atl. 380. But in such a case there is no delegation of a duty in the proper sense of the phrase, and the circumstances are controlled by the principle that the dangerous agencies were, for the time being, quite out of the control of the plaintiff's master.

In New York the doctrine established is that an employer is not liable to a servant for the condition of a structure erected by an independent contractor for the use of his servant. The question was very fully discussed in *Devlin v. 54 L. R. A.*

Smith (1881) 25 Hun, 206, Affirmed in (1882) 89 N. Y. 470, 42 Am. Rep. 311. There the defendant was employed to paint a building, and, not being able himself to build a scaffold, employed a skillful and competent person to build it. It was held that A was not liable for injuries received by one of his workmen through the giving way of the scaffold. The position taken in the lower court is shown by the following passage of the opinion delivered: "Whenever the employer has been held liable, not for his own negligence, but for the negligence of another person, it was upon the ground that the latter was charged with his duties. . . .

That is not the case where the employer, not having the requisite skill to do the work himself, intrusts the performance of it entirely to a competent and unexceptionable contractor. The employer cannot escape the responsibility of exercising due care by delegating that duty to an agent, but he can employ a competent and unexceptionable contractor to construct tools, machinery, etc., and such conduct would be the exercise of that care which the law requires. The employment of a contractor is not a delegation of the employer's duty. It is, when properly done, an exercise of the care, and a fulfillment of the duty which the law exacts. It would be unreasonable and unjust to hold an employer liable for the negligence of such a contractor so employed, for the employment of him would not be negligence, and the contractor's negligence could not be attributed to the employer, because no relation of agency would exist between them. Unless, therefore, the employer knew of the defect which caused the injury, or his ignorance thereof of itself indicated a breach of duty on his part, there would be nothing of which negligence could be predicated. . . .

Smith having used due care in procuring the scaffold, and having no knowledge nor any reason to apprehend that it was in any respect defective, he was justified in subjecting it to immediate use without inspection. It is true, an inspection might have disclosed the fact that the support which gave way was fastened with nails instead of ropes. But no reason has been shown why that fact should have admonished *Smith* that the scaffold was unsafe. Not being an expert, his inspection must have been merely that of a common observer. If the defect in the scaffold would have been apparent to him, the deceased was equally bound to take notice of it; one was as competent to determine whether the fastenings referred to were sufficient or not as the other." The argument of the court of appeals proceeds upon much the same lines: "Under the recent decisions in this state, it may be that if *Smith* had undertaken

Y. 512, 13 N. E. 339; *Huda v. American Glucose Co.* 154 N. Y. 474, 40 L. R. A. 411, 48 N. Y. 897; *Powers v. New York, L. E. & W. R. Co.* 98 N. Y. 274; *Garety v. King*, 9 App. Div. 443, 41 N. Y. Supp. 633; *Vitto v. Farley*, 15 Misc. 153, 36 N. Y. Supp. 1105; *Vilas v. Vanderbilt*, 20 Misc. 51, 44 N. Y. Supp. 267.

The method of putting out the fire, thus preventing damage and protecting the master's property, and the manner of avoiding at the same time the perils incidental to such service, were details of the work that belonged to the duties of the servant, and not to those which the master owed to him. Anything done or omitted by the foreman, therefore, relating to the peril to which the servant was exposed in extinguishing the fire, was the act or omission of a fellow servant, and not of the master.

to erect the scaffold through agents, or workmen acting under his direction, he would have been liable for negligence on their part in doing the work, provided that in doing it they were not fellow servants of the party injured. But in this case he did not so undertake. Stevenson was not the agent or servant of Smith, but an independent contractor for whose acts or omissions Smith was not liable. *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 804. Smith received the scaffold from him as a completed work, and we do not think that it was negligence to rely upon its sufficiency and permit his employees to go upon it for the purpose of performing their work. Stevenson was, as appears from the evidence, much more competent than Smith to judge of its sufficiency. He had undertaken to construct a first-class scaffold, and had delivered it to Smith in performance of this contract, and we do not think that Smith is chargeable with negligence for accepting it without further examination. All that such an examination would have disclosed would have been that the upright was nailed to the ledger, and Smith, not being an expert, would have been justified in relying upon the judgment of Stevenson as to the propriety of that mode of fastening. The defect was not such as to admonish Smith of danger."

To the same effect, see *Wittenberg v. Friederich* (1890) 8 App. Div. 433, 40 N. Y. Supp. 895, where a floor constructed by a sub-contractor in a building which a contractor was erecting gave way and injured one of the latter's servants.

These cases seem inconsistent with *Wannamaker v. Rochester* (1892) 44 N. Y. S. R. 45, 17 N. Y. Supp. 321, where a municipality was held liable for injuries caused by the caving in of a trench made by an independent contractor. But there is no discussion of the general question involved in such a situation.

It will be observed from the extracts given from the opinion of the court of appeals that, while recognizing the antagonism between this doctrine and that of the nondelegable quality of certain duties, it contents itself with declaring the master's nonliability, and gives no reasons for its opinion.

In Pennsylvania it has been laid down, *arguendo*, in a comparatively late case that, as the master owes to the servant the duty of providing a reasonably safe place in which to work, and reasonably safe appliances, he is not relieved from liability for an injury resulting to a servant from neglect of such duty by the fact that he delegated it to an agent or independent contractor. *Trainor v. Philadelphia & R. R. Co.* (1890) 137 Pa. 148, 20 Atl. 632. 54 L. R. A.

Loughlin v. State, 105 N. Y. 159, 11 N. E. 371; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 906; *Miller v. Thomas*, 15 App. Div. 105, 44 N. Y. Supp. 277; *Ulrich v. New York C. & H. R. Co.* 25 App. Div. 465, 51 N. Y. Supp. 5; *Hussey v. Coger*, 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556; *Hutchinson v. Charles F. Parker & Co.* 39 App. Div. 133, 57 N. Y. Supp. 168, 58 N. Y. Supp. 190; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Mahoney v. Vacuum Oil Co.* 76 Hun, 579, 28 N. Y. Supp. 196; *McCosker v. Long Island R. Co.* 84 N. Y. 77.

Notice to Hannan that the tree had burned to such an extent that it was likely to fall was not notice to the defendants.

Reiser v. Pennsylvania Co. 152 Pa. 38, 25 Atl. 175; *Richardson v. Cooper*, 88 Ill. 270; *Kecnan v. New York, L. E. & W. R. Co.* 145

But there is an earlier decision to the effect that if a mechanic is under a contract to construct stills of sufficient strength for a certain purpose, and the details are left to his own judgment and skill, the employer cannot be visited with the consequences of his failure. *Ardesco Oil Co. v. Gilson* (1870) 63 Pa. 146. The liability of the company was held to be for the jury, as there was evidence that the stills were made according to a plan directed by the president: but the court states the rule as to the result of employing a contractor in the most uncompromising terms. "It may be considered as now settled that, if a person employs others, not as servants, but as mechanics, or contractors in an independent business, and they are of good character, if there is no want of due care in choosing them he incurs no liability for injuries resulting to others from their negligence or want of skill. *Painter v. Pittsburgh* (1863) 46 Pa. 213. If I employ a well-known and reputable machinist to construct a steam engine, and it blows up from bad materials or unskilful work, I am not responsible for any injury which may result, whether to my own servant or to a third person."

The task of reconciling the conflicting views thus evidenced must be left to the distinguished court which is responsible for them. To the present writer the more recent expression of opinion appears to be unquestionably the correct one. It is worth observing that, as the doctrine of nondelegable duties had not yet been formulated with much distinctness at the time the earlier case was decided, it is extremely probable that the effect of such a conception as qualifying the rule with regard to independent contractors was not considered at all by the court. The opinion delivered gives no indication that this aspect of the relations of the parties was taken into account.

In Rhode Island a company was held responsible for the negligence of an independent contractor in so constructing a crane that the hauling chains were not properly insulated from the current of electricity which operated it. *Moran v. Corliss Steam Engine Co.* (1899) 21 R. I. 386, 45 L. R. A. 267, 43 Atl. 874 (the appliance became dangerous after being put into use).

Some language has been held by the supreme court of South Carolina which would seem to indicate that the master is not absolved from liability for conditions of the place created by work which is being done by a contractor. *Conlin v. Charleston* (1868) 15 Rich. L. 201. But the precise position of the learned judge who wrote the opinion is not very clearly defined.

In Texas it has been held that the duty of a railroad company to an employee to furnish

N. Y. 190, 39 N. E. 711; *Nashville & C. R. Co. v. McDaniel*, 12 Lea, 386.

Mr. M. E. Driscoll, for respondent:

There is a clear distinction, with respect to the master's liability, between cases where the accident happens in the regular place and employment, and where it happens in a new and unusual place and employment to which the servant is ordered by the master or his representative.

Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; *McDermott v. New York Cent. & H. R. R. Co.* 38 N. Y. S. R. 33, 13 N. Y. Supp. 435, Affirmed in 131 N. Y. 668, 30 N. E. 867; *Monn v. Oriental Print Works*, 11 R. I. 152; *Nichols v. Brush & D. Mfg. Co.* 53 Hun, 137, 6 N. Y. Supp. 601, Affirmed in 117 N. Y. 646, 22 N. E. 1131; *Rettig v. Fifth Ave. Transp. Co.* 6 Misc. 323, 26 N. Y. Supp. 986; Affirmed in 144 N. Y. 715, 39 N. E. 859;

Kranz v. Long Island R. Co. 123 N. Y. 1, 25 N. E. 206; *McGonigle v. Canty*, 80 Hun, 301, 30 N. Y. Supp. 320; *Panizar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Hatton v. Hilton Bridge Constr. Co.* 42 App. Div. 308, 59 N. Y. Supp. 272; *McGovern v. Central Vermont R. Co.* 123 N. Y. 280, 25 N. E. 373; *Leland v. Hearne*, 49 App. Div. 111, 63 N. Y. Supp. 204; *Brennan v. Gordon*, 118 N. Y. 489, 8 L. R. A. 818, 23 N. E. 810.

To hold, as matter of law, that the men were bound, under the conditions, to take notice of the stub from time to time, and protect themselves against its falling, would be unreasonable in the extreme.

This question was submitted to the jury as a question of fact, and their finding is conclusive.

Mehan v. Syracuse, B. & N. Y. R. Co. 73

safe appliances cannot be affected by a contract between it and a third person to which the plaintiff was not a party, giving such person control of the cars, and requiring him to make all repairs. *Gulf, C. & S. F. R. Co. v. Shearer* (1892) 1 Tex. Civ. App. 343, 21 S. W. 133; *Gulf, C. & S. F. R. Co. v. Delaney* (1900) 22 Tex. Civ. App. 427, 55 S. W. 538. In the latter case, the contract for ballasting a railroad track provided that "the contractor would carry on and prosecute the work in such manner" as the engineer of the railroad company should direct, and the injury was caused by a defect in a derrick used by the contractor in performing such work.

In Virginia, on the general ground that the reconstruction of a railway bridge without the interruption of traffic is not an essentially hazardous undertaking, but may be effected with entire safety if ordinary care be used, a company has been held not liable for the negligence of a reputable contractor, employed to do the work. *Norfolk & W. R. Co. v. Stevens* (1899) 97 Va. 631, 46 L. R. A. 367, 34 S. E. 525 (train went through one of the spans, owing to the fact that the false work had been taken away too soon).

The court does not refer to any of the authorities opposed to its own conclusion, and contents itself with applying the general rule as to independent contractors, without noticing the possibility of an exception to that rule in the case of absolute duties.

Whichever of these views of the nature of the master's liability is taken, it is manifest that the general principles which determine the extent of the responsibility of an employer for the acts of an independent contractor involve the corollary that the owner of premises cannot dictate that his building be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it; nor can he, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it, and shift all responsibility upon the builder. *McIver v. Morgan* (1892) 82 Wis. 289, 52 N. W. 174.

Similarly, since the physical conditions created by the negligence are the necessary result of the work contracted for, an employee of a street railway which is relaying its rails under a municipal permit may recover for injuries due to an obstruction in the track. *North Chicago Street R. Co. v. Dudgeon* (1900) 184 Ill. 477, 36 N. E. 796, Affirmed (1898) 83 Ill. App. 528, 54 L. R. A.

I. Same subject continued; opposing doctrines discussed.

The cases absolving the master from responsibility for the negligence of an independent contractor in this connection clearly seem to have been decided upon a false theory of the circumstances involved. It is a contradiction in terms to speak of an absolute duty as being susceptible of delegation. If it can be delegated in any particular instance, it ceases, *ex hypothesi*, to be absolute. That this is a necessary corollary of the theory that a duty is absolute has been fully recognized in many English and American cases, where the complainant was a stranger. *Hole v. Sittingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L. J. Exch. N. S. 81, 8 L. T. N. S. 750, 9 Week. Rep. 274 (railway company held liable for the act of a contractor in obstructing the navigation of a river while building a bridge); *Tarry v. Ashton* (1876) L. R. 1 Q. B. Div. 314, 45 L. J. Q. B. N. S. 260, 34 L. T. N. S. 97, 24 Week. Rep. 581 (tenant, who maintained a lamp over a foot-path in a condition so defective as to be a dangerous nuisance, was held answerable to a passerby injured by its fall, although he had hired a competent contractor to repair it); *Curtis v. Kiley* (1891) 153 Mass. 123, 26 N. E. 421 (similar facts); *Wilkinson v. Detroit Steel & Spring Works* (1889) 73 Mich. 405, 41 N. W. 490 (building so defectively constructed as to be a nuisance); and the other cases cited in 1 Shearm. & Redf. Neg. §§ 14, 176. Why a different principle should be applied where the injury is received by a servant of the party subject to the duty is not apparent, and no court has yet furnished any reason for making such a distinction. See the comment made *supra*, II. 1, on the New York cases. On the other hand, there is a consideration which points very strongly, if not conclusively, to the conclusion that the case of a servant is precisely the one in which the courts should be most unwilling to allow the interposition of a contractor to shield the master. As has already been shown in an earlier note in this series (*Walkowski v. Penokee & Gogebic Consolidated Mines* (Mich.) 41 L. R. A. pp. 38-45, and pp. 107-119), a manufacturer who supplies a chattel to another person to be used in his business is not bound to indemnify the vendee's servants for injuries which they receive owing to defects in the chattel. Manifestly the result of applying concurrently this principle and the principle that the master who purchases appliances from a manufacturer is, as regards his servants, entitled to rely upon its fitness for the purposes contemplated, unless there is something to put him on

N. Y. 585; Kain v. Smith, 89 N. Y. 375; *Lofrano v. New York & Mt. V. Water Co.* 55 Hun, 452, 8 N. Y. Supp. 717; *Gates v. State*, 128 N. Y. 221, 28 N. E. 373.

Bartlett, J., delivered the opinion of the court:

This action was brought by the plaintiff, as administratrix of the estate of her deceased husband, to recover of the defendants damages in negligently causing his death. In October, 1897, the defendants, under contract with the state, were engaged in deepening the Erie canal in the town of Camillus, Onondaga county. The deceased was working with a gang of men employed by the defendants under the supervision of Orson Seeley as foreman. These workmen were engaged in driving spiles as part of the work they were prosecuting. The canal

inquiry as to its condition, is to deny any remedy to servants for injuries due to defects in such appliances. Such a conclusion is simply preposterous and disgraceful to any system of jurisprudence. Either the vendor should no longer be allowed to shelter himself, under the supposed circumstances, by the defense of want of privity of contract, or it should be regarded as an implied term in the contract between the master and his servants that all appliances obtained from parties not in his service are free from all defects which can be prevented by the exercise of that degree of care and skill which is required of persons following the same line of business as the vendor. The latter method of escaping from the absurd predicament into which the law has got itself at this meeting point of the principles under discussion would seem to be the most desirable. Not only would it round off and render entirely consistent the doctrine of absolute duties, but it would obviate the almost insuperable practical difficulties which would, in many instances, block the attempts of servants to obtain redress from vendors of instrumentalities residing in distant localities. There would be no injustice to the master in such rule, for he would still have his action over against the vendor of the defective appliance, and would almost invariably be more favorably situated than his servants for the enforcement of his rights.

1. Massachusetts doctrine not identical with that of other states.

The doctrine which has been involved in Massachusetts is somewhat different from that which prevails in other courts, although in a large class of cases its practical results are quite similar. In some of the earlier cases we find language used which can scarcely be construed otherwise than as an explicit affirmative of the theory of nondelegable duties in the simple form in which it has been enunciated in other jurisdictions.

For the management of his machinery and the conduct of his servants, a master is not responsible to their fellow servants; but he cannot avail himself of this exemption from responsibility when his own negligence in not having suitable instruments, whether persons or things, to do his work causes injury to those in his employ. He cannot divest himself of his duty to have suitable instruments of any kind, by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his, 54 L. R. A.

at this point ran east and west, and was crossed at right angles by a highway, which, about 1,000 feet south of the canal, was intersected by a state ditch, also being excavated by these contractors. The ditch ran from the highway diagonally to the canal, intersecting it some distance west of the highway bridge, thus making a triangle bounded on the north by the canal, on the east by the highway, and on the south and west by the state ditch. The land in this triangle was low, swampy, and apparently useless. The evidence shows that it was covered with grass, wood, stumps, trees, and refuse. On this land, some 40 or 50 yards south of the canal, stood a dead elm tree about 35 feet high, with some ragged stumps or ends of branches projecting from the upper part; the bark had fallen from it; it was weather beaten and decayed. A short dis-

and not merely theirs, and for negligence of his duty in this respect he is responsible. *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210.

In *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598, it was held that instructions were properly refused which said the defendants would not be liable for negligence of persons examining a boiler. The court said: "The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep, its machinery in safe condition. The duty is essentially the same. . . . The question was not whether the officers named knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use."

But the position of this court now is, that the master's exercise or non-exercise of a proper supervision over the servants to whom he has delegated the performance of the duties which elsewhere are treated as absolute without qualification is the test to which the question of his responsibility for the negligence of those servants ought to be referred. The most useful explanation of this theory, for the purposes of comparative jurisprudence, is contained in the following passage from the opinion of Field, J., in *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77: "As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest that, if it is held that these are all fellow servants, and that the corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery and of keeping it in repair, to one or more principal servants, such as superintendents or managers, the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation, or its principal officers, knew that the subordinate servants were incompetent, or that the machinery used was defective. To avoid this result, some courts have held that superintendents or managers are not fellow servants with the men employed to work under them, or that servants employed in one department of the business are not fellow servants with those employed in another. Other courts have held that they are all fellow servants, but that the master cannot

taunce west were a few other elm trees. Some little distance northwest of this dead elm, and near the canal, was a large quantity of spiles to be used in the work of the defendants. During the morning of the day the plaintiff's intestate was killed, a fire was discovered on the southwesterly or southerly portion of this triangle, which spread rapidly, and, unless checked, it was obvious that the spiles in question would be consumed. These defendants had two other gangs of workmen engaged in excavating on the state ditch under separate foremen. They also employed a walking boss, named Hannan, who was supervising the work generally. The men in all of these gangs were called upon to fight the fire, and did so for a considerable time. Hannan assumed the control of the men, and directed their operations. Some of the men, among whom was

the deceased, were engaged in carrying water in pails from the canal to the fire, and in doing so passed a short distance north of the dead elm tree. At the time of the accident this tree had been on fire for about three quarters of an hour, and it was the subject of conversation between Hannan and a workman whether it should be cut down or allowed to burn, Hannan inclining to the latter view. The evidence does not disclose any general apprehension existing among the workmen that the burning tree was an object of special danger. The deceased while engaged with some twenty-five others in carrying water from the canal to fire in the undergrowth, passed, as he had repeatedly done, about 20 feet or more to the north of the burning tree, when it suddenly fell upon him, causing his instant death. The wind at the time was blowing from the

avoid his obligation to see to it that reasonable care shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and retaining competent servants, by employing a servant to do these things for him; and that if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible. . . . The rule of *respondent superior* as applied to cases like the present, the exception of injuries caused by the negligence of a fellow servant, and the limitations of this exception, have been established by courts upon considerations of public policy, as well as of the legal principles which govern cases somewhat analogous. If a master who takes no personal part in the management of his business has any duty to perform towards his servants, it is difficult to say that it is always wholly performed by doing two things, namely, by employing competent servants, and by furnishing ample means. In order that the business may be properly managed, the servants should not only be competent, but they should be numerous enough to do, and they should have the means of doing, whatever ought reasonably to be done, and such regulations should be established as will insure the requisite subordination and control, and the exercise of reasonable intelligence and care in the conduct of the business; and it is almost as difficult to define all the duties of the master in these respects as to define the duties of a person under other relations. If it is not the absolute duty of the master to furnish suitable machinery, and if he is not held to warrant that the servants he employs to furnish machinery, or to keep it in repair, shall always use reasonable care, then the duty of a master who does not personally conduct his business, if he is under any duty, we think, must be to use reasonable care in the management, and that is to exercise, or have exercised, a reasonable supervision over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and are furnished with suitable means for carrying on the business." The learned judge then reviewed some of the earlier cases, and proceeded thus: "These decisions show that it is the duty of the master to exercise a reasonable supervision over the condition in which the machinery, structures, and other appliances used in his business are kept by his servants, and that he cannot wholly escape responsibility by delegating the performance of this duty to servants; that the negligence of his servants in repairing or in failing to repair machinery, is not necessarily the negligence of the master, but that it is also to be determined in each case whether the master has exercised a reasonable

supervision over his servants, and reasonable care in seeing that his machinery is kept in proper condition, although he may have employed competent servants and furnished them with suitable materials, and instructed them to keep the machinery in repair."

As was said in *Johnson v. Boston Tow-Boat Co.* (1883) 135 Mass. 215, 46 Am. Rep. 458: "The master is liable in all cases for his own negligence, and that may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master may be inferred from it."

We are aware that this rule is somewhat indefinite, and is perhaps not precisely that which generally prevails in the United States. *Northern P. R. Co. v. Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Benzing v. Steinway* (1896) 101 N. Y. 547, 5 N. E. 449.

The following extracts will also be found serviceable as elucidating still further the position of the court:

The servant charged with providing these appliances stands in the place of the master, and performs the duty incumbent on him. It is not sufficient that he is an intelligent and competent servant; if he neglects this, the master is still responsible, unless he shall himself have exercised a reasonable care and supervision over him in seeing that the machinery was in proper condition. Nor is it enough that the master has employed suitable servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair. He must see that such servants do their duty. *Elmer v. Locke* (1883) 135 Mass. 575; *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690.

Perhaps the whole question is whether the master has exercised reasonable care in employing competent servants, in providing suitable machines and implements, and in doing that part of his business which he has undertaken to do himself, and has exercised a reasonable supervision over his servants in the performance of the duties which he has intrusted to them. This is often a question for the jury. Courts have therefore held that they could not say, as matter of law, that a master was not responsible for injuries occasioned by defective machinery, when the defect was substantial and rendered the machine unfit for use, although it was through the neglect of a competent servant that the machine had not been repaired; and they have also held that, when the defect was one that must frequently arise from the use of the machine, and was such that the person employed to superintend the use of the machine

south. The defendants were not present during the fire. The jury rendered a verdict for the plaintiff, and the appellate division affirmed the judgment entered thereon with a divided court. The prevailing opinion rests upon the theory that the foremen and the walking boss, Hannan, were representing the masters in the prosecution of the regular work, and that when the property of the latter was endangered by fire it was their duty to request the assistance of the men under them to preserve it if possible; that, if the men consented to leave the regular work, and engage in protecting the property, the foreman still represented the masters in the emergency, and owed to the men the same duty as would the masters if personally present. It is conceded that the nature of the work was hazardous, and that plaintiff's intestate assumed the obvious

risks, but it is argued that he had the right to expect that he would be warned of any imminent danger which was known to the masters, but of which he had no knowledge. The only alleged negligent act by which it is sought to charge the defendants is the failure of Hannan, the walking boss, to inform the men, including the deceased, who were carrying water in the vicinity of the burning tree, to keep away from it, as it was about to fall. This position assumes that Hannan represented the masters, and, furthermore, that he knew the tree was about to fall.

As to the time when the burning tree would fall, it was matter of opinion, and a subject upon which each person present could exercise his individual judgment. The fact that the tree would fall if the fire continued to consume it was as much an ob-

should attend to in order to keep it in running order, the master performed his whole duty by furnishing suitable materials and employing competent servants to keep the machinery in repair. These decisions have been made in cases where it appeared that the defect in the machinery was unknown to the master. The general question is, what, under the circumstances, the master ought reasonably to have known and done, and, in determining this, the nature of the defect, the length of time it has existed, and the means taken to remedy it, are important facts. *Rice v. King Philip Mills* (1887) 144 Mass. 236, 59 Am. Rep. 80, 11 N. E. 101.

It is the duty of the master to exercise ordinary care in supplying and maintaining machinery, appliances, and instrumentalities; and if the servant exercising ordinary care is injured by a deficiency therein, he is entitled to recover damages. The servant charged with providing these appliances stands in the place of the master, and performs the duty incumbent on him. It is not sufficient that he is an intelligent and competent servant; if he neglects this, the master is still responsible, unless he shall himself have exercised a reasonable care and supervision over him in seeing that the machinery is in proper condition. Nor is it enough that the master has employed suitable servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair. He must see that such servants do their duty. *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690.

The very nature of the implied contract created by the hiring, whereby the master undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow servant, for whose negligence he is not to be responsible. His obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come to the hands of his servants for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risk of the business, to enable him reasonably to protect his servants from a danger which he should prevent. *Moynihan v. Hills Co.* (1888) 146 Mass. 592, 16 N. E. 574.

In *Coates v. Boston & M. R. Co.* (1891) 153 Mass. 297, 10 L. R. A. 769, 26 N. E. 864, a case of an accident caused by the absence of a jaw-strap on a railway car, the court expressly refused to put its decision "on the identification

of master and servant, and a union of the knowledge of the corporation and the command of the conductor in one person, by a fiction."

See also, to the same effect, *Sweat v. Boston & A. R. Co.* (1892) 156 Mass. 284, 31 N. E. 296; *Colton v. Richards* (1878) 123 Mass. 484; *Neveu v. Sears* (1892) 155 Mass. 303, 29 N. E. 472.

This theory virtually amounts to holding that there is only one duty which is nondelegable in the sense in which that term is ordinarily understood,—the duty, namely, of efficient supervision over the agents whom he has appointed to represent him in seeing that the various instrumentalities of work are furnished and maintained in a reasonably safe condition. In the language of other courts, the employees who act as his deputies in performing that duty are vice principals.

In *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 325, the court, in discussing the question whether there was evidence to warrant the judge in submitting to the jury the question whether the section master was so far charged with the duty of supervision that the defendant might be liable to one of its servants for his negligence, said: "It is well settled that one who is in some things a mere servant may be made the master's agent to perform duties which are primarily personal to the master. *Moynihan v. Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574, and cases cited. If in the present case the section master was intrusted by the defendant with the performance of the duty, or a part of the duty, of supervision of the tracks which a reasonable regard for the safety of its employees required the corporation to perform, the defendant is liable for his negligence in the performance of it. There was evidence tending to show that different persons had some responsibility in representing the defendant in this respect. A part of the printed instructions to section masters was in these words: 'They will see that no wood, lumber, ties, or other obstructions are piled within 6 feet of the track.' It does not very clearly appear what other measures were taken by the defendant promptly to ascertain the existence of defects or obstructions along the track. The evidence on this branch of the case is rather meagre, but we cannot say that there was not enough to warrant the judge in submitting the question to the jury under the instructions which he gave. It is the duty of a railroad corporation to use reasonable care and diligence to keep its tracks in a safe condition for its employees to work upon. So far as the work of keeping its tracks in repair is left to its servants, it is its duty to exercise reasonable super-

vious risk of the employment as any other danger which confronted the workmen in this unusual and exciting situation. It may be said, in a general way, that it is the duty of the servant to protect his master's property from destruction by fire or any other cause; but when to do so subjects him to great and unusual danger, he alone must decide the risk to be assumed. This would be so whether the peril to be encountered is regarded as a detail of the work or in the nature of a new employment. The intestate must have realized that the new employment (if it was such) upon which he entered involved risks not incident to the regular work in which he had been engaged for months. The scene was one of great confusion and excitement, with clouds of smoke, sparks, and cinders driven towards the men employed in fighting the fire by a wind

from the south. The plaintiff's intestate passed the burning tree a number of times in the course of his employment, and the danger of the situation was as obvious to him as to any other person engaged in the work of saving property; and, if it failed to impress him, he was either negligent or dominated by that excitement and preoccupation usual at such a time. A servant assumes, not only the risks incident to his employment, but all dangers which are obvious and apparent; and so, if he voluntarily enters into or continues in the service, having knowledge, or the means of knowing, the dangers involved, he is deemed to assume the risks, and to waive any claim for damages against the master in case of personal injury. *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Thomp. Neg.* p. 1008; *Haskin v. New York C. & H. R. R. Co.* 65 Barb. 129,

vision to see that the work intrusted to them is properly done. How far into details this supervision must go before the domain which belongs exclusively to the master is passed, and the domain which may be left to servants is entered, depends upon what it is reasonable to require of a master who is charged with the duty of providing safe works, machinery, tools, and appliances for his employees. In some cases this may be a difficult question to decide. But undoubtedly a jury may find that a railroad corporation should so far supervise the work of its servants in repairing its tracks as to see that a pile of sleepers 3 or 4 feet wide is not left for a long time within 18 inches of the rails in the freight yard of an important station." Commenting on the exception taken to the refusal of the trial judge to instruct the jury that if the defendant had used reasonable care in the supervision of the section men and of the use of the yard, the plaintiff could not recover for the neglect of the section men in leaving the ties by the track, or the neglect of the yard master or the section master or road master in failing to have them removed or to report that they were there, the court said: "This instruction could not properly be given, because it required of the corporation merely supervision of the section men and of the use of the yard, and disregarded the duty of the defendant to use reasonable care in looking after the condition of the road in other particulars. It may have been the duty of the yard master or the road master to exercise this supervision, and, if he discovered neglect, to see that the road was not left in a dangerous condition on account of the neglect. Under the instructions requested the yard master or road master might have used reasonable care in the supervision of the section men, and been negligent in the performance of a part of the master's duty which was incidental to supervision, namely, the correction of the errors which supervision disclosed. We are of the opinion that the instructions were correct and sufficient."

In *McCauley v. Norcross* (1892) 155 Mass. 584, 30 N. E. 464, the law was laid down as follows: "If the beams were so left that one of them would be liable, as a natural consequence from some intervening cause or agency, to be so moved that it might fall through the floor, the fact that an intervening act or agency occurred which directly produced the injurious result would not necessarily exonerate the defendants from responsibility. Superintendence is necessary in order to guard against injuries from such intervening and inadvertent acts of careless persons as are likely to happen and ought to be guarded against. The question is whether

the moving of a beam was so likely to occur that it ought to have been provided against by the superintendent. It might be found that the beams were negligently left near the hole in the floor where they were likely or liable to be toppled over so that one of them might fall through the hole, and thus injure someone below, and that this was the proximate cause of the plaintiff's injury, although some careless person came along and toppled them over."

From the foregoing remarks it is apparent that the Massachusetts decisions in regard to negligence of the kind with which we are concerned in this note stand outside the general current of the authorities. But a connecting link between the doctrine thus formulated and the one which prevails in most American states is supplied by the consideration that it is only in cases which have relation to obligations which, outside of Massachusetts itself, are viewed as being nondelegable, that the ulterior duty of supervision becomes a determinative factor. From the standpoint of other courts those cases may fairly be regarded as authorities for the position that the obligations involved belong to the nondelegable category; and this is the footing upon which they have been, for the purposes of the present inquiry, collated, as to the facts involved, with the rulings in other jurisdictions.

The nondelegable quality of the duty of supervision, so far as it is connected with other duties of the same stamp, is sometimes asserted in the opinions of other courts beside Massachusetts.

A master cannot claim immunity on the ground that he has exercised due care in selecting mechanics of competent skill in the construction of machinery and buildings, but assumes the burden of seeing that such mechanics actually exercise reasonable care and skill in the execution of their work. *Collyer v. Pennsylvania R. Co.* (1886) 49 N. J. L. 59, 6 Atl. 438.

k. Servants may act in a dual capacity.

In the *note* to *O'Neill v. Great Northern R. Co.* (1900: Minn.) 51 L. R. A. 593-596, a number of decisions were cited in which employees who are deemed to be vice principals by virtue of the extent of the control exercised by them were viewed as persons whose negligence is or is not imputed to the master according as they may or may not be discharging one of his absolute duties. The foundations of this theory, as was there shown, are by no means satisfactory; but no objection, either on the score of logic or otherwise, can be made to the theory of such a dual capacity in cases where the vice principalship of

Affirmed in 56 N. Y. 608; *Jones v. Roach*, 9 Jones & S. 248; *Wormell v. Maine O. R. Co.* 70 Me. 397, 10 Atl. 49; *Kennedy v. Manhattan R. Co.* 145 N. Y. 288, 39 N. E. 956. The supreme judicial court of Massachusetts held in *Leary v. Boston & A. R. Co.* 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115, that if a servant of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, and is injured by reason of his ignorance and inexperience, he cannot maintain an action against the master for such injury. If the deceased entered upon a new employment when accepting the invitation of the foreman to assist in extinguishing the fire, the plaintiff is not entitled to recover, for reasons already stated. If, on the other hand, the effort to preserve the master's property be regarded as a detail of the regular work, the plaintiff's recovery cannot be sustained.

the delinquent is itself predicated solely from the fact that his delinquency was of such a nature as to constitute a breach of an absolute duty. The doctrine that a representative character is deducible from this circumstance obviously connotes by implication the doctrine that the delinquent employee is not, as regards any other kind of negligence, an agent of the master; and such is the effect of the cases.

One who has not the authority of a general vice principal may be intrusted by the master with the discharge of absolute personal duties that rest upon it, such as the duty to use reasonable care to employ competent and careful fellow servants; and in such a case he may be termed a special vice principal. He stands in the place of the master when he is discharging one of these personal duties of the master, and the latter is liable for his negligence in the discharge of it; but in the performance of his other services as a general employee he is not the representative of the master, nor is the master liable for his negligence in the performance of them. *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525.

A servant is a vice principal only when he stands in place of the principal with reference to the principal's duty, or in the exercise of the principal's functions. *Hanna v. Granger* (1894) 18 R. I. 507, 28 Atl. 659.

The relation of a foreman to the other workmen is that of a coemployee, except as to such acts performed by him as were embraced in the duties of the defendant. *Mahoney v. Vacuum Oil Co.* (1894) 76 Hun, 579, 28 N. Y. Supp. 196.

If the principal is a corporation, or is unable for any reason to discharge these obligations in person, they must be discharged through an officer, agent, or foreman. The person who is thus put in the place of the principal, to perform for him the duties which the law imposes, is a vice principal, and *quoad hoc* represents the principal so that his act is the act of the principal. This is true, however, only when and so long as his acts are in discharge of the duties which the principal owes to his employees. Beyond this line he acts as a workman, and not as a vice principal. *Ross v. Walker* (1891) 139 Pa. 42, 21 Atl. 157, 159.

The liability of the master, when the negligence is not his personal act or omission, but the immediate act or omission of a servant, turns upon the character of the act or omission complained of. If the coservant, whose act or

Assuming, for the argument's sake, that Hannan was negligent in not warning the deceased that the burning tree was dangerous, and about to fall, the defendants are not liable, as it was no part of their duty to thus protect the deceased, by notice, of a peril that had developed during the progress of the conflagration, and which was equally obvious to all. If there was any negligence on the part of Hannan, it was the negligent act of a coservant. In *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371, Judge Andrews pointed out with great clearness the principles of law which determine the liability of the master for injuries caused by the negligence of a coservant. The learned judge, in the course of his opinion, said: "But this liability, when it exists, does not rest upon the doctrine of *respondet superior*, but solely upon the ground that in the particular case the coservant whose act or neglect caused the injury was, by the appointment of the master, charged with the performance of duties which the

omission caused the injury, is at the time representing the master, in doing the master's duty, the master is liable; if, on the other hand, he is simply performing the work of servant in his character as a servant or employee merely, the master is not liable. The injury in the last case supposed would, as between the master and the servant sustaining the injury, be attributable solely to the immediate author, and not to the master. *Vitto v. Keogan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1.

It is not the rank of the employee or his authority over other employees, but the nature of the duty or service which he performs, that is decisive. Whenever a master delegates to another the performance of a duty to his servant which rests upon himself as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of a discharge of those duties by the middleman, however high or low his rank, or however great or small his authority over other employees, he stands in the place of the master, but as to all other matters he is a mere coservant. It follows that the same person may occupy a dual capacity of vice principal as to some matters, and of fellow servant as to others. *Lindvall v. Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020.

According to the firmly settled rule of law in this state, Helm, notwithstanding the higher grade of service in which he was employed, was a fellow servant with plaintiff in so far as he served in the places, or with the machinery or appliances, prepared and furnished by the defendant; and, for the consequences to fellow servants of his negligence in the performance of such services in the places, or with machinery or appliances, thus prepared and furnished, the defendant is not responsible. But in so far as Helm was authorized and employed to prepare the places in which other servants were to work, or to furnish the machinery or appliances with which they were to work, he represented the corporate defendant, and his negligence in the performance of these services was the negligence of the defendant, for the injurious consequences of which to other servants, without their fault, it is responsible to the same extent it would have been if such places, machinery, and appliances had been prepared and furnished through the immediate agency of the general superintendent, or of the special super-

master was bound to perform for the protection of his servants, a failure to perform which, or a negligent performance of which, by a servant delegated to perform them, is regarded in law the master's failure or negligence, and not merely the failure or negligence of the coservant. . . . In harmony with the general principle that the character of the act is the decisive test, it has been repeatedly decided in this court that the fact that the person whose negligence caused the injury was a servant of a higher grade than the servant injured, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not take the case out of the operation of the general rule, nor make the master liable. *Hofnagle v. New York O. & H. R. R. Co.* 55 N. Y. 608; *McCosker v. Long Island R. Co.* 84 N. Y. 77; *Allen, J., in Wright v. New York O. R. Co.* 25 N. Y. 562, 565; *Folger, J., in Loring v. New York C. R. Co.* 49 N. Y. 528, 10 Am. Rep. 417." In the case at bar the several foremen and

the men under them were engaged as coservants in a laudable effort to protect the property of their employers, assuming voluntarily all the risks involved, and the masters rested under no duty of specially protecting the servants in the changing phases of this emergency. This court has had occasion to deal with the general principle which limits the liability of the master for injuries caused by a coservant in a large number of cases, a few of which we cite: *Arnold v. Delaware & H. Canal Co.* 125 N. Y. 15, 25 N. E. 1064; *Cullen v. Norton*, 128 N. Y. 1, 28 N. E. 905; *Keenan v. New York, L. E. & W. R. Co.* 145 N. Y. 190, 39 N. E. 711; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021; *Capasso v. Woolfolk*, 163 N. Y. 472, 57 N. E. 760; *Di Vito v. Crage*, 165 N. Y. 378, 59 N. E. 141.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to abide the event.

Parker, Ch. J., and O'Brien, Martin, Vann, Landon, and Cullen, JJ., concur.

intendant, of the silver-room. *Nixon v. Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 38 Pac. 803.

A Scotch case was sent back for retrial on the ground that the instructions had not been such as to make it clear to the jury that the defendant would be liable for the negligence of his underground manager in providing a defective rope only if such negligence was committed by him in his representative capacity, as performing a duty delegated to him by the master, and representing the master in the performance of that duty. *Wilson v. Sneddens* (1886) 4 Macph. Sc. Bess. Cas. 3d series, 736.

See also, to the same effect, *Meehan v. Speirs Mfg. Co.* (1899) 172 Mass. 875, 52 N. E. 518; *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 241, 14 Am. Rep. 598; *Hussey v. Cogger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556, *Reversing* (1896) 39 Hun, 639; *Scarff v. Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796; *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Callan v. Bull* (1896) 118 Cal. 593, 45 Pac. 1017; *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 390, 46 L. R. A. 837, 27 S. E. 278, 31 S. E. 258; *Ell v. Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222; *Chapman v. Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551.

The moment that an employee, not vice principal, for general purposes, who has authority to hire an emergency assistant, has completed such a hiring, and, after having resumed his place as servant, enters upon the performance of his work as such, he ceases to represent the master, and becomes a coemployee of the emergency assistant for all purposes. *Marks v. Rochester R. Co.* (1899) 41 App. Div. 66, 58 N. Y. Supp. 210; former appeal (1894) 77 Hun, 77, 28 N. Y. Supp. 814, *Reversed* (1895) 146 N. Y. 181, 40 N. E. 782.

Any liability beyond this "is inconsistent with the well-settled rule of the master's duty. It adds to and alters it in ways that cannot be foreseen nor guarded against, and makes the master liable however great may have been his care and diligence in selecting his servants. But it may be said that the converse makes the servant suffer. So it may. Accidents are continually happening from somebody's carelessness. The law gives a remedy in damages against the guilty party, but not against an innocent one. As to strangers, upon principles 54 L. R. A.

of public policy, it treats a master as guilty for the negligence of his servant; but public policy does not demand that he should be so treated as to his own servants who have the option to examine their surroundings in his service, and to receive pay according to the risk they incur. They may sue a fellow servant for his negligence, but to make the master liable for it, unless that servant is taking the place of the master, is contrary to reason and justice." *Hanna v. Granger* (1894) 18 L. R. A. 507, 28 Atl. 659.

Whether the negligent act in any particular instance did or did not amount to a breach of a nondelegable duty will be determined with reference to the principles established by the cases cited in the following subtitles.

1. Pleading.

A complaint alleging the breach of one or more of the absolute duties of a master is good against a demurrer. *Louisville, E. & St. L. Consol. R. Co. v. Miller* (1895) 140 Ind. 685, 40 N. E. 116; *Camp v. Hall* (1897) 39 Fla. 535, 22 So. 792; *Wallace v. Standard Oil Co.* (1895) 66 Fed. 260; *Chicago & N. W. R. Co. v. Swett* (1867) 45 Ill. 197, 92 Am. Dec. 206; *Nicholas v. Burlington, C. R. & N. R. Co.* (1899) 78 Minn. 43, 80 N. W. 776; *Ressex v. Chicago & N. W. R. Co.* (1878) 45 Wis. 477.

A declaration alleging that the defendant carelessly and negligently permitted the track and a car to become and remain defective is sustained by evidence that they became and remained defective through his personal carelessness and negligence in not discovering and remedying the defects, if he took upon himself that branch of the business; or by evidence that he assumed the general management and superintendence of the road, and employed all the workmen, and that from gross negligence he employed no repairmen, or an insufficient number, or unskilful ones, whereby the track and a car became and remained defective. In either case the defects were existing by reason of his own negligence. *Fifield v. Northern R. Co.* (1860) 42 N. H. 225.

m. Burden of proof.

In the face of proof of injury from illy constructed and unsafe machinery furnished for the servant's use, a court will indulge in no presumption that the master performed his du-

Mary QUIGLEY, Admx., of Michael Joseph Quigley, Deceased, Appt.,
v.

William M. LEVERING *et al.*, Resp'ts.

(187 N. Y. 58.)

1. A master is not liable for injury to an employee by reason of failure of his foreman to keep cleaned and oiled an automatic stop designed to prevent the trolley from running off the end of the track of a traveler used to convey metal plates from one place to another in the shop, because of which the stop fails to work and the trolley falls upon the employee.
2. The negligence of a fellow servant is the cause of injury to an employee by the fall of the trolley from the traveler used for conveying metal plates across the shop, where, in disregard of orders, he pulls the trolley towards the end

of the track without looking to see whether or not the stop designed to prevent it from running off the end is working, and not the failure of the stop to work.

3. Upon the question of liability of a master for injury to a servant by failure of an appliance furnished for his use to operate as intended, evidence is not admissible of the successful working of another device intended for the same purpose, where it is not shown to be a standard article, and the failure of the one furnished was due to lack of oiling and cleaning, and not to faulty design.

(April 30, 1901.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County in favor of defendants in an action brought

ties, or that coservants were negligent. *Ellis v. New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546.

The act of a servant in repairing a ladder will be presumed to be that of a vice principal, where one of the principals testified that the ladder was repaired the evening before the accident by one of the hands, the presumption being that it was done by the direction of the principal. *Huth v. Doble* (1898) 76 Mo. App. 671 (demurrer to evidence properly refused).

Negligence in running a train at a time when the track was so unsafe that it should not have been run at all will be attributed to the railroad company, rather than to the fellow servants of an employee injured thereby, in the absence of evidence as to who directed it to be run. *Stoher v. St. Louis, I. M. & S. R. Co.* (1891) 105 Mo. 192, 18 S. W. 991, first appeal (1887) 91 Mo. 511, 4 S. W. 889.

But if the immediate cause of the accident may have been the act of a fellow servant, and the servant seeks to recover on the ground that it was really due to negligence constituting a breach of a nondelegable duty, he will fail unless he satisfies the requirements of the ordinary rule that the burden of proving negligence is upon the person who alleges it.

In *Rose v. Boston & A. R. Co.* (1874) 58 N. Y. 217, where the train on which the plaintiff's intestate was a brakeman was sent out within three or four minutes of another train, and was itself followed by a third train at about the same distance of time, and the injury which caused the death of the brakeman resulted from the trains being sent out so near together but by whose direction it did not appear, the plaintiff failed to make out a clear case; and the court rendered a decision based upon the theory that the company was not liable for the negligence in not observing the regulations regarding the starting of trains, or in the disobedience.

n. Propriety of instructions.

Any instruction inconsistent with the doctrine of nondelegable duties is properly refused, and if such an instruction is given, it is a ground for reversing a verdict in favor of the plaintiff, as for example, an instruction which directs the jury to find for the defendant, if he used care in the selection of the appliance and of a competent inspector, and the plaintiff's injury was due to the negligence of such inspector in not making proper tests. *Texas & P. R. Co. v. Barrett* (1895) 14 C. C. 373, 30 U. S. App. 196, 67 Fed. 214.

Or an instruction is erroneous which declares that a corporation is only liable for the negli-

gence of its directors, and not for the negligence of any other officers, whatever their position and duties. Authorities cited in *Krueger v. Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 937.

Or an instruction that an appliance furnished by the master to his servants to be used by them in the prosecution of their work has been constructed by one who is a fellow servant engaged in the same kind of work with the servant who is injured (see VI. *infra*) exonerates the master from liability for the consequences of a defective appliance. *Jones v. St. Louis, N. & P. Packet Co.* (1890) 43 Mo. App. 398.

Or an instruction that if the fall of a roof in a mine was due to the negligence of the mine boss, it was the negligence of a fellow servant. *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 31 S. E. 614.

See also, to the same general effect, *Moran v. Corlies Steam Engine Co.* (1899) 21 R. I. 386, 45 L. R. A. 267, 43 Atl. 874; *Rouse v. Downs* (1897) 5 Kan. App. 549, 47 Pac. 982; *Hess v. Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743.

It is error to direct a verdict for the defendant where evidence is introduced which would justify the jury in finding that the accident was caused by the negligence of an employee to whom had been delegated the duties of furnishing and maintaining a safe place and safe appliances. *Kelley v. Ryus* (1892) 48 Kan. 120, 29 Pac. 144.

In an action by an employee to recover of a railway company for injuries sustained by the giving way of a grab iron of a ladder on the side of the car, an instruction that defendant's duty to inspect the car was shown to have been performed by two inspectors when it was put in the train is erroneous in declaring, as matter of law, that defendant had discharged its duty as to the inspection of the car. *Thompson v. Great Northern R. Co.* (1900) 79 Minn. 201, 82 N. W. 637.

A railroad company, when sued by a stock and fuel agent for injuries due to a defective track, is not entitled to an instruction that the plaintiff cannot recover if he was an employee of the company, and the injury was caused by the negligence of a servant of the company. *Texas & P. R. Co. v. Kirk* (1884) 62 Tex. 227.

Where the servant injured by the failure of his foreman to shore the sides of a trench properly had nothing to do with its excavation, being merely one of a gang sent, after it had been cut, to lay pipes along it, and there is no evidence tending to show that it became unsafe after he began work, it is not error to refuse to instruct the jury that if they found from the evidence that the defendant had selected a fore-

to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles Donohue and Thomas G. Frost, with Mr. Philo P. Safford, for appellant:

Plaintiff having shown the "automatic" to be a new and novel device used by defendants only, it was incumbent upon defendants, to justify a nonsuit, to show that it was reasonably safe by evidence permitting no other reasonable inference. This they made no effort to do.

Marshall v. Widdicomb Furniture Co. 67 Mich. 107, 34 N. W. 541; *Hesketh v. New York C. & H. R. R. Co.* 37 App. Div. 78, 55 N. Y. Supp. 898; *Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. 623; *Bailey, Personal Injuries, Relating to Master & Servant*, § 232.

man who was competent to take charge of the work, and had given him proper instructions, and if the cave-in occurred by reason of the foreman's subsequent neglect to shore up the trench, the neglect, if there was any, which caused the accident was that of a coservant of the plaintiff, and the defendant was not responsible. *Baird v. Reilly* (1899) 35 C. C. A. 78, 68 U. S. App. 157, 92 Fed. 884.

In a case where no reliance is placed upon the latent character of the defects, an instruction is not exhaustive, and therefore erroneous, which allows a jury to infer that a master has sufficiently discharged his duty of furnishing his servant with a safe scaffold when he intrusts the construction of it to a competent contractor. *Macdonald v. Wyllie* (1898) 1 Sc. Sess. Cas. 5th series, 339. But see II. g. h, *supra*.

An instruction to the effect that if the room was a suitable place, and there were proper and suitable means of extinguishing fire, and the means of egress and escape were suitable and proper, and in order and ready for use, then the plaintiff could not recover, is sufficiently favorable to the plaintiff. *Keith v. Granite Mills* (1878) 126 Mass. 80, 30 Am. Rep. 666.

c. Functions of court and jury.

If there is no dispute as to the facts, and the deduction to be drawn from these facts, under the doctrines accepted in the jurisdiction where the cause of action arose is also clear, the question whether the negligent servant was a vice principal or not as regards a certain act is one of law. *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

But if the facts are in controversy, or the evidence is susceptible of two constructions, the proper course is for the court to define the relation of fellow servants, and leave it to the jury to determine whether the employees in a particular case come within the definition. *Wilson v. Charleston & S. R. Co.* (1897) 51 S. C. 79, 28 S. E. 91.

The trial judge had erroneously ruled that the relation of the negligent and injured servants was one solely for the consideration of the jury. The following distinction was drawn by the supreme court: "Whether an engineer, brakeman, or switchman is, when exercising his ordinary duties, a fellow servant with a car cleaner is a question of law. But whether, in a particular case, either of them was engaged in performing certain acts which the law requires of the master, and which would prevent them from being fellow servants, is a question of fact to be determined by the jury."

Where there is testimony going to show that 54 L. R. A.

Even aside from the novelty of the automatic, the evidence was sufficient to go to the jury upon the question whether it was a reasonably safe device.

Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990; *Rollings v. Levering*, 18 App. Div. 223, 45 N. Y. Supp. 942; *Tomaselli v. John Griffiths Cycle Corp.* 9 App. Div. 127, 41 N. Y. Supp. 51; *Leonard v. Collins*, 70 N. Y. 90; *Palmer v. Conant*, 58 Hun, 333, 11 N. Y. Supp. 917; *Frankfort & B. Turnp. Co. v. Philadelphia & T. R. Co.* 54 Pa. 345; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Larkin v. Washington Mills Co.* 45 App. Div. 6, 61 N. Y. Supp. 93.

Under the factory act, it was defendant's absolute duty to guard the trolley properly, and to see to it that the automatic was not made ineffective.

the injury was caused by a breach of a nondelegable duty it is error to take the case from the jury. *Johnson v. Field-Thurber Co.* (1898) 171 Mass. 481, 51 N. E. 18; *Scandell v. Columbia Constr. Co.* (1900) 50 App. Div. 512, 64 N. Y. Supp. 232.

On the other hand, there is no error under such circumstances in refusing to say, as a matter of law, that the plaintiff cannot recover. *Herbert v. Northern P. R. Co.* (1882) 3 Dak. 38, 13 N. W. 349, *Affirmed* in (1886) 116 U. S. 642, 29 L. ed. 755, 8 Sup. Ct. Rep. 590 (brake defective through negligence of car repairer); *McCanley v. Southern R. Co.* (1897) 10 App. D. C. 560; *Mackey v. Baltimore & P. R. Co.* (1890) 8 Mackey, 282; *Leonard v. Kinnare* (1898) 174 Ill. 532, 51 N. E. 688, *Affirming* (1897) 75 Ill. App. 145; *Brickner v. New York C. R. Co.* (1870) 2 Lans. 506; *Bernardi v. New York C. & H. R. R. Co.* (1894) 78 Hun, 454, 29 N. Y. Supp. 230; *Schulz v. Rohe* (1893) 4 Misc. 884, 24 N. Y. Supp. 118; *Richards v. Hayes* (1897) 17 App. Div. 422, 43 N. Y. Supp. 284; *Cavanagh v. O'Neill* (1898) 27 App. Div. 48, 50 N. Y. Supp. 207; *Carter v. Oliver Oil Co.* (1891) 84 S. C. 211, 13 S. E. 419; *Luebke v. Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870; *McMahon v. Ida Min. Co.* (1897) 95 Wis. 308, 70 N. W. 478.

III. What duties are deemed to be nondelegable.

a. Duties imposed by statute.

So far as it is possible to extract any general rule from the cases, it may, perhaps, be said that the courts proceed upon the theory that, unless the legislature has either expressly or by reasonable implication declared its intention in this regard, a duty imposed upon a master by a statute should be treated as delegable or nondelegable, according as it belonged to one category or the other under the common-law doctrines which previously prevailed in the particular jurisdiction to which the statute applies.

1. Quality of duty unchanged by statute.

On the one hand, the mere fact that certain precautions which concern the proper maintenance of the instrumentalities have been prescribed by statute will not be a sufficient ground for treating the duties thus prescribed as nondelegable, if the court considers duties pertaining to maintenance to be, as a class, delegable. *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 226, 19 L. T. N. S. 30, per Lord Chelmsford. (The statute in question was 23 & 24 Vict. chap. 151, §§ 10 and 22, requiring mine-owners to keep

Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194, 29 N. E. 999; *Johnson v. Steam Gauge & Lantern Co.* 146 N. Y. 152, 40 N. E. 773; *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.* 11 App. Div. 411, 42 N. Y. Supp. 285, Affirmed in 162 N. Y. 399, 56 N. E. 897.

This duty could not be delegated.

Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662, Affirming 34 App. Div. 515, 54 N. Y. Supp. 615; *Sommer v. Carbon Hill Coal Co.* 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54.

It was the province of the jury to decide whether this trolley was "properly guarded" in the first instance.

Glens Falls Portland Cement Co. v. Travelers' Ins. Co. 162 N. Y. 399, 56 N. E. 897; *Johansen v. Eastmans Co.* 44 App. Div.

270, 60 N. Y. Supp. 708; *Gorman v. McArdle*, 67 Hun, 484, 22 N. Y. Supp. 479; *Sciolina v. Erie Preserving Co.* 7 App. Div. 417, 39 N. Y. Supp. 916.

It is obvious that the automatic was made ineffective, and that the defendants' neglect of their statutory duty caused, or helped to cause, the accident. This is evidence of negligence.

McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153.

There was evidence sufficient to go to the jury upon the question whether defendants were negligent as to inspection of the automatic.

Prescott v. J. Ottman Lithographing Co. 20 App. Div. 397, 46 N. Y. Supp. 812; *Woods v. Long Island R. Co.* 11 App. Div. 16, 42 N. Y. Supp. 140; 14 Am. & Eng. Enc. Law, p. 894; *Dorney v. O'Neill*, 49 App. Div. 8,

up an adequate amount of ventilation, and imposing a penalty for a breach of this provision.) The other law lords declined to express any opinion on this point. But the reasoning and the decision in *Hedley v. Pinkney & Sons* 8 S. C. [1894] A. C. 222, Affirming [1892] 1 Q. B. 58, are quite in harmony with this view. There it was held that a ship is "seaworthy," within the provisions of the English merchant shipping act (89 & 40 Vict. chap. 80), if it is properly equipped for the safety of the crew in the first instance, and that the mere neglect of the captain to use the equipment furnished will not render her unseaworthy in such a sense as to render her owner liable as for an infringement of the act. The fault in such a case is entirely that of the captain, a mere conservant of the members of the crew. The plaintiff, who was injured by the omission to properly secure a movable section of the ship's railing, contended, without success, that the case comes within the 5th section of the merchant shipping act 1876, which provides that "in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship and the master shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same." In the court of appeal, Kay, L. J., reasoned thus: "Leaving a door open or a bolt unshot or a movable railing out of position, as in this case, clearly would not make the ship unseaworthy within that definition. The ship here had all the necessary equipment ready to be used; she was a perfect machine. It was a case of negligence in not using a perfect machine properly. I do not think it can be said that the negligence of the master in allowing a door to be left open or a bolt to be left unshot, or not having a railing placed in position, which was ready to hand, not stowed away in the hold where it could not be got at, or for any other reason unavailable, amounts to a breach of the obligation to keep the ship seaworthy under the act." In the House of Lords the same view prevailed. Said Lord Herschell: "It is quite clear, . . . that the *Prodano* was not unseaworthy at the time she left the port of London. After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped. The fault was in not making use of the equipment with which she had been furnished. Under circumstances such as these, I do not think 54 L. R. A.

It can be said that there has been a failure to keep her in a seaworthy condition for the voyage, within the meaning of the enactment. Following, as it does, the obligation that the owner and the master, and every agent charged with the loading of the ship or the preparing thereof for sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, I think the words 'to keep her in a seaworthy condition for the voyage during the same,' point to an obligation of the same character, and not to a neglect properly to use the appliances on board a vessel well equipped and furnished. There is ample scope for the operation of the words in question, even though this construction be put upon the enactment. If any of the necessary appliances were lost or destroyed in the course of the voyage, it would, no doubt, be the duty of the master to use all reasonable means to supply others in their place, just as it might be his duty during the voyage to restore the hull or machinery, if damaged, to a condition suited to the perils to be encountered. But if the appellant's argument were to prevail, it would have a much wider scope than I am able to gather from the words of the enactment was intended by the legislature. The failure properly to secure many parts of the ship which are in ordinary practice open, from time to time, would, no doubt, diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy. In truth, the point is only of importance because of the limitation which the law at present imposes upon a liability of an employer for accidents due to the negligence of his servants; but for this limitation, I do not think it would have occurred to anyone to maintain that there had been, in the present case, a breach of the implied obligation created by § 5 of the merchant shipping act 1876." On the other hand, the acts which have been passed in most of the American states for the purpose of securing the safer operation of mines are held to prescribe duties of the absolute class. *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 8 Kan. App. 292, 45 Pac. 100 (decision upon Kan. Gen. Stat. 1889, § 3850, which in order to promote the health and safety of the persons employed in coal mines, provides that the owner, agent, or operator shall employ a competent and practical inside overseer, who shall keep a careful watch over the ventilating apparatus, the air ways, traveling ways, pumps and pump timbers, drainage, and roofs of tunnels, and that there shall be sufficient manholes and proper signaling apparatus on

43 N. Y. Supp. 107; *Terrell Compress Co. v. Arrington* (Tex. Civ. App.) 48 S. W. 59; *Walkowski v. Penokee & G. Consol. Mines*, 115 Mich. 629, 41 L. R. A. 33, 73 N. W. 895; *McGovern v. Central Vermont R. Co.* 123 N. Y. 280, 25 N. E. 373; *Crowell v. Thomas*, 18 App. Div. 520, 46 N. Y. Supp. 137; *Clarke v. Holmes*, 7 Hurlst. & N. 943; *Wood, Mast. & S.* 2d ed. p. 809.

Williams was beyond question a vice principal.

The inspection of this automatic was not a mere detail of the work; it was carried on at a separate time while general work in the shop was suspended. The machine itself was inaccessible; the workmen never had anything to do with it.

Byrne v. Eastmans Co. 163 N. Y. 461, 57 N. E. 738; *Fow v. Le Comte*, 2 App. Div. 61, 37 N. Y. Supp. 316; *Stimper v. Fuchs*

& *L. Mfg. Co.* 26 App. Div. 333, 49 N. Y. Supp. 785; *Murray v. Usher*, 117 N. Y. 543, 23 N. E. 564; *Egan v. Dry Dock, E. B. & B. R. Co.* 12 App. Div. 556, 42 N. Y. Supp. 198; *Kaplan v. New York Biscuit Co.* 5 App. Div. 60, 38 N. Y. Supp. 1049; *Larkin v. Washington Mills Co.* 45 App. Div. 6, 61 N. Y. Supp. 93; *McKnight v. Brooklyn Heights R. Co.* 23 Misc. 527, 51 N. Y. Supp. 738; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *Jennings v. New York, N. H. & H. R. Co.* 12 Misc. 408, 33 N. Y. Supp. 585, Affirmed in 155 N. Y. 672, 49 N. E. 1099; *Avilla v. Nash*, 117 Mass. 318; *Wheeler v. Wason Mfg. Co.* 135 Mass. 294; *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Barrows*, Neg. p. 131.

A man could not be more fully "clothed

refuge manholes on the traveling ways, and also prescribes that safety lamps and sufficient timber for props shall be furnished); *Linton Coal & Min. Co. v. Persons* (1894) 11 Ind. App. 264, 39 N. E. 214 (holding that the owner of a mine does not, by employing a mining boss, relieve himself from liability for failure of the latter to use reasonable care to make the mine safe to work in, under Ind. Rev. Stat. 1894, §§ 7472, 7473, providing for the employment of such boss, and that for any violation of the act the owner shall be liable to any person who is injured thereby); *Sommer v. Carbon Hill Coal Co.* (1898) 32 C. C. A. 156, 59 U. S. App. 519, 69 Fed. 54 (coal miner does not assume the risk of negligence of the person having charge of the ventilation of the mine, where a statute requires the mine owner to provide for proper ventilation).

A similar doctrine prevails with respect to statutory duties imposed on railway companies to fence their tracks. *Atchison, T. & S. F. R. Co. v. Reesman* (1894) 23 L. R. A. 768, 9 C. C. A. 20, 10 U. S. App. 596, 60 Fed. 370.

And to block the frogs in their yards so as to prevent the catching of feet therein. *Ashman v. Flint & P. M. R. Co.* (1892) 90 Mich. 567, 51 N. W. 645 (railway company held guilty of actionable negligence, under Mich. Laws 1883, p. 191, where a frog was suffered to remain unfilled so long that knowledge of its condition might be presumed).

2. Quality of duty altered.

On the one hand, the rule which absolves a master from liability for negligence in the erection of a scaffold, where such erection is a part of the work, has been changed by the New York labor law (Laws 1897, chap. 415, § 18), providing that any person employing or directing another to perform labor of any kind in the erection of a building shall not furnish unsafe scaffolding. His duty is not discharged sufficiently by furnishing a sufficient quantity of suitable materials. *McLaughlin v. Eidlitz* (1900) 50 App. Div. 518, 64 N. Y. Supp. 193; *McAllister v. Ferguson* (1900) 50 App. Div. 529, 64 N. Y. Supp. 197; *Stewart v. Ferguson* (1899) 44 App. Div. 58, 60 N. Y. Supp. 429, reiterating doctrine laid down in the first appeal (1898) 84 App. Div. 515, 54 N. Y. Supp. 615. On the other hand, certain statutes which require mine-owners to take specified precautions have received a construction which apparently renders their obligations less onerous than they would have been, if common-law principles had been left to operate. This is virtually the effect of the acts in force in Pennsylvania and elsewhere, by 54 L. R. A.

which mine-owners are required to appoint competent foremen to supervise the underground workings. As we have already seen in the note to *O'Neill v. Great Northern B. Co.* (1900; Minn.) 51 L. R. A. 535, an appointment made in compliance with the terms of these acts relieves the employer of any further liability with regard to the defective condition of his mine, so far as that condition is the consequence of the nonperformance of duties of the class which the foreman is supposed to discharge.

Another decision illustrating the situation adverted to in the text is *Consolidated Coal Co. v. Yung* (1887) 24 Ill. App. 255, where it was held that the failure of a coal mining company to furnish props, and prop the clod, dirt, and slate, is not a violation of Ill. Rev. Stat. chap. 93, § 16, which only requires that a sufficient supply of timber be kept for props to be sent down when required; and it does not create any common-law liability.

b. *Duty to see that the unintelligent instrumentalities of the work are reasonably safe; general rule stated.*

Subject to certain qualifications which will be explained in later sections, the doctrine which now prevails in the large majority of the American states may be enunciated in the following terms: A master must indemnify a servant who is injured by the negligence of a co-servant, when the delinquency consisted in a failure to discharge properly either the function of furnishing the instrumentalities with which the business is carried on, or the function of keeping those instrumentalities up to the legal standard of safety while they continue to be used.

A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employees, an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the incorporation who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury

with power of control and direction" than Williams was. Williams being a vice principal, that there was at least a question for the jury whether the automatic was properly inspected and cared for by him is obviously indisputable.

Whittaker v. Delaware & H. Canal Co. 126 N. Y. 544, 27 N. E. 1042; *Coppins v. New York C. & H. R. R. Co.* 122 N. Y. 557, 25 N. E. 915; *Stapp v. Loewer's Gambrinus Brewing Co.* 1 App. Div. 405, 37 N. Y. Supp. 256; *McCone v. Gallagher*, 16 App. Div. 272, 44 N. Y. Supp. 697; *Bailey v. Rome, W. & O. R. Co.* 139 N. Y. 302, 34 N. E. 918; *Bensing v. Steinway*, 101 N. Y. 547, 5 N. E. 449.

It was for the jury to say whether defendants negligently failed to provide such rules and regulations and give such instructions as were reasonably necessary, there being evidence that they provided none.

results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation. *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612. To the same effect, see *Northern P. R. Co. v. Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 846, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has the right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other he may. *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 260, 14 Am. Rep. 598. (The theory of the master's responsibility, however, which is now accepted in Massachusetts itself is somewhat different from this. See *li. j. supra.*)

The doctrine of common employment is not applicable, "where injuries to servants or workmen happen by reason of improper and defective machinery and appliances, used in the prosecution of the work" of the corporation. *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353.

As to the bearing of the English and colonial cases upon the doctrine stated in the text, see *note to O'Neil v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. pp 557 *et seq.*

Many of the cases cited in the following subdivisions directly suggest, by the facts involved, 54 L. R. A.

Doing v. New York, O. & W. R. Co. 151 N. Y. 579, 45 N. E. 1028; *McGovern v. Central Vermont R. Co.* 123 N. Y. 280, 25 N. E. 373; *Sheehan v. New York C. & H. R. R. Co.* 91 N. Y. 332; *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466; *Tully v. New York & T. S. S. Co.* 10 App. Div. 463, 42 N. Y. Supp. 29; *Stock v. Le Boutilier*, 19 Misc. 112, 43 N. Y. Supp. 248; *O'Connor v. Barker*, 25 App. Div. 121, 49 N. Y. Supp. 211; *Avilla v. Nash*, 117 Mass. 318; *Wheeler v. Wason Mfg. Co.* 135 Mass. 294; *Daley v. Brown*, 45 App. Div. 428, 60 N. Y. Supp. 840; *Eastwood v. Retsof Min. Co.* 86 Hun, 91, 34 N. Y. Supp. 196; *Ilannigan v. Lehigh & H. River R. Co.* 91 Hun, 300, 36 N. Y. Supp. 293; *Abel v. Delaware & H. Canal Co.* 128 N. Y. 662, 28 N. E. 663; *Barrows*, Neg. p. 102.

It was for the jury to say whether de-

the difference, hereafter to be explained (V. h, and VI. a-e, *infra*) between the position of servants who supply a stock of material from which a selection is to be made as the work progresses and of servants who make that selection; and this distinction is often expressly relied upon as the *rationalle* of the judgments.

In *Lehigh Valley Coal Co. v. Warrek* (1898) 28 C. C. A. 540, 55 U. S. App. 437, 84 Fed. 866, the evidence was that, whenever plaintiff needed new blocks he applied for them to the foreman, whereupon the carpenter brought them; that, so far as plaintiff was informed, there was no stock of new ones from which he could supply himself; that plaintiff three days before the accident, and again two days before the accident, called the attention both of the foreman and of the outside superintendent to the condition of the blocks, and asked for sound ones, and that to his request both replied, "All right," and the foreman expressly promised to "give him new blocks right away." The case was held by the court to be distinguishable from those cited by defendant's counsel, where the plaintiff had a stock of new appliances at hand from which to help himself.

See also, as illustrating the same point of view, *Thomas v. Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 40; *Bushby v. New York, L. E. & W. R. Co.* (1897) 107 N. Y. 374, 14 N. E. 407; *Woods v. Lindvall* (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62; *Mullane v. Houston, W. S. & P. Ferry R. Co.* (1897) 21 Misc. 10, 46 N. Y. Supp. 957, *Affirming* (1897) 20 Misc. 434, 45 N. Y. Supp. 1039; *Strauss v. Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425; and the cases cited in VI. b, 1, *infra*.

Similarly, in *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185, 36 Am. Rep. 662, we find the court committing itself to this doctrine: If a railroad company exercises ordinary care and skill in the selection of employees to construct a bridge, it will not be responsible for defects resulting from its original construction.

But the master cannot avail himself of the protection afforded by this distinction, where it is negligent under the circumstances to leave the task of selection to the particular servant or class of servants upon whom that function is necessarily thrown in the ordinary course of the master's business.

In *McElligott v. Randolph* (1891) 61 Conn. 157, 22 Atl. 1094, the court reasoned thus: "While it is true that the defendants intrusted the execution of the work upon which McElligott was engaged to a competent superintendent, provided him, McElligott, with collaborators who

endants negligently failed to give decedent a safe place in which to work.

Plank v. New York C. & H. R. R. Co. 60 N. Y. 607; *Krans v. Long Island R. Co.* 123 N. Y. 1, 25 N. E. 206; *Cavanagh v. O'Neill*, 27 App. Div. 48, 50 N. Y. Supp. 207; *Bagley v. Consolidated Gas Co.* 13 Misc. 6, 34 N. Y. Supp. 187; *Simmons v. Peters*, 20 App. Div. 251, 46 N. Y. Supp. 800; *Cunningham v. Sicilian Asphalt Paving Co.* 49 App. Div. 380, 63 N. Y. Supp. 357.

The rule *res ipsa loquitur* applies.

Van Sickle v. Ilsley, 75 Hun, 537, 27 N. Y. Supp. 1113; *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662, Affirming 34 App. Div. 515, 54 N. Y. Supp. 615; *Griffen v. Manice*, 47 App. Div. 70, 62 N. Y. Supp. 364; *Dumes v. Sizer*, 3 App. Div. 11, 37 N. Y. Supp. 929; *Kennedy v. McAllister*, 31 App. Div. 453, 52 N. Y. Supp. 714; *Mullen v. St. John*, 57

N. Y. 567, 15 Am. Rep. 530; 16 Am. & Eng. Enc. Law, p. 449; *Shearm. & Redf. Neg.* § 60.

Messrs. Eugene Lamb Richards, Jr., and Arnold W. Sherman, for respondents:

If the failure of the automatic to work was not the proximate cause, but merely the occasion, of the accident, the judgment must be affirmed.

Laidlaw v. Sage, 158 N. Y. 73, 44 L. R. A. 216, 52 N. E. 679.

Whatever the proximate cause, it arose from the contributory negligence of the plaintiff or the negligence of his fellow servants.

LaCroy v. New York, L. E. & W. R. Co. 132 N. Y. 570, 30 N. E. 391; *Williams v. Delaware, L. & W. R. Co.* 116 N. Y. 628, 22 N. E. 1117.

were fit and competent when under competent supervision, and had upon the premises appliances and apparatus suitable for the work, it is equally true that, during the progress of much of the work, and at the time of and for a considerable time prior to the accident, the work was wholly without competent superintendence, that there was even no one present who was possessed of mechanical skill, that the provision of suitable appliances was simply in the sense of there being such near at hand mingled with others unsuitable, that those appliances which were in fact chosen and set apart for the work were mainly selected by unskilled factory hands at random, and without instructions, oversight, or examination, and that they were adjusted by like laborers with the like absence of instructions, oversight, and examination. The accident happened in part because a certain wooden horse or support was inadequate. Dunning, the superintendent, selected this particular appliance and directed its use. The wheel fell in fact because a certain rope was too small and inadequate. The defendants had done nothing to provide a suitable rope except to have upon the premises a stock of various kinds of rope, some suited to one purpose and some to another, and to allow any chance inexperienced laborer to select for each special use the one which his impulse dictated. Just here we touch upon the most significant and potent factor in the situation, namely, the entire absence of competent superintendence during all the later stages of the work. After Dunning's departure about midnight there was no one, either over or connected with the gang of men employed, who possessed any mechanical knowledge or skill. Had Dunning remained present properly executing his master's duty intrusted to him, there would have been no such unintelligent, haphazard selection of apparatus, no such inadequate and unsuitable devices of support, as were instrumental in McElligott's death. Moreover, Dunning's departure in an instant transformed McElligott and his fellows from fit into unfit co-laborers. The finding states explicitly that these men were incompetent for the work assigned them without suitable supervision. During the hours, therefore, which succeeded Dunning's return home, McElligott was surrounded only by incompetent fellow workmen, and he went down to his death in consequence of constructions and mechanical adjustments made by his fellow servants, employed by the defendants to do, in company with him, what they were unfit to do. Plainly, therefore, the defendants' duties as masters of the deceased were not performed."

Such a situation indicates a lack of that efficient L. R. A.

client supervision which is a condition precedent to the operation of the rule as to details of work. See VIII. *infra*.

It is observable, moreover, that the rule which absolves the master from liability for the condition of the place of work, on the ground that it is temporary and transitory, is not available as a defense, when the place is unsafe at the time the servant is brought to the place of work, and no warning is given him of the peril. *Hess v. Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743.

c. *Duty to see that the unintelligent instrumentalities of the work, as originally supplied, satisfy the legal standard of safety.*

All the authorities seem to be unanimous as to the doctrine that, where it is a question of the condition of the instrumentalities, animate or inanimate, when they first become a part of the organism through which the master carries on his business, he must, at his peril, see that due care has been exercised in making them safe and suitable for the use of his servants,—at all events, where the agent employed to procure these instrumentalities from a dealer or to manufacture them occupies the position of a servant. See II. h, i, *supra*.

The principle upon which all the authorities agree is that the master is under what may be termed an absolute duty to his servant of using care, to the end that the machinery put into the hands of his servant for use shall be reasonably safe, having regard to its nature and the purposes for which it is intended. This duty he may discharge, either by himself in person, or by a designated agent or servant. If he discharge it by an agent or servant, the latter becomes, in respect of it, his vice principal, wholly without reference to the rank which in other respects he occupies in his master's or principal's service. *Dutzi v. Giesel* (1886) 23 Mo. App. 676.

The universality of the acceptance of this doctrine in America is sufficiently demonstrated by the cases cited below. In England it has never been announced in the same explicit, formal manner. But it has been shown in a former note (*O'Neill v. Great Northern R. Co.* [1900; Minn.] 51 L. R. A. 571, 572) that the decision of the House of Lords in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, has by implication left the master responsible for the defaults of employees whose duty it is to supply the instrumentalities. It may therefore be asserted with reasonable confidence that the servant's right of recovery in that country remains, so far as the common law is concerned, exactly what it was, when it was de-

The alleged failure to obey the factory act was not the proximate cause of the accident.

Graves v. Brewer, 4 App. Div. 327, 38 N. Y. Supp. 566; *Glassheim v. New York Economical Printing Co.* 13 Misc. 174, 34 N. Y. Supp. 69; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *DeYoung v. Irving*, 5 App. Div. 499, 38 N. Y. Supp. 1089; *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986; *Monai v. Friedline*, 33 App. Div. 217, 53 N. Y. Supp. 482; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286.

No defect was disclosed in the embodiment of the theory in the automatic. No part was shown to be bent or broken or in any way affected by wear and tear, either before or after the accident. The defendants therefore fulfilled their duty in this regard.

clared by Lord Cranworth in *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 286, 4 Jur. N. S. 767, that the ruling in *Gray v. Brassey* (1852) 15 Sc. Sess. Cas. 2d series, 135, was in strict accordance with the English authorities. In the Scotch case, referred to, the complaint was held to be relevant, inasmuch as the plaintiff would be entitled to recovery if he established his allegations that his injuries were due to the negligence of an employee whose function was the providing of safe machinery for the employee who had to use it. The facts alleged were that a brake slipped down when plaintiff stepped in it, in consequence of there being no blocking on it.

In *Hall v. Johnson* (1805) 3 Hurlst. & C. 589, 24 L. J. Exch. N. S. 222, 11 Jur. N. S. 80, 11 L. T. N. S. 779, 13 Week. Rep. 411, the court emphasized the fact that the master was not shown to have been negligent in regard to putting his mine in proper order.

An appliance constructed to enlarge the capacity of the master's works stands, as respects the nondelegable quality of the duty to see that it is not defective in any respect, on the same footing as if it had been a part of the work when they first began to be operated. *Wilson v. Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653 (operative injured by the fall of a countershaft on some new machinery—superintendent has been notified that a collar was needed).

The selection of appliances out of a stock furnished by the master is a function usually regarded as characteristic of a mere servant (V. h. *infra*); but in one case it was held, on the ground of his having discretionary authority in the premises, that a master was liable for the negligence of an employee in the choice and use of tackle for the purpose of lowering a heavy piece of machinery into its place. *Telander v. Sunlin* (1891) 44 Fed. 564. But this decision is scarcely consistent with the general current of the authorities; as the special factor relied upon for purposes of differentiation seems to be present in every instance where the master's duty has been denied to extend beyond the supply of the materials out of which the selection is to be made. See, however, *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669, 11 C. 10, *infra*. Some courts seem to limit the application of this doctrine to cases in which the delinquent servants were invested with a controlling or superior authority in respect to the supply of the instrumentalities. This form of expression is used in *Cooper v. Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37. But this view is not supported by the authorities as a whole, and is not consistent with the theory that the rank of the offender is

Probst v. Delamater, 100 N. Y. 286, 3 N. E. 184; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Stringham v. Hilton*, 111 N. Y. 158, *sub nom. Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 870; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31, 36 N. E. 813; *Garvey v. New York & C. Mail S. S. Co.* 26 App. Div. 456, 50 N. Y. Supp. 77; *Reiss v. New York Steam Co.* 128 N. Y. 107, 28 N. E. 24; *Dingley v. Star Knitting Co.* 134 N. Y. 552, 32 N. E. 35; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537.

No evidence whatever was offered of any defect which inspection, however careful and frequent, would have disclosed. Defects within the rule requiring inspection must be substantial defects in the machine itself, such as render it unfit for use, and dangerous.

entirely immaterial. The rationale of the rule also indicates that its operation is not dependent upon the delinquent's possession of the power of discharging or employing other servants. *Allend v. Spokane Falls & N. E. Co.* (1899) 21 Wash. 324, 58 Pac. 244.

The reason assigned for the doctrine under discussion, *viz.*, that were the rule otherwise the most important of the duties owed by capital to labor could be evaded by the capitalist employing only his own servants in the construction of his buildings and machinery (*Indiana Car Co. v. Parker* (1885) 100 Ind. 181), sounds somewhat singular when we consider it in connection with that other rule which, according to some courts (see II. h. i, *supra*), allows capital to "evade the duty" in question by the simple expedient of abstaining from the "employment of his own servants," and intrusting the work to an independent contractor. A theory of absolute responsibility which may be so easily nullified is little better than a solemn farce. It is only proper, however, to mention that in the state in which the policy of holding capital to its obligations has been thus indorsed, there has been no explicit adoption of this theory which entirely exonerates a master who interposes an independent contractor between himself and his servants; and possibly this court may hereafter enunciate a doctrine upon this point which will not be open to the charge of inconsistency from which it seems impossible to absolve any court which accepts this theory, and at the same time declare that the master must answer for the negligent construction of an instrumentality by any person in his service.

The decisions cited below are referred to as illustrations of the rule enunciated above, for the reason that the use of some such words as "provide," "furnish," "supply," etc., in describing the duty incumbent on the master, may, in some sense, be said to show that the court had in mind the master's responsibility for the original condition of the instrumentalities. But, so far as most of the courts are concerned, it is immaterial whether the dereliction of duty was in respect to original supply or subsequent maintenance; and the absence of any practical necessity for differentiating between the extent of the master's liability in one case or the other has naturally resulted in a certain lack of precision in the phraseology employed.

It is customary to predicate two distinct non-delegable duties in respect to what we have, for convenience sake, styled the unintelligent instrumentalities of work, *viz.*, the duty "to provide reasonable, safe tools, appliances, and machinery for the accomplishment of the work necessary to be done," and the duty "to provide the

Webber v. Piper, 109 N. Y. 490, 17 N. E. 216; *Cregan v. Marston*, 126 N. Y. 568, 27 N. E. 952; *Rogers v. Ludlow Mfg. Co.* 144 Mass. 198, 50 Am. Rep. 68, 11 N. E. 77; *Rice v. King Philip Mills*, 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101.

The only causes shown i. e., the unexplained failure of the drop bars to fall or the dusty and gummy condition of the oil, being those which arose from the negligent act or omission of the employees as such in the performance of the work or in the use of the automatic, the character of the place, if it was unsafe, was due to the negligence of a fellow servant or the nature of the business, and was a risk which plaintiff's interstate assumed.

Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E.

358; *Bagley v. Consolidated Gas Co.* 5 App. Div. 432, 39 N. Y. Supp. 302; *Ludlow v. Graton Bridge & Mfg. Co.* 11 App. Div. 452, 42 N. Y. Supp. 343; *Smith v. Empire Transp. Co.* 89 Hun, 588, 35 N. Y. Supp. 534; *Gullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Hussey v. Cogger*, 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648.

If temperature and dust do not fall within the rule that it is the master's personal duty to furnish reasonably suitable appliances and to take reasonable care to discover and remedy defects therein, then the defendants' omission to raise the temperature or remove the dust, whether notified thereof or not, was not the proximate cause of

servant with a reasonably safe place to work in, having reference to the character of the employment." Northern P. R. Co. v. Peterson (1898) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843. But this division of duties scarcely satisfies the exigencies of a logical classification, for the reason that, in a large number of cases, it is difficult, if not impossible, to say with certainty whether the liability of the master for a defective apparatus should be treated as resulting from a violation of his duty to furnish that apparatus, or from a violation of his duty to see that the place of work which was rendered dangerous by the apparatus was safe. The subjoined cases in which the master was held liable are therefore arranged, without regard to the supposed distinction of duties, under headings indicative of the nature of the abnormal danger from which the master's representative failed to protect the injured person. Whether it is explicitly so stated or not, the master was held responsible for the acts of the servants whose negligence was the cause of the various abnormally dangerous conditions mentioned in connection with the citations.

1. Defective railway track and appurtenances.

Compare III. d, *infra*.

Trask v. California Southern R. Co. (1883) 63 Cal. 96; *Louisville, N. A. & C. R. Co. v. Graham* (1890) 124 Ind. 89, 24 N. E. 668; *Rouse v. Downs* (1897) 5 Kan. App. 549, 47 Pac. 982 (fireman injured by switch negligently constructed by division roadmaster).

2. Inadequacy of safeguards against dangers from explosive substances.

Contrast V. e, f, and VI. b, 3, *infra*.

Gilmore v. Northern P. R. Co. (1884) 9 Sawy. 558, 18 Fed. 866 (no suitable appliances providing for thawing giant powder); *O'Donnell v. East River Gas Co.* (1895) 91 Hun, 184, 36 N. Y. Supp. 288 (duty to provide proper appliances held to have been violated, where an employee was injured while cleaning out a boiler, by an explosion of naphtha negligently left by a fellow servant in a pipe to which the hose used in cleaning out the boiler was attached. The fellow servant's negligence here was in regard to the use of the defective appliance for work distinct from that upon which the plaintiff was engaged, and the naphtha was exploded by the heat of an adjoining boiler); *Bernard v. New York C. & H. R. Co.* (1894) 78 Hun, 454, 29 N. Y. Supp. 230 (no cars suitable for transporting dynamite were provided). 54 L. R. A.

3. Defective appliances for protecting servants engaged in excavating.

Kranz v. Long Island R. Co. (1890) 123 N. Y. 1, 25 N. E. 206 (servant ordered to perform work as a machinist in underground trenches opened and prepared for him by other employees, held not a fellow servant of the latter); followed in *Schmit v. Gillen* (1899) 41 App. Div. 302, 58 N. Y. Supp. 458 (servants opening a trench are not, as regards duty to sheath it properly, the fellow servants of other servants who lay pipes in it); *Van Steenburgh v. Thornton* (1895) 58 N. J. L. 160, 33 Atl. 880 (foreman of work of excavating a trench neglected to take measures to prevent the sides from falling in); *Laporte v. Cook* (1899) 21 R. I. 158, 42 Atl. 519 (no materials furnished for the servants' protection); *Baird v. Rellly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884 (foreman, whose duty it is to shore a trench, which is being dug for laying pipes, held not to be a coservant of one of the pipe-layers, who has nothing to do with the work of excavation).

4. Defects in bridges, trestles, etc.

A master is liable for the negligence of employees to whom he delegates the function of building bridges, etc. *Davis v. Central Vermont R. Co.* (1892) 55 Vt. 84, 45 Am. Rep. 590, Overruling *Hard v. Vermont & C. R. Co.* (1860) 32 Vt. 473.

Where contractors for the erection of a railway trestle constitute an employee their representative, and impose on him the duty, and confer on him the authority, to supervise, direct, and control its construction, and require the laborers to obey his orders and directions in the premises, that employee stands in the shoes of his employers, and they are responsible for the results of his negligence in the work so committed to his direction, supervision, and control. *Woods v. Lindvall* (1891) 1 C. C. A. 87, 4 U. S. App. 49, 48 Fed. 62, Affirming 44 Fed. 855.

The supreme court of Minnesota had previously held that the injured servant in this case was not entitled to recover. *Lindvall v. Woods* (1889) 41 Minn. 212, 4 L. R. A. 798, 42 N. W. 1020. See VI. d, *infra*.

5. Defects in scaffolds, stagings, etc.

Contrast VI. c-f, *infra*.

That the master is liable for the negligent selection of the materials to be used in constructing a scaffold has occasionally been expressly laid down. *Kansas City Car & Foundry Co. v. Sawyer* (1898) 7 Kan. App. 146, 53 Pac.

the accident, and cannot be made a basis of their liability.

Yaw v. Whitmore, 46 App. Div. 422, 61 N. Y. Supp. 731; *Kimmer v. Weber*, 151 N. Y. 417, 45 N. E. 860.

The condition arose from the omission to perform a detail of the work or from the method of conducting the work. The master, therefore, is not liable, whether the omission or method was that of a foreman or other servant.

Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216; *Hall v. United States Radiator Co.* 52 App. Div. 90, 64 N. Y. Supp. 1002; *Ludlow v. Groton Bridge & Mfg. Co.* 11 App. Div. 452, 42 N. Y. Supp. 343; *Stringham v. Hilton*, 111 N. Y. 188, *sub nom. Stringham v. Stewart*, 1 L. R. A. 483, 18 N. E. 870; *Harley v. Buffalo Car Mfg.*

90; *Goldie v. Werner* (1893) 50 Ill. App. 297, Affirmed in (1894) 151 Ill. 551, 38 N. E. 95; *Kerr-Murray Mfg. Co. v. Hess* (1899) 38 C. C. A. 647, 98 Fed. 56 (servant charged by the master with providing lumber for the building of a scaffolding by his fellow servants is in that respect discharging a personal duty of a master, who is liable for his negligence in providing defective and unsafe material); *McNamara v. MacDonough* (1894) 102 Cal. 575, 36 Pac. 941 (carpenter deputed to construct scaffold for bricklayers and hodcarriers); *Brown v. Gilchrist* (1890) 80 Mich. 56, 45 N. W. 82 (master held liable for the negligence of his foreman in selecting materials, and superintending the erection of a scaffold). And this is assumed to be the correct doctrine in all those numerous cases in which, for reasons to be hereafter explained, the master is not responsible for the improper construction of the scaffold out of the materials furnished. See VI. d, 8, *infra*.

The servants constructing a scaffold are deemed to be vice principals whenever the master undertakes to furnish it as a completed instrumentality. *Killea v. Faxon* (1878) 125 Mass. 485; *Brickner v. New York C. & E. Co.* (1870) 2 Lana. 506 (where scaffold erected by co-servants collapses, injured person has a right to have the case submitted to the jury, both on the theory that the master was negligent in furnishing a dangerous structure, and on the theory that he was negligent in knowingly keeping incompetent servants in his employ); *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697 (completed scaffold furnished for particular work); *Sellick v. J. Langdon & Co.* (1891) 37 N. Y. S. R. 511, 13 N. Y. Supp. 858 (scaffold erected where its supports were likely to be struck by defendant's wagons); *Green v. Banta* (1882) 16 Jones & S. 156; *Chicago & A. R. Co. v. Scanlan* (1897) 170 Ill. 106, 48 N. E. 826, Affirming (1896) 67 Ill. App. 621 (foreman, charged with duty of erecting scaffold to be furnished to workmen in a complete condition, held to be a vice principal); *Chicago & A. R. Co. v. Maroney* (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618; *Swift & Co. v. Wyatt* (1898) 75 Ill. App. 348 (one injured by a fall from a scaffold, caused by the tipping of an unfastened ladder placed in position before the servant was employed and directed to use it, held entitled to recover therefor, although the ladder was placed by a fellow servant); *Whalen v. Centenary Church* (1876) 62 Mo. 326 (seems to be based on the non-assignability of the duty to provide a safe scaffold, but the real ground of the decision is somewhat obscure); *Haworth v. Seevers Mfg. Co.* (1892) 87 Iowa, 765, 51 N. W. 68, 62 N. W. 325 (superintendent

Co. 142 N. Y. 31, 36 N. E. 813; *Vitto v. Keogan*, 15 App. Div. 329, 44 N. Y. Supp. 1; *Kimmer v. Weber*, 151 N. Y. 417, 45 N. E. 860; *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Mahoney v. Vacuum Oil Co.* 76 Hun, 579, 28 N. Y. Supp. 196.

Vann, J., delivered the opinion of the court:

This action was brought to recover damages resulting from the death of the plaintiff's intestate, which was caused, as it is alleged, by the negligence of the defendants. In 1896 the defendants, as copartners, carried on a manufacturing business in the city of New York, and the plaintiff's intestate was employed by them as an ordinary laborer about the works. The room in which he worked was about 60 feet long north and south by 50 feet wide east and

of construction of a building held to be a vice principal as regards the erection of a scaffold); *Brown v. Gilchrist* (1890) 80 Mich. 56, 45 N. W. 82 (foreman intrusted with the entire control of the erection of a scaffold—injury was received after the scaffold was finished); *Kansas City Car & Foundry Co. v. Sawyer* (1898) 7 Kan. App. 146, 53 Pac. 90 (scaffold already complete when plaintiff was set to work on it).

That this was the character of the implied contract in regard to such a structure is usually inferable where it was erected by a set of servants different from that to which the plaintiff belonged. *Chicago & A. R. Co. v. Maroney* (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618 (scaffold built by carpenter for masons to use); *McNamara v. MacDonough* (1894) 102 Cal. 575, 36 Pac. 941 (carpenter employed by the day by an architect having the management of the construction of a building for the owner, to erect a scaffolding for the use of masons and hodcarriers employed in the construction of the building); *Cadden v. American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800 (riveter upon the side of a vessel, who uses a scaffold, is not a fellow servant with the scaffold builders whom the master employs to adjust the scaffold for him, although the former indicates where it is to be placed).

Where, on the trial, it is shown that a defendant had in his employ a crew of men, whose exclusive work and duty it was to put up such staging and scaffolding as, from time to time, was needed for the use of workmen engaged in defendant's general work and business, the presumption arises that a staging found in position at the place where a workman is required to perform his work, and upon which he is obliged to stand to perform it, was built by one or more of the staging crew; and, as the men composing such a crew are not fellow servants of men engaged in the defendant's general work, any of the latter may, if injured by defects in the staging, recover damages. *Sims v. American Steel Barge Co.* (1894) 56 Minn. 68, 57 N. W. 322; and the cases cited in VI. d-f, 1, *infra*.

Sometimes the circumstance emphasized is that the scaffold was one erected for permanent use, and is therefore distinguishable from one erected as a part of the work merely (see VI. f, 1, *infra*). *Edward Hines Lumber Co. v. Ligas* (1898) 172 Ill. 315, 50 N. E. 225, Affirming (1896) 68 Ill. App. 523 (scaffold erected for permanent use in removing lumber from the top of a pile).

If the scaffold was unsafe for the work which the injured servant was ordered to do, the master cannot excuse himself on the theory that it was sufficient for the work for which it was

west. In the center was a machine known as a "punch," which was used for the purpose of making holes in heavy iron plates. Over this punch, about 16 feet from the floor, was a traveler, consisting of three sections, each about 20 feet long, which, when joined together, made a continuous track, with sides projecting from the base, upon which a trolley ran. The trolley had chains hanging down, which were used to attach the plates, for the purpose of transportation, to the punch. Each section of the traveler could be disconnected from the others, and moved east or west 8 or 10 feet, where it could be united to another traveler and form a part thereof. When the three sections were together the trolley could not run off, but when one of the sections was gone the trolley, if put in motion, would run off as soon as it reached the space which

had been occupied by the absent section. As a safeguard against this danger the defendant Levering, a mechanical engineer of long experience, had invented an automatic drop bar, one of which was attached to either end of each section. It consisted of a series of levers so arranged that when the sections were all together the drop bar would be up in the air and the trolley could be moved without difficulty, but when one of the sections was gone the drop bar was forced down by a counterweight and the trolley could not be moved. This device was new, having been used in the shop in question for about six months, and for about eight months in another shop belonging to the defendants in Philadelphia, but not elsewhere. Although in constant use, it had never failed to work prior to the time when Quigley, the decedent, lost his life, except

originally erected. *Richards v. Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234.

Sometimes the fact that the servants deputed to erect the scaffold did not possess sufficient skill to qualify them for doing the work properly furnishes an independent ground for compelling the master to answer for injuries caused by defects in the structure. *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 87 Atl. 874 (owner of quarry, who employs common laborers engaged in stowing stone posts in a schooner to suspend a platform to be used in loading the vessel with heavy stone, and to select the gear by which the platform is suspended, held liable for injury to another employee while engaged in loading the vessel, caused by the breaking of a defective rope selected by them).

6. Defects in other structures.

The delinquent employees were held in the following cases to be vice principals: *McCampbell v. Cunard S. S. Co.* (1898) 69 Hun, 181, 23 N. Y. Supp. 477 (omission of dock superintendent to have the wedge-shaped "mouthpiece" properly fastened to the skid or gangplank upon which tracks are drawn from a ship to a dock by stevedores is not a risk assumed by the latter); *Welty v. Lake Superior Terminal & Transfer R. Co.* (1898) 100 Wis. 128, 75 N. W. 1022 (servant who had to climb a railway semaphore was injured by its negligent construction); *Van Dusen v. Letellier* (1889) 78 Mich. 492, 44 N. W. 572 (defects in lumber-yard dock discoverable by reasonable care).

7. Unguarded machinery.

Darby v. Duncan (1861) 23 Dunlop, Sc. Sess. Cas. 529.

8. Unguarded openings in floors, etc.

Johnson v. Field-Thurber Co. (1898) 171 Mass. 481, 51 N. E. 18 (no guards furnished by employers for trapdoor—coservant in leaving trapdoor open held not to be, as matter of law, guilty of negligence causing the injury).

9. Defective pipes.

McDade v. Washington & G. R. Co. (1886) 5 Mackey, 144 (defective pipe in mine caused a fire); *Nixon v. Seiby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803 (servant scalded by the severing of a rubber hose improvised by the foreman of the silver-room of a smelting company for the purpose of conveying acid into the waste tank).

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10. Defective appliances for loading and unloading vehicles.

A complaint alleging that a foreman selected unsafe skids for the purpose of unloading a car has been held not demurrable. *Great Northern R. Co. v. McLaughlin* (1895) 44 U. S. App. 189, 17 C. C. A. 380, 70 Fed. 669.

But, in view of the cases cited in V. j. *infra*, this ruling seems to be of dubious correctness (compare, however, *Telander v. Sunlin* (1891) 44 Fed. 504, cited *supra*). *Kain v. Smith* (1880) 80 N. Y. 458 (1881) 25 Hun, 146 (jigger used for loading heavy wheels defective to knowledge of yard foreman).

11. Defective locomotives.

Cumberland & P. R. Co. v. State use of Moran (1875) 44 Md. 283 (1876) 45 Md. 229 (agent for purchase of locomotive is a vice principal); *Krueger v. Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 957 (tender with deck 8 or 4 inches higher than that of engine broke away from engine in consequence of the excessive lost motion thereby produced, and allowed plaintiff's decedent to fall on the track).

12. Defective railway cars.

See also III. r-t, *infra*.

Louisville, E. & St. L. Consol. R. Co. v. Miller (1895) 140 Ind. 685, 40 N. E. 116; *Chicago & N. W. R. Co. v. Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661; *Missouri P. R. Co. v. James* (1888; Tex.) 10 S. W. 332; *Redington v. New York, O. & W. R. Co.* (1895) 84 Hun, 231, 32 N. Y. Supp. 535 (cars too short for the load to be placed on them); *Toledo, W. & W. B. Co. v. Fredericks* (1874) 71 Ill. 294 (car with too short a draw-bar sent out); *Taylor v. Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206 (defective coupling furnished); *Troxler v. Southern R. Co.* (1899) 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550 (defective couplings); *Griffin v. Boston & A. R. Co.* (1889) 148 Mass. 143, 1 L. R. A. 698, 19 N. E. 168 (suitable links for coupling cars not furnished in sufficient number); *Gray v. Brasey* (1852) 15 Ct. of Sess. Cas. 2d series, 135 (defective brake); Approved as to this point by *Lord Cranworth* in *Bartonshill Coal Co. v. McGulre* (1858) 8 Macq. H. L. Cas. 300, 4 Jur. N. S. 773, 1 Paterson, Sc. App. 789; *McIntyre v. Boston & M. R. Co.* (1895) 163 Mass. 189, 39 N. E. 1012 (not enough for a railway company to furnish suitable lumber for side stakes on flat cars); *Pennsylvania R. Co. v. La Rue* (1897) 27 C. C. A. 363, 81 Fed. 148, 55 U. S. App. 20

on one occasion, which was not reported to the defendants or their superintendent. What then caused it to fail did not appear, but no defect in design, materials, or construction was shown. Quigley was at work in the shop when the automatic device was first used, and he continued working there, with an interval when he was absent, until the accident happened. On the 16th of December, 1896, Quigley and one Jones were working about the punch as assistants to Mr. Berterman, who operated the punch and sometimes helped work the trolley. The trolley had not been used for two hours, as they had been moving plates by means of a vehicle, called a "buggy," which ran upon wheels resting upon the floor of the shop. After a while, in order to move a heavy plate, Berterman called for the trolley, which at the time was hanging over the

punch. Not long before the north section had been moved over to the west, and the drop bar on the middle section was up, which showed that it was not working. The north end of the middle section of the traveler was almost over their heads, and the drop bar, being up, was a conspicuous object in plain sight, so that if they had looked up they could have seen that the trolley would fall if set in motion towards them. They were in a hurry and did not look up, but Jones, when the trolley was called for, seized one of the depending chains and gave a quicker and heavier pull than usual towards the place where he and Quigley were standing, which was right under the space occupied by the north section when in line. As the drop bar was up and did not work, the trolley, weighing over 50 pounds, ran off, fell down upon Quigley,

(standards used for retaining timber on flat car deemed to be part of its equipment in such a sense that the duty to select proper ones is nondelegable); Followed in *Port Blakely Mill Co. v. Garrett* (1899) 38 C. C. A. 342, 97 Fed. 587; *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 874, 14 N. E. 407 (servant charged with duty of furnishing side stakes for a lumber car held to be a vice principal); *Dougherty v. Rome, W. & O. R. Co.* (1892) 45 N. Y. S. R. 154, 18 N. Y. Supp. 841 (counsel for defendant had agreed that whatever was done to lengthen the drop stakes was merely part of the operation of loading the car. See IV. o. 3, *infra*); *Indiana, I. & L. R. Co. v. Snyder* (1895) 140 Ind. 647, 39 N. E. 912 (timber known to be unsuitable put in handle of hand-car).

On the ground that a conductor was a vice principal as regards the duty of providing a safe and suitable car for laborers who were being conveyed from the place of their work, a railway company has been held liable for injuries received by a laborer, owing to the failure of the conductor to fasten a gate on the platform of a car, as the rules of the company required. *Pendergast v. Union R. Co.* (1896) 10 App. Div. 207, 41 N. Y. Supp. 927. But it is difficult to see how this decision can be sustained without breaking in upon the rule that the master is not liable where the proximate cause of the injury was the negligence of a fellow servant.

13. Defective ladders.

Ryan v. Miller (1883) 12 Daly, 77.

14. Defective ropes, rigging, etc.

Indiana Car Co. v. Parker (1885) 100 Ind. 181 (defective rope—condition known to foreman); *Thomas v. Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 40 (defective stock of rope selected); *The Julia Fowler* (1892) 49 Fed. 277 (defective rope used by chief officer of ship to suspend a triangle); *Lund v. Hersey Lumber Co.* (1890) 41 Fed. 202 (foreman furnished defective rope and tackle); *The Norway v. Jensen* (1869) 52 Ill. 373 (defective rigging furnished for a ship); *McElligott v. Randolph* (1891) 61 Conn. 157, 22 Atl. 1094 (defective rope); *Prescott v. Ball Engine Co.* (1896) 176 Pa. 459, 35 Atl. 224 (master held liable for negligence of rigger charged with the duty of keeping a supply of ropes from which a selection may be made). See also III. c. 6, *supra*, and III. c. 15, *infra*.

15. Defective hoisting apparatus.

Higgins v. Williams (1896) 114 Cal. 176, 45 Pac. 104 (foreman left out a peg from a pin 54 L. R. A.

holding apparatus in place); *Leonard v. Kinare* (1898) 174 Ill. 532, 51 N. E. 688, Affirming (1897) 75 Ill. App. 145 (block and tackle improperly constructed by defendant's foreman); *Blomquist v. Chicago, M. & St. P. R. Co.* (1896) 60 Minn. 426, 62 N. W. 818 (derrick negligently constructed); *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 380 (pin securing wheel of tackle block was not properly fastened); *Terrell Compress Co. v. Arrington* (1898; Tex. Civ. App.) 48 S. W. 59 (greasy plank furnished for hoisting purposes).

16. Other defects in machinery.

Donahue v. Drown (1891) 154 Mass. 21, 27 N. E. 675 (machinery not prepared or arranged properly so as to guard against the danger of its starting of itself); *Sanborn v. Madera Flume & Trading Co.* (1886) 70 Cal. 261, 11 Pac. 710 (appliance known as a "sword" for keeping open the channel made by a circular saw as the log moves onward was known by the mechanic who fashioned it to be unsafe).

Additional cases recognizing the general principle are the following.

Bosworth v. Rogers (1897) 27 C. C. A. 385, 53 U. S. App. 620, 82 Fed. 975; *Mackey v. Baltimore & P. R. Co.* (1890) 8 Mackey, 282; *McCauley v. Southern R. Co.* (1897) 10 App. D. C. 560; *Mullin v. California Horseshoe Co.* (1894) 105 Cal. 77, 38 Pac. 585; *Wells v. Coe* (1886) 9 Colo. 159, 11 Pac. 50; *Herbert v. Northern P. R. Co.* (1882) 3 Dak. 38, 13 N. W. 349; *Chicago, B. & Q. R. Co. v. Avery* (1884) 109 Ill. 314; *Norton v. Volzke* (1895) 158 Ill. 402, 41 N. E. 1085; *Hess v. Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743; *Kewanee Boiler Co. v. Erickson* (1898) 78 Ill. App. 35; *Krueger v. Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 957; *Pennsylvania v. Whitcomb* (1887) 111 Ind. 212, 12 N. E. 380; *Louisville, N. A. & C. R. Co. v. Graham* (1890) 124 Ind. 89, 24 N. E. 668; *Nall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611; *Louisville, N. A. & St. L. Consol. R. Co. v. Miller* (1895) 140 Ind. 685, 40 N. E. 116; *Kelley v. Ryus* (1892) 48 Kan. 120, 29 Pac. 144; *Fink v. Des Moines Ice Co.* (1892) 84 Iowa, 321, 51 N. W. 155; *Stucke v. Orleans R. Co.* (1897) 50 La. Ann. 188, 23 So. 342; *Rice v. King Philip Mills* (1887) 144 Mass. 229, 11 N. E. 101; *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Roux v. Blodgett & D. Lumber Co.* (1893) 94 Mich. 607, 54 N. W. 492; *Brown v. Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; *Kell-*

who was getting a plate ready to attach, and inflicted injuries which soon caused his death. At this time, 10 or 12 feet away, the north section was in plain sight, with the chains, supporting a load of iron, hanging down to within 2 feet of the floor, all of which they could see without looking up. The drop bar did not work, because the oil on the sliding plates had become gummy, as the weather was cold, and some dust had settled upon a surface an inch and a quarter long. No dust could reach this spot when the sections were together, as they had been for three weeks prior to the day of the accident, during which period they had not been oiled. Immediately after the accident the apparatus was examined and found in good order, and a ladder, put up to make the examination, as it struck the traveler, caused the drop bar to fall. Some-

times the drop bar fell when the sections were in line, but this did no harm, except to require replacement before the trolley could be moved. It was the duty of Williams, the foreman, to take general charge of the shop and men, and to see that the machinery was kept in good order and the work properly done. He sometimes cleaned and oiled the automatic device, but it was generally done by the workmen; suitable materials being furnished for the purpose. The duty of Bruggeman, the superintendent, was to see that the foreman carried out the orders sent from the office. Scherveman was the outside superintendent, whose duties were not fully described. All the men, including Quigley, had been instructed to look up to the drop bar, to "watch for that thing up there," and see that everything was all right before using the trolley. Ev-

v. Erie Teleg. & Teleph. Co. (1885) 84 Minn. 321, 25 N. W. 706; Harper v. Indianapolis & St. L. R. Co. (1871) 47 Mo. 567, 4 Am. Rep. 353; Jones v. St. Louis, N. & P. Packet Co. (1890) 43 Mo. App. 398; Maher v. Thropp (1896) 59 N. J. L. 186, 35 Atl. 1057; Cole v. Warren Mfg. Co. (1899) 63 N. J. L. 626, 44 Atl. 647; Benzling v. Steinway (1886) 101 N. Y. 547, 5 N. E. 449; Sciofas v. Erie Preserving Co. (1896) 7 App. Div. 417, 39 N. Y. Supp. 916; Schulz v. Rohe (1893) 4 Misc. 384, 24 N. Y. Supp. 118; Ford v. Lyons (1886) 41 Hun, 512; Bernardi v. New York C. & H. R. R. Co. (1894) 78 Hun, 454, 29 N. Y. Supp. 230; O'Donnell v. East River Gas Co. (1896) 91 Hun, 184, 36 N. Y. Supp. 288; Gunter v. Graniteville Mfg. Co. (1882) 18 S. C. 274, 44 Am. Rep. 573; Ogle v. Jones (1897) 16 Wash. 319, 47 Pac. 747.

To render the master liable on the ground that an employee was negligent in furnishing defective materials, it must be shown that such employee was authorized to supply the materials which caused the injury. Hoppin v. Worcester (1885) 140 Mass. 223, 2 N. E. 779. There the committee on highways of a city directed the commissioners to erect a building to be used to contain a machine for crushing stone for the highways of a city. The commissioners employed A, a master builder, to furnish the labor and tools required in the erection of the building. The city paid A and the men employed by him, for their services, and furnished all the materials used in the erection of the building. A directed B, one of the men employed by him, to erect a staging for the purpose of shingling the roof of the building, and to use therefor certain brackets which belonged to A. B used the brackets for the support of the staging. One of the brackets, being defective, broke, and the staging upon which C was working fell, and he was injured. Held, that C could not maintain an action against the city for his injury. The court said: "It is argued that Gates, in supplying the defective bracket, acted as the agent of the defendant in furnishing materials, and not as its servant to construct the staging, and was not, in that respect, a fellow servant with the plaintiff. But Gates had no authority from the defendant to furnish materials for it, and it was not as its agent for that purpose that he used his own brackets to support the staging. If not strictly tools required to be furnished by him, they are implements prepared and kept by him for the purpose of supporting stagings, which he might use under his contract with the defendant. He had no other authority from the defendant for furnishing them. The defendant employed him to furnish the labor and tools in the erection of 54 L. R. A.

the building from materials to be furnished by the defendants, and it provided for furnishing all materials needed. The negligence which the evidence tends to prove is that of servants in constructing an unsafe staging, and not that of the master in not furnishing proper materials."

In Kimmer v. Weber (1897) 151 N. Y. 417, 45 N. E. 860, one of the grounds on which recovery was denied was that it was not shown that the plumbers' scaffold which gave way was only part of the material furnished by the defendants or the foreman, or that they contemplated the use of it for the purpose to which it was put.

In Keenan v. New York, L. E. & W. R. Co. (1896) 145 N. Y. 190, 39 N. E. 711, where a foreman of car repairers was held not to be a vice principal in directing a subordinate to go on a track not ordinarily used for repairing purposes, and not protected by any rules, for the purpose of getting a car-spring which he needed in his work, the court said: "It is admitted by the learned counsel for the appellant that there is no direct evidence in the case showing that it was any part of Tracy's duty to furnish materials required by the workmen under him, but he insists that the defendant having failed to designate any one person whose duty it should be to borrow springs from other cars for temporary use, and still continuing the business of car repairing, it not only acquiesced in the gang foreman procuring such materials, but impliedly authorized them to procure them wherever they could. The appellant's counsel also admits that Tracy was the fellow servant of the intestate in everything except in the performance of a duty which the law imposed upon the defendant, *viz.*, procuring materials for use. We are unable to adopt these views. It would lead to the establishment of an exceedingly unsafe rule to hold that a gang boss over forty or fifty men could, without direct authority from the company, change the safe and proper rules in pursuance of which the work in the repair yards was conducted, and direct workmen to prosecute their labors under cars standing on tracks other than the regular duly protected repair tracks. Tracy was in no legal sense the representative of the defendant when he suggested to the intestate that he should procure a spring from a car standing on track No. 8; he was a fellow servant making a very unwise and dangerous suggestion."

In Callaway v. Allen (1894) 12 C. C. A. 114, 24 U. S. App. 388, 64 Fed. 297, a master was declared not to be liable for an injury to an employee through the failure of an additional device provided by the employees in violation of

every week each man was paid by money placed in an envelope on which was printed the following: "Notice. All employees are cautioned to exercise all possible care to prevent accidents, and are forbidden to use any tools, rope, timbers, or other appliances without carefully inspecting same to see that they are in good order." This notice was signed by the defendants, under their firm name. The defendants had never heard that the drop bar had once failed to work, and it had been frequently examined by one of them, who always found it in good order.

The relation of master and servant existed between the decedent and the defendants. It is the duty of a master to exercise reasonable care to furnish safe machinery for his servants to use, and to keep the same in reasonably safe repair. He is not bound, as a carrier of passengers may be, to provide the best possible machinery or the safest

the orders of the superintendent, for the purpose of making the work easier to themselves, although the ground of his prohibition was that it was a hindrance to the work, and not that it was unsafe. "As we understand the contention of the appellee," said the court, "it is this: That it is the absolute duty of the master to furnish safe and suitable machinery and appliances; that this duty cannot be delegated; and that, therefore, when the foremen, Thompson and Anderson, constructed this dangerous device, and used it, the receiver became liable for its use, though it was wholly unknown to him, and neither himself nor his general superintendent, nor superintendent of bridges and buildings had provided it, or authorized its use. This contention, we think, is not maintainable. A railroad corporation must act through its agents, and where a railroad is in the hands of a receiver, the receiver represents the company, and acts through its agents in the same way. Of course, the receiver must use all reasonable care to provide suitable machinery. The evidence shows that he did so provide in this case. The employees, however, were not satisfied with it; and they themselves provided something in addition that would make the work of lifting timbers easier for them though the evidence showed that it was rather a hindrance than a help to the progress of the work. It is true, the superintendent of bridges knew that this device had been used, and its use had been forbidden by him; and he had very recently told foreman Anderson to throw it away, and that if he used it he should hold him responsible. . . . The objection to its use seemed to be founded wholly upon its want of effectiveness in aiding the work. No suggestion was made by Johnson or the men that it was not safe. The most that can be said of the superintendent is that he did not succeed in stopping the use of the device. Probably, his objection that it retarded the work may have been the reason why the men afterwards tried to carry three stringers at a time instead of one and two, as they had done before. We do not think, under the circumstances, that the receiver should be held liable for the use of this device. He neither furnished it, nor authorized its use. It could not be expected that he or the superintendent should be present at all times and at all places to see that such a device was not used, or that they should take means to destroy it, or prevent its use by force. The orders of the superintendent were disobeyed and his wishes disregarded by the employees, and the responsibility for its use should rest with them." 54 L. R. A.

appliances known, but only such as are reasonably safe when used with reasonable care. He is not called upon to procure other devices to secure greater safety, provided those furnished by him are reasonably safe. The test of responsibility is not whether he omitted to do something that he could have done, but whether he was reasonably careful and prudent. *Kern v. De Castro & D. Sugar Ref. Co.* 125 N. Y. 50, 25 N. E. 1071; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56. The servant assumes the ordinary risks of the service in which he is engaged, or such as he may discover by the use of reasonable care, as well as the risk of injury from the negligence of competent fellow servants. *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021; *Hussey v. Cogger*, 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358. There is no

d. Duty to see that the unintelligent instrumentalities are maintained in a suitable condition for the work to be done.

Most of the courts which apply the doctrine illustrated by the decisions cited under the last subdivision have also adopted the doctrine that from the moment an instrumentality is, or by the exercise of reasonable care might have been, known to be defective, an absolute duty on the master's part arises, either to remedy the defect, or to cease using the instrumentality.

A master is "equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep his machinery in safe condition." *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598. Quoted with approval in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612.

It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives; and we think it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and safe working order; and if these duties, or any of them, are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have intrusted the performance of such duties to subordinates by whatever name they may be called, and even though the master may have exercised due care in the selection of such subordinates. *Gunter v. Graniteville Mfg. Co.* (1882) 18 S. C. 274, 44 Am. Rep. 573.

The nondelegable quality of the duty to discontinue the use of instrumentalities known to be defective is seldom adverted to explicitly. See *Indiana Car Co. v. Parker* (1885) 100 Ind. 181; *Doig v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028 (duty to abandon a dangerous system). But the predication of such a quality is so obviously a necessary corollary of the existence of a duty as to maintenance that specific authority for it is scarcely required. In other words, the duty of furnishing suitable and safe instrumentalities for the use of the servants includes the duty of maintaining them in safe condition. "Repairing is in a sense, furnishing." *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 33, 23 N. W. 229. That is, the duty to provide safe instrumentalities is a continuous one. *Indiana Car Co. v. Parker* (1885) 100 Ind. 181; *Nail v. Louisville, N. A. & C. R. Co.* (1891) 120 Ind. 268, 23 N. E. 183, 611. It follows, therefore, that the defense of com-

evidence that the automatic device in question was defective or unsafe in itself. The only danger was from neglecting to oil and clean it and the machinery with which it was connected. Cleaning and oiling are not the work of a master, but of a servant, and hence can be delegated to a competent person without responsibility for his negligence. *Webber v. Piper*, 109 N. Y. 496, 499, 17 N. E. 216. Williams was not a vice principal with reference to this subject, at least, but a fellow servant, and his negligence and that of the men under him in failing to oil and clean the machinery was not chargeable to the defendants. *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521. The duty of inspection did not, under the circumstances, extend to oiling and cleaning, which were mere details of the work, but was confined to the condition of the machinery with reference to defects or the want of repairs. *Oregan v. Marston*, 126 N. Y.

568, 27 N. E. 952. The work was not so complex as to require further rules or instructions than such as were given. Jones was also a fellow servant of Quigley, and his failure to obey orders and look up to see whether everything was all right overhead before he pulled the trolley towards the place where they stood was not the negligence of the defendants. No part of the machinery was concealed, but all, including the drop bar as it stood up, was in plain view. A glance upward would have shown that the north section of the traveler was out of line, and that the drop bar was not working, while a glance to the west would have shown the missing section, loaded with iron plates. Thus there was warning of danger from two independent directions, but both were disregarded. While Quigley was busy getting a plate ready to put the chain around it, Jones was not occupied. He had been instructed not to use the trolley

soon employment is not available where the defects which caused the injury would not have existed if the servant whose appropriate function it was to keep the defective instrumentality up to the legal standard of safety and efficiency had adequately discharged his duty.

An instruction that "the defendant would be responsible for the consequences of any want of diligence or due care or caution on the part of those whose duty it was to make repairs" is correct. *Cowan v. Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 340.

The master must, of course, also answer for defects resulting from the negligence of a servant in altering a machine. Compare II. f. *infra*.

It is proper to draw attention here to a doctrine to which we shall recur in a later subdivision (see VIII.), that, even if the dangerous conditions which caused the injury were originally due to negligence which is deemed characteristic of mere servants, as distinguished from vice principal (see IV., V., VI., VIII., *infra*), the responsibility for those conditions is shifted to the master as soon as he has ascertained, or might by the exercise of reasonable care have ascertained, that they exist. The general principle which thus becomes controlling has been fully discussed in a note to *Walkowski v. Penokee & G. Consol. Mines* (1898; Mich.) 41 L. R. A. pp. 33 *et seq.*

The master is chargeable with knowledge which any employee intrusted with the duty of keeping instrumentalities in repair may acquire regarding their condition. *Ohio & M. R. Co. v. Stein* (1894) 140 Ind. 61, 39 N. E. 246. See, generally, note to *Walkowski v. Penokee & G. Consol. Mines* (1898; Mich.) 41 L. R. A. pp. 132 *et seq.*; *Strauss v. Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425.

Even in cases where it may be conceded that there was no duty of regular inspection of the tools in use imposed upon the supervising officers of the defendant, and he trusted to the daily inspection of the man who used the tools for information as to their condition of repair, yet, when such information was given to them, they (those officers), and not the plaintiff, are the proper agents to fulfil the master's duty in furnishing reasonably safe tools. *Lehigh Valley Coal Co. v. Warrek* (1898) 28 C. C. A. 540, 55 U. S. App. 437, 84 Fed. 866.

The illustrative decisions cited below are arranged under headings corresponding as closely as may be to those employed for the purposes of classification in the preceding subdivisions, and showing the nature of the specific dereliction of duty involved.

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1. Defective railway tracks.

In some cases, under the head in which liability has been imposed, the delinquent has occupied a position higher than that of servants actually engaged in the manual work of repairing tracks. *Atchison, T. & S. F. R. Co. v. Moore* (1884) 31 Kan. 197, 1 Pac. 644 (roadmaster was delinquent here); *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585 (company held liable to a brakeman on the ground that the assistant roadmaster had sent the section foreman to repair the track, but did not see that the defect was remedied); *Palmer v. Utah & N. R. Co.* (1887) 2 Idaho, 290, 13 Pac. 425 (station agent failed to report condition of track); *Nashville & C. R. Co. v. Elliott* (1880) 1 Coldw. 611, 78 Am. Dec. 506 (engineer did not report defects in track); *Colorado C. R. Co. v. Ogden* (1877) 3 Colo. 499 (assistant superintendent had notice that track was defective); *Bessex v. Chicago & N. W. R. Co.* (1878) 45 Wis. 477 (yard master is a vice principal as to the act of leaving a dangerous obstruction, like a pile of lumber, near the track).

But the application of the general principle is by no means restricted to such employees. That the master must answer for the negligence of the trackmen themselves, and more especially of the foremen of gangs engaged on repairs, has been frequently affirmed. *Louisville & N. R. Co. v. Ward* (1894) 10 C. C. A. 166, 18 U. S. App. 658, 61 Fed. 927 (dangerous hole left by ballasting crew); *Southerland v. Northern P. R. Co.* (1890) 43 Fed. 646 (pile of ashes left on the track); *St. Louis & S. F. R. Co. v. Weaver* (1886) 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Kentucky C. R. Co. v. Ryle* (1892) 13 Ky. L. Rep. 862, 18 S. W. 938 (tie left on track threw brakeman off of a switch engine); *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 35 Am. Dec. 720; *Balhoff v. Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592 (failure to level depression caused derailment); *Drymala v. Thompson* (1879) 26 Minn. 40, 1 N. W. 255 (rail taken up without setting proper signals to warn approaching trains); *Hall v. Missouri P. R. Co.* (1891) 74 Mo. 298 (obstruction); *Vautrain v. St. Louis, I. M. & S. R. Co.* (1880) 8 Mo. App. 538 (dangerous hole left by section-hands); *Elfield v. Northern R. Co.* (1860) 42 N. H. 225 (track allowed to become blocked with snow and ice); *Wellman v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pac. 625 (failure to report defects); *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450,

without looking up to see that all was in order, yet he pulled it towards Quigley quicker and harder than usual without looking to see whether he was thereby pulling a heavy weight down on Quigley's head. There was nothing to divert attention or excuse his violation of orders. The defendants were not shown guilty of negligence that contributed to the accident, which was conclusively proved to have been caused wholly by the negligence of fellow servants of the decedent. *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Loughlin v. State*, 105 N. Y. 150, 11 N. E. 371; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Hofnagle v. New York C. & H. R. R. Co.* 55 N. Y. 608.

Several exceptions relating to the admission of evidence were taken by the plaintiff, only one of which requires the expression of consideration. An expert, called by the

plaintiff, was asked to "state whether or not a device for the purpose of preventing the trolley from running off the north end of the middle section, and the north end, if as it was placed there, could have been placed upon that section with a positive action so as to prevent the running off of the trolley unless some rigid part broke." Notwithstanding the objection of the defendants was sustained, the witness answered: "I know of another device in practical use designed to prevent the running off of trolleys placed upon sections arranged in line so as to be put as desired out of line. I have a sketch of it here." He was then asked if he knew where that device was in use, and the objection that the evidence was irrelevant and incompetent was sustained, and the plaintiff excepted. The evidence offered did not go far enough

29 Pac. 497 (track-repairer killed by derailment of car while he was being conveyed to his work); *Calvo v. Charlotte, C. & A. R. Co.* (1885) 28 S. C. 526, 55 Am. Rep. 28; *Gulf, C. & S. F. R. Co. v. Johnson* (1892) 1 Tex. Civ. App. 103, 20 S. W. 1123; *Moon v. Richmond & A. R. Co.* (1884) 78 Va. 745, 40 Am. Rep. 401; *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71 (night watchman as well as section foreman here held to be vice principal); *Bateman v. Peninsular R. Co.* (1898) 20 Wash. 133, 54 Pac. 996; *Hulehan v. Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 520, 32 N. W. 529 (obstruction).

In the following cases, also, the nondelegable quality of the duty of repairing the track is asserted in perfectly general terms: *Illinois C. R. Co. v. Patterson* (1873) 69 Ill. 650; *Schaub v. Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924; *Wright v. Southern R. Co.* (1898) 123 N. C. 280, 31 S. E. 652; *Missouri P. R. Co. v. James* (1888; Tex.) 10 S. W. 332; *Texas & P. R. Co. v. Kirk* (1883) 62 Tex. 227; *Houston & T. C. R. Co. v. Dunham* (1878) 49 Tex. 181; *Galveston, H. & S. A. R. Co. v. Pitts* (1897; Tex. Civ. App.) 42 S. W. 255; *Torian v. Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 330; *McClarnay v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 277, 49 N. W. 963 (snow was allowed to accumulate, and caused derailment).

An action by a trainman for injuries received from a guy which the railroad company permitted a third person to stretch across the track does not present the question of common employees, since it involves the duty of the employer to provide safe tracks. *New York, N. H. & H. R. Co. v. O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737.

Where a defect in the planking over a railroad crossing, by reason of which a brakeman was injured while coupling cars, had existed for so long a time that the company may be presumed to have had notice of it, the fact that the section foreman was furnished with materials, and instructed generally to make repairs when needed, does not relieve the company from the charge of negligence. *Fuhrer v. Lake Shore & M. S. R. Co.* (1899) 121 Mich. 212, 80 N. W. 23.

In several of the above cases the abnormal danger. It will be observed, arose from the negligence of the trackmen in leaving temporary obstructions, etc., on the track. But according to one ruling the trackmen themselves are not vice principals in respect to the removal of defects produced by the use of the track,—such as piles of ashes,—and the company should not be held liable unless the conditions have been 64 L. R. A.

brought to the knowledge of some supervising official, like the road master or one of his assistants, and he fails to see that the proper remedy is applied. *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585 (Grant, J., dissenting). This doctrine, which seems to represent the result of an attempt to compromise between the theory that the duty of repairing is nondelegable and the theory that trainmen and trackmen are not in distinct departments in such a sense that the former do not assume the risk of the latter's negligence is, it is submitted, wholly illogical.

Under the Massachusetts doctrine explained in II. K. *supra*, it is held that, if a section master is intrusted by a railroad company with the performance of the duty or a part of the duty of supervision of the tracks, which a reasonable regard for the safety of its employees requires the corporation to perform, the company is liable for his negligence. *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 325.

2. Dangerous conditions alongside railway tracks.

A railway company is liable to a trainman for injuries due to the obstruction of a track which fell after being allowed to remain an unreasonable time in such a position that, if it fell, it would necessarily endanger the safety of such a servant. That the derrick was originally set up by his fellow servants will not affect this result. *Holden v. Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 343.

In *Texas & N. O. R. Co. v. Echols* (1897) 17 Tex. Civ. App. 677, 41 S. W. 488, it was shown that a remnant stack of ties was liable to topple over and fall upon men at work, which rendered the premises unsafe. The court said that "if, by the exercise of such care, its servants and agents, charged with the duty of keeping the premises in a safe condition, knew or would have known of the dangerous condition in which the remnant stack of ties was left in time to have removed the danger, and failed to do so, the company would be liable." The insecurity was deemed to be a merely temporary condition.

The plaintiff was also held entitled to recover in *Southern P. R. Co. v. Markey* (1892; Tex.) 19 S. W. 392 (brakeman fell over a piece of timber lying near the track); *Lewis v. St. Louis & I. M. R. Co.* (1875) 59 Mo. 495, 21 Am. Rep. 385 (excavation left near track); *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907 (no one deputed to see that a derrick near a track was properly secured, when not in use—iron hook, suspended from the arm,

to show that there was a standard article in general use for the purpose of preventing trolleys from running off the track when one section of a traveler is removed, and no notice of intent to do so was given. For this reason the objection was properly sustained. If, however, the offer had been broader, it is doubtful whether the evidence would have been admissible under the circumstances of this case. As the automatic device was a new invention, if it had appeared that the accident was caused by an imperfect design, or was owing to a wrong principle of construction, involving a departure from safe methods as commonly applied, evidence to show the existence of a standard article would have been material. According to the evidence, however, the accident was not owing to an inferior design, but to negligence in oiling and cleaning. The

failure of the automatic bar to drop was completely accounted for by this neglect. The learned counsel for the plaintiff in his argument before us admitted that the accident was caused by friction resulting from lack of oiling and cleaning. The uncontradicted evidence showed that the device was safe when properly cared for, and hence, even if there was a standard article, the defendants, according to the authorities cited, were not obliged to procure it.

We find no error in the record that requires a reversal, and the judgment appealed from should therefore be affirmed, with costs.

Parker, Ch. J., and Gray, Bartlett, Martin, Cullen, and Werner, JJ., concur.

struck plaintiff while standing on a passing car): Missouri P. R. Co. v. Bond (1893) 2 Tex. Civ. App. 104, 20 S. W. 930 (pile of cinders left near the track).

3. Defects in other kinds of tracks.

Recovery was allowed in *Gunter v. Graniteville Mfg. Co.* (1882) 18 S. C. 262, 44 Am. Rep. 573; *Laure v. Graniteville Mfg. Co.* (1882) 18 S. C. 275 (tramway on which plaintiff was wheeling bales of cotton collapsed).

4. Defective footpaths.

A railroad company owes its employees the duty, not only to employ suitable persons to keep in repair walks upon which their duties call them, but also to use reasonable diligence to see that they perform their duty. *Sweat v. Boston & A. R. Co.* (1892) 156 Mass. 284, 81 N. E. 296.

5. Inadequacy of safeguards against dangers from explosive substances.

See also III. o, *infra*.

In *McDonough v. Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334, where the plaintiff was injured by striking his drill against an unexploded charge of dynamite, the court seems to base its decision, both on the general ground that anything which the foreman did in the discharge of his functions as a departmental vice principal was constructively the act of the railway company (see note to *O'Neill v. Great Northern R. Co.* [1900; Minn.] 51 L. R. A. pp. 572 et seq.), and also on the special ground that he was intrusted with the particular nonassignable duty of seeing that the place of work was safe. See also *Stewart v. New York, O. & W. R. Co.* (1889) 28 N. Y. S. R. 215, 8 N. Y. Supp. 19 (explosion of dynamite while being thawed).

6. Inadequacy of protection for servants engaged in excavation work.

See also III. o, *infra*.

It is only at his own risk that a person engaged in excavating a ditch can depute to another the task of keeping in a safe condition for the servants whom he puts to work in it. *Van Steenburgh v. Thornton* (1895) 68 N. J. L. 160, 33 Atl. 380 (sewer trench fell in for want of adequate means to shore up the sides properly).

On the ground that the work was particularly dangerous, and the foreman was the only person on the ground who could discharge the duty of

supervision, it has been held that the foreman of a gang of twenty-five or thirty men, who has charge of drilling, blasting, and removal of material from a bank of hardpan, and indicates the places where the men under him shall use their shovels, and who hires and discharges men and alone gives orders, is not, as matter of law, a fellow servant with those under him, and as such discharged from any duty of supervising in order to protect them against unnecessary dangers from the fall of loose earth. *Hill v. Winston* (1898) 73 Minn. 80, 75 N. W. 1030. To the same effect, see *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24 (earthslide, danger of which was apparent to official in control); *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 18 Fed. 239 (bank in process of excavation under roadmaster's directions fell in); *Eilledge v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720 (roadmaster held to be vice principal as regards keeping place of work safe for men blasting rock from a cliff).

7. Inadequacy of protection for servants working in mines.

One employed to timber a drift in a mine so as to provide and keep a safe place for other employees working therein is a vice principal as to them. *Grant v. Varney* (1895) 21 Colo. 329, 40 Pac. 771; *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 31 S. E. 614; *Consolidated Coal Co. v. Scheiber* (1896) 65 Ill. App. 304.

8. Defects in bridges.

The defendant was held liable in *Chicago G. W. R. Co. v. Healy* (1898) 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245; *Chicago & N. W. R. Co. v. Swett* (1887) 45 Ill. 197, 92 Am. Dec. 206; *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 560; *Bowen v. Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230; *Galveston, H. & S. A. R. Co. v. Daniels* (1892) 1 Tex. Civ. App. 695, 20 S. W. 955; *San Antonio & A. P. R. Co. v. Adams* (1894) 6 Tex. Civ. App. 102, 24 S. W. 839 (roadmaster was negligent). Overruling *Hard v. Vermont & C. R. Co.* (1860) 32 Vt. 473; *Davis v. Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 500; *Bateman v. Peninsular R. Co.* (1898) 20 Wash. 138, 54 Pac. 996.

9. Defects in scaffolds, platforms, etc.

Contrast VI. c, *infra*.

Cole v. Warren Mfg. Co. (1899) 63 N. J.

KENTUCKY COURT OF APPEALS.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*,

v.

Tinie J. JOSEY, Admx., etc., of F. M. Josey, Deceased.

(.....Ky.....)

1. A section foreman in charge of a crew on a hand car, with power to determine where the car should be stopped, is not, in the act of applying the brakes, a fellow servant of one of the crew, so as to relieve the railroad company from liability for injuries to the latter by his negligent application of the brakes.
2. It is negligence for a section foreman in charge of a crew on a hand

car to apply the brakes when the car is running at a high rate of speed, and he sees a member of the crew standing without support, so that suddenly checking the speed of the car will be likely to throw him off from it.

3. Under the Kentucky statutes, gross negligence is not necessary to entitle an administrator to compensatory damages for the negligent killing of his intestate.
4. Objectionable remarks of counsel in arguing to the jury must be preserved by bill of exceptions, to be the subject of review on appeal.

(March 21, 1901.)

A PPEAL by defendant from a judgment of the Circuit Court for Muhlenberg County in favor of plaintiff in an action

L. 626, 44 Atl. 647 (master liable for failure to maintain in safe condition a scaffold furnished for the use of a mill-wright repairing a shaft); *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925 (platform not repaired by carpenters employed for that purpose).

10. Defects in other structures.

Ferris v. Hershelm Bros. (1899) 51 La. Ann. 178, 24 So. 771 (judgment for defendant by judge sitting as jury—reversed on evidence showing that a stairway had not been kept in repair); *Van Dusen v. Letellier* (1889) 78 Mich. 492, 44 N. W. 572 (employee repairing docks in a millyard, held a vice principal).

11. Defective method of loading cars.

Contrast cases cited in V. o, 3, *infra*.

In *Atchison, T. & S. F. R. Co. v. Seeley* (1894) 54 Kan. 21, 37 Pac. 104, it was held that a brakeman on a railway train is not a fellow servant with a station agent intrusted with the duty of loading open cars, and of seeing that such cars are properly inspected and prepared to be put into the train for transportation, by whose negligence in loosely placing smoke-stacks upon such a car the brakeman is knocked off the train and thrown under the wheels of the car. After reviewing the previous rulings of the court in which it had been held that the servants charged with the duty of inspecting the cars themselves were vice principals, the opinion concludes as follows: "We are unable to see any reason for a distinction between the preparation and inspection of the car itself as a fit instrumentality to be placed in a train and the preparation and inspection of a loaded car to be placed in the train for transportation. Each is an instrumentality to be used in connection with the services necessary to be performed by the trainmen in its transportation, and no distinction between them is seen, so far as the obligation of the company or the safety of the employees engaged in handling it are concerned. The inspection in either case is made with reference to the same end, and the person to whom this duty is delegated stands in the place of the company, and the latter is responsible for his acts." To the same effect, see *Irvine v. Flint & P. M. R. Co.* (1891) 89 Mich. 416, 50 N. W. 1008 (held to be the duty of a railroad company to see that its cars are so loaded that a brakeman will have reasonably safe access to the brakes); *Galveston, H. & S. A. R. Co. v. Farmer* (1889) 73 Tex. 85, 11 S. W. 156 (car loaded so that lumber projected over the end); *Redington v. New York, O. & S. L. R. A.*

W. R. Co. (1895) 84 Hun, 231, 32 N. Y. Supp. 535 (loading a car held to be an act of the employer, where it makes coupling more dangerous than usual, and there are no rules providing for such a case).

12. Pitfalls.

Sunney v. Holt (1883) 15 Fed. 880 (jury charged that a porter whose duty it is to light the hatchways of a ship is a vice principal); *Simmons v. Peters* (1897) 20 App. Div. 251, 48 N. Y. Supp. 800 (servant charged with the duty failed to light a gas jet which was intended solely to give employees a safe means of access to an elevator); *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, 15 S. W. 561 (no lights provided for place of work); *Sadowski v. Michigan Car Co.* (1890) 84 Mich. 100, 47 N. W. 598 (person employed to lay a water pipe in a ditch through a yard left the yard in a dangerous condition).

13. Want of adequate protection against injuries from falling bodies.

Northwestern Fuel Co. v. Danielson (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 916 (fellow servants of a workman held to be the representatives of the employer in removing timbers standing over the head of such workman); *Wilson v. Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653 (employee engaged in setting up machinery injured by a countershaft which fell owing to the negligence of the superintendent or overseer of repairs in a factory); *Stephens v. Hudson Valley Knitting Co.* (1893) 69 Hun, 375, 23 N. Y. Supp. 656 (injury was caused by the fall of a pile of rolls of cloth); *Cavanagh v. O'Neill* (1898) 27 App. Div. 48, 50 N. Y. Supp. 207 (employee in a store injured by the fall of a dress form model); *Stimper v. Fuchs & L. Mfg. Co.* (1898) 26 App. Div. 333, 49 N. Y. Supp. 785 (part of machine, not being properly secured, fell on plaintiff); *Blondin v. Oolitic Quarry Co.* (1894) 11 Ind. App. 395, 37 N. E. 812 (stone negligently set on edge by one servant fell on another working in the same yard).

In *Cole Bros v. Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074, it was held (Ross, J., dissenting) that a foreman in a manufacturing shop is a vice principal, and not a fellow servant, of an employee ordered by him to work in a space just large enough for one person to work in safety, with respect to his act in going into such place with another without such employee's knowledge, where one of them comes in contact with and displaces certain tubing causing it to fall and seriously injure such employee. The

brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Pirtle & Trabue, with Messrs. Jensen & Wickliffe, for appellant:

At the time of the injury, deceased was not in the service of the company, but he and the foreman, Gayle, and other employees of appellant, were transporting themselves upon a hand car from a section house to some place upon appellant's road where they were to be employed; and the conclusion is inevitable that they were at the time in the relation of fellow servants, being engaged in one common undertaking where there could be no superior or inferior.

3 Elliott, *Railroads*, § 1319; *Ashland Coal & I. R. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Baltimore & O. E. Co. v. Baugh*, 149 U. S. 368, 37 L. ed.

772, 13 Sup. Ct. Rep. 914; *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 380, 47 S. W. 493.

It was common prudence for Josey and every other man occupying a place on an open hand car, which was upon a down grade and going at the rate of perhaps 8 miles per hour, as is shown in this case to be true, to have held on to the lever bar, and thus have prevented his falling off. His failure to do so was not only not prudent, nor the act of an ordinarily prudent man, but evinced a surprising recklessness and a total disregard for his personal safety.

Mr. Charles Eaves for appellee.

Paynter, Ch. J., delivered the opinion of the court:

F. M. Josey was a section hand employed by the appellant, being one of the force of

court distinguishes *New Pittsburgh Coal & Coke Co. v. Peterson* (1894) 136 Ind. 398, 35 N. E. 7, on the ground that the acts there charged, viz., the starting of machinery and the failure to warn the plaintiff, were such as naturally devolve on a fellow servant. The only principle on which this decision can be sustained, if at all, appears to be, that the duty of notifying an employee of any increase of danger in his environment is nonassignable. See III. c, *infra*.

14. Want of adequate means to keep railway cars stationary when not in use.

Henry v. Wabash Western R. Co. (1891) 109 Mo. 488, 19 S. W. 239 (railway company cannot relieve itself from liability for injuries to a locomotive fireman by a collision with a freight car placed on a side track by delegating to a servant its duty of seeing that it is properly supplied with brakes, and that other means are used to prevent it from being removed by its own weight, or by wind, upon the main tracks).

15. Defective locomotives.

In *Texas & P. R. Co. v. Barrett* (1897) 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, the following instruction was approved: "If the jury believe, from the evidence under the foregoing instructions, that the boiler which exploded and injured the plaintiff was defective and unfit for use, and that defendant's servants, whose duty it was to repair such machinery, knew, or by reasonable care might have known, of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant; and if said boiler exploded by reason of said defects, and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way by his own neglect contributed to his injuries."

In *Fuller v. Jewett* (1880) 80 N. Y. 46, 36 Am. Rep. 575, *Affirming s. c. sub nom. Stevenson v. Jewett* (1878) 16 Hun, 210, an action against a railroad receiver to recover damages for the killing of a locomotive engineer by the explosion of a boiler, there was evidence that the boiler had been frequently reported and sent to the repair shops for repairs, and the defendant was held not to be excused from liability by the facts that there was no negligence in employing the superintendent of repairs, or in making proper regulations, that the master mechanic in charge gave proper instructions for the repairing, and that the negligence was 64 L. R. A.

that of the workmen directed to make the repairs.

Where there is evidence that the engine which caused the injury was out of repair to the knowledge of the defendant's master mechanic, a trial judge is not justified in nonsuiting the plaintiff on the ground that the doctrine of common employment is applicable. The question still remains: Did the master exercise due care to furnish a safe appliance? *Kain v. Smith* (1881) 25 Hun, 146, *Affirmed* in (1882) 89 N. Y. 375; *Reiterating doctrine of* (1880) 80 N. Y. 458, which reversed (1877) 11 Hun, 552.

To the same effect are the following cases, in which the employees in charge of the round-house or other place where repairs of locomotives are executed were held to be vice principals as regards trainmen. *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524 (foreman of shops and master mechanic both vice principals in allowing a defective engine to go out on the road); *Chicago & A. R. Co. v. Shannon* (1867) 43 Ill. 338; *Ohio & M. S. R. Co. v. Stein* (1894) 140 Ind. 61, 39 N. E. 246; *Krueger v. Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 957; *Cone v. Delaware, L. & W. R. Co.* (1880) 81 N. Y. 206, 37 Am. Rep. 491, *Affirming* 15 Hun, 172; *Pennsylvania N. Y. Canal & R. Co. v. Mason* (1885) 109 Pa. 298, 58 Am. Rep. 722; *Brabblits v. Chicago & N. W. R. Co.* (1875) 38 Wis. 289.

There is also authority for holding a railway company liable for the failure of an engineer to report that his engine was defective. *Texas & N. O. R. Co. v. Bingle* (1897) 16 Tex. Civ. App. 653, 41 S. W. 90. Writ of error denied in 91 Tex. 287, 42 S. W. 971, *Former Appeal* (1895) 9 Tex. Civ. App. 322, 29 S. W. 674 (company held to be bound by promise of engineer that repairs would be done); *Bridges v. St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 389. These decisions would hardly be concurred in by many of the courts which adopt the general principle under discussion. But the imposition of responsibility to the extent here predicated seems to be quite justifiable on logical grounds, if the engineer be regarded as the person who for the time being is in full charge of the piece of machinery operated by him.

16. Defects in railway cars.

That railway companies are responsible for the negligence of employees whose duty it is to keep cars in repair was held in the following cases: *Northern P. R. Co. v. Herbert* (1866) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, *Affirming* (1882) 3 Dak. 38, 13

which G. W. Gayle was foreman or boss. One of the duties of the section foreman and such of his force as he desired to aid him was to go over the section on certain days to ascertain whether any stock had been killed along the line of the road, and see the condition of the track. To accomplish this it was necessary to go on a hand-car, which the appellant furnished for that purpose. In July, 1898, Gayle took a number of his section men, together with Josey, and started along the line to perform the duty mentioned above. Some of the men rode on the rear end of the car, with their faces in the direction it was moving, and others with their backs in that direction. Among the latter was Josey. The car was moving down grade at a pretty rapid rate of speed, when, as the testimony of appellee conduces to show, foreman Gayle unneces-

sarily put his foot upon a lever which applied the brakes to the wheels, thus causing the car to suddenly check its speed, throwing Josey in front of it, and it passed over his body, inflicting injuries from which he shortly thereafter died. The testimony introduced by plaintiff conduces to show that the foreman gave no warning of his intention to apply the brakes to stop the car. The defendant sought to show that deceased fell off of the car by reason of his own carelessness and negligence, and thus lost his life, and that the foreman did not apply the brakes until the deceased was in the act of falling off of the car, and it was done in an effort to prevent it from passing over him. The defendant sought to show that the deceased fell off of the car because he did not have hold of the lever which was used in propelling it. The court, in instruc-

N. W. 349 (car repairer failed to remedy defects in brake); Central Trust Co. v. Texas & St. L. R. Co. (1887) 32 Fed. 448 (defect in brake due to negligence of foreman of round-house); Mackey v. Baltimore & P. R. Co. (1890) 8 Mackey, 282 (defective brakes); Chicago & N. W. R. Co. v. Jackson (1870) 55 Ill. 492, 8 Am. Rep. 661; Chicago & E. I. R. Co. v. Driscoll (1897) 70 Ill. App. 91; Schaub v. Hannibal & St. J. R. Co. (1891) 106 Mo. 87, 18 S. W. 924; McNamara v. Brooklyn City R. Co. (1895) 11 Misc. 667, 32 N. Y. Supp. 913; Missouri P. R. Co. v. James (1888; Tex.) 10 S. W. 832.

In *Rodney v. St. Louis S. W. R. Co.* (1895) 127 Mo. 676, 23 S. W. 887, 30 S. W. 150, the duty with respect to a car discovered to be defective was discussed as follows: The defendant did not discharge its full duty to the plaintiff by inspecting and marking the car. The duty to furnish reasonably safe appliances and machinery for the use of its servants in the course of their employment was not only an imperative, but a continuous, duty. It ran, so to speak, with the defective car from the moment it was discovered to be defective, continually calling upon the master to repair it, or to warn those of its servants, whom it required in the course of their employment to handle it, of its dangerous character. These duties were not only imperative and continuous, but they were personal duties of the master, to whomsoever delegated, and if neglected by those to whom they were delegated, their negligence was the negligence of the master.

A like principle is controlling where the defective apparatus is a hand-car. *Banks v. Wabash Western R. Co.* (1890) 40 Mo. App. 458. (Here the delinquent was the foreman of a section crew, and the decision as to such a functionary is perhaps not one which would receive approval in all courts. It must be sustained, if at all, on the same ground as that suggested for the similar decision as locomotive engineer, in the preceding subdivision.)

Unless it is a part of the duty of the trainmen themselves to make the adjustment of the brake-rods of a railway car, an improper adjustment is as much a breach of the nondelegable duty to keep the appliance in safe condition as if some part of it was defective in character or wanting. *Woods v. Long Island R. Co.* (1899) 159 N. Y. 548, 54 N. E. 1095, Affirming (1896) 11 App. Div. 16, 42 N. Y. Supp. 140.

17. Defects in other vehicles.

Boelter v. Ross Lumber Co. (1899) 103 Wis. 324, 79 N. W. 243 (foreman permitted use of wagon reported to be unsafe).
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18. Defective boilers.

See also III. d, 11, *supra*.

Mitchell v. Robinson (1881) 80 Ind. 281, 41 Am. Rep. 812 (defective boiler exploded).

19. Defective hoisting apparatus.

Corcoran v. Holbrook (1875) 59 N. Y. 517, 17 Am. Rep. 369 (mill-owner was held liable for the negligence of his general agent in omitting to repair a chain by which an elevator was raised and lowered, after he had been notified that the apparatus was in a dangerous condition); *Union P. R. Co. v. Fray* (1890) 43 Kan. 750, 23 Pac. 1039 (foreman in charge of derrick failed to keep it in safe condition).

In *Courtney v. Cornell* (1883) 17 Jones & S. 286, the majority of the court held that the owner of a derrick was liable for the negligence of his foreman in beginning work with a derrick, the rigging of which was defective, owing to the fact that the ropes had been stretched by a rain which fell during the night before the accident. *Sedgwick* dissented on a ground which would probably be now deemed controlling in New York (see VI. *infra*), *vis.*, that the plaintiff "accepted the risk that would be involved in arranging the derrick and its several attachments, from occasion to occasion."

20. Defective adjustment of the parts of machinery.

Eingartner v. Illinois Steel Co. (1896) 94 Wis. 70, 34 L. R. A. 503, 68 N. W. 664 (oller was injured through the negligence of a carpenter gang, whose duty it was to replace planks about a machine called the "bloom rolls," after their removal for the purpose of attaching new rolls); *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, 36 N. E. 117, Affirming (1892) 45 Ill. App. 411 (employer is not relieved from liability for injuries to an employee caused by the sudden starting of machinery due to the absence of a nut from an eyebolt used to hold a lever in place to keep the machinery stationary, where the nut had been gone for several weeks, by the fact that another employee having charge of the machinery knew of such defect, and did not report it or see that it was repaired).

21. Other defects in machinery.

Fox v. Le Comte (1896) 2 App. Div. 61, 37 N. Y. Supp. 316 (power press so defective that it moved without pressure on the treadle); *Carter v. Oliver Oil Co.* (1891) 34 S. C. 211, 13 S. E. 419 (servant whose duty it is to repair

tions, submitted the questions at issue to the jury, and it could not have found against the appellant except upon the idea that Gayle applied the brakes to the wheels of the car, thus causing a sudden stop, and consequently threw the deceased therefrom, which resulted in the loss of his life.

Counsel for appellant urge in argument that, when a superior is engaged with an inferior servant in performing services ordinarily performed by the latter, he becomes a fellow servant, and the master is not liable for his negligence; that the same person may in some things be a superior, and in others a fellow servant, and in the latter event the master is not liable for injuries caused by his negligence. If the principle contended for by counsel is conceded to be correct, still it has no application to this case. The section foreman, Gayle, directed

the movements of his force. He determined when the car should be placed upon the track and the place where it should be stopped. His duty placed him on the car, where he was when this accident occurred; and, furthermore, it was his duty to manage and control the brakes. He was not performing the duty of one of the section men in manipulating the brakes on the car, thus controlling its movements, but was performing the duty imposed upon him by reason of the fact that he was foreman of the crew, directing and controlling their movements, as well as the car. He controlled the brakes on that car as an engineer upon a locomotive engine does the air brakes upon a train. While it is not done by steam, as in the former case, he supplied the force which applied the brakes to the wheels of the car. When a fireman is present performing his

sacks which are dangerous to use when torn held to be a vice principal as regards another servant, who handles them in operating a machine); *Swift & Co. v. Short* (1899) 34 C. C. A. 545, 92 Fed. 567 (act of a fellow servant of a person injured by the flying of a shoe forming part of a clutch from a rapidly revolving wheel, in wiring the shoe to make it safe after it is cracked, held to be the act of the master); *Jaques v. Great Falls Mfg. Co.* (1891) 86 N. H. 482, 13 L. R. A. 324, 22 Atl. 562 (employee liable for an injury received by a weaver in consequence of the unskilful manner in which the loom had been repaired by the mechanic to whom the duty of repairing had been assigned).

An injury received by one servant through the failure of another servant to keep the brake of a hoisting apparatus in repair would be regarded as due to the negligence of a vice principal. But if the injury is received by the negligence of the second servant in releasing the brake, while taking an active part in the working of the apparatus, the negligence is that of a mere fellow servant. *Fox v. Spring Lake Iron Co.* (1891) 89 Mich. 387, 50 N. W. 872.

Other authorities for the general principle are the following: *Wells v. Coe* (1886) 9 Colo. 159, 11 Pac. 50; *Denver Tramway Co. v. Crumbaugh* (1897) 23 Colo. 363, 48 Pac. 503; *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, 36 N. E. 117; *Norton v. Volzke* (1895) 158 Ill. 402, 41 N. E. 1085; *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Tudor Iron Works v. Weber* (1899) 31 Ill. App. 306; *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 592, 15 Pac. 484; *Lawrence v. Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704; *Shanny v. Androscoggin Mills* (1876) 66 Me. 420; *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 30, 11 N. E. 101; *Fox v. Spring Lake Iron Co.* (1891) 89 Mich. 387, 50 N. W. 872; *Roux v. Blodgett & D. Lumber Co.* (1893) 94 Mich. 607, 54 N. W. 492; *Sadowski v. Michigan Car Co.* (1890) 84 Mich. 100, 47 N. W. 598; *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585; *Bridges v. St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 392; *Dutal v. Gelsel* (1886) 23 Mo. App. 676; *Bensing v. Steinway* (1886) 101 N. Y. 547, 5 N. E. 449; *Ballard v. Hitchcock Mfg. Co.* (1893) 71 Hun, 582, 24 N. Y. Supp. 1101; *Strauss v. Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425; *Galasso v. National S. S. Co.* (1898) 27 App. Div. 169, 50 N. Y. Supp. 417, rehearing denied in 28 App. Div. 624, 51 N. Y. Supp. 136; *Carter v. Oliver Oil Co.* (1891) 84 S. C. 211, 13 S. E. 419; *Houston & T. C. R. Co. v. Marcelles* (1883) 39 Tex. 334; *Fordyce v. Culver* (1893) 2 Tex. 54 L. R. A.

Civ. App. 569, 22 S. W. 237; *Chapman v. Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551 (employee charged with the direction of work in the absence of a foreman, and with the duty of repairing machinery when needed, not a fellow servant of another employee so far as his duty to make repairs is concerned); *Mackey v. Baltimore & P. E. Co.* (1890) 8 Mackey, 282.

The breach of the duty to keep an instrumentality in safe condition may obviously be committed, not only by failing to repair it, but by removing from it some essential part, the want of which renders it dangerous in use. *Browning v. Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, affirmed in 27 S. W. 644 (engineer killed owing to the removal of brakestaffs by a roadmaster).

It should be observed that as soon as the superior employee, who is responsible for the repairs, has given orders to have them executed, any servant who knows of the dangerous condition, and goes to work of his own motion before the repairs are completed, does so at his own risk. *Schuls v. Roke* (1896) 149 N. Y. 132, 43 N. E. 420, reversing (1894) 8 Misc. 683, 28 N. Y. Supp. 1147. The explanation of the case in *Galasso v. National S. S. Co.* (1898) 27 App. Div. 169, 50 N. Y. Supp. 417, seems to be based on a misapprehension as to its actual scope.

e. Difference between the extent of a master's responsibility for original supply and subsequent maintenance.

In a recent note the discussion of the question whether general managers are vice principals necessitated an examination of the decisions which are based upon the theory that the duty of original supply is absolute and personal, while the duty of maintenance is delegable. See note to *O'Neill v. Great Northern R. Co.* (1900) (Minn.) 51 L. R. A. pp. 564 *et seq.* But it will not be out of place to quote here a few judicial statements which, as bringing out clearly the antagonism between this theory and the one explained in the last section, are pertinent for the purposes of the present investigation. That the opposing theories like so many others which produce a conflict in this branch of law, rest upon premises which imply essentially irreconcilable views as to the extent of the obligations which should be imposed upon the master, is clearly shown by the extracts from the two Vermont cases following.

In *Hard v. Vermont & C. R. Co.* (1860) 32 Vt. 473, the court, in discussing the contention of defendant's counsel, said: "It is insisted that there is an implied warranty on the part of the principal of the soundness of the machinery

duties on the engine by supplying it with fuel, thus generating the steam which propels the engine, and makes it possible for the engineer to control the movement of the train by applying the brakes, the relation of fellow servant does not exist between them, and, if the engineer should negligently apply the brakes, and cause the train to give a sudden movement, throwing the fireman from the engine, certainly no one would contend that the master was not responsible for the negligent act of the engineer. In such case he is not the fellow servant of the fireman; neither was the foreman of the section crew the fellow servant of the deceased.

Counsel for appellant cite the case of *Gann v. Nashville, O. & St. L. R. Co.* 101 Tenn. 380, 47 S. W. 493, in support of their position. That is a case of the Tennessee

supreme court, which recognizes that the foreman of a section crew is not the fellow servant of the section men. The facts of that case were substantially the same as in this case, and the court there held that, although the foreman was not the fellow servant of the section men, still, as he was performing a service ordinarily performed by section men, he became a fellow servant. The facts of that case show that it was the duty of the foreman to manipulate the brakes of the hand car, and control its movements, as well as direct the men in charge of it. We fail to understand, in view of those facts, how the court concluded that the section foreman was performing a service ordinarily performed by one of the inferior servants. Under the facts of that case the court, in our opinion erroneously, reached the conclusion that the foreman

which he puts into the hands of his servants, so far as any unsoundness therein may be discovered by the exercise of proper care and diligence.' This rule is undoubtedly correct, as we have already seen, and as is shown by the authorities cited in support of it. But this is true only of the state and condition of the machinery at the time it is put into the hands of the servant. The principal does not warrant that the servants shall faithfully discharge their duty in keeping the machinery in its original safe condition. To establish this principle would be to abrogate the rule and make the principal the warrantor of the faithfulness of all the servants."

In *Davis v. Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, the court remarked that, when the above decision was rendered "the liability of the master was held to be dependent upon whether the servant whose negligence caused the injury and the servant injured were fellow servants in a common employment or work," and proceeded thus: "Making this the test for determining the master's liability, and the reasoning and conclusions of the late Chief Justice Pierpont are unanswerable. But this test, while determinative in a great number of cases, as we have seen, has been abandoned both in England and in this country, and in lieu thereof the master's liability has been made to rest upon whether the negligence arose in the performance of a duty for the careful discharge of which he became responsible when he assumed the relation of master to the injured servant. On the principles which we think furnish the true ground upon which the master's liability rests, and on the American application of them, the charge of the county court in the particulars to which exceptions were taken contains no error. The American doctrine holding the master liable for the negligence of his servant while discharging a duty which the master owes to a general workman is more consonant with reason and the general safety of the traveling public than the English doctrine announced in *Wilson v. Merry* (1868) 1 L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 80."

In *Howd v. Mississippi C. R. Co.* (1874) 50 Miss. 178, the court said: "A railroad company is bound, in the original construction of its road and appurtenances, to make it reasonably secure for the safe transportation of trains upon it, and also to keep the track in repair. In order to discharge the latter duty the corporation must employ suitable persons, and supply them with needful material to make repairs; and should also, through its agent or agents, have a supervision over the road. In order to hold the

company responsible to an employee (as a conductor on its train) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants or an insufficient number to do the work, or failure to furnish proper material, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing. The corporation will have done all that could be reasonably required of it, when it exercised circumspection and prudence in appointing employees to observe the road, make the repairs, and when it put at their disposal suitable material for the work; and when it caused suitable supervision to be had over these."

In *Wilson v. Merry* (1868) 1 L. R. Sc. App. Cas. 326, 19 L. T. N. S. 30, Lord Colonsay said: "I think that there are duties incumbent on masters with reference to the safety of laborers in mines and factories, on the fulfillment of which the laborers are entitled to rely, and for the failure in which the master may be responsible." But he concurred in the actual decision of the House.

f. Duty to see that worn-out or otherwise defective parts of instrumentalities are replaced by suitable substitutes.

The quality of the duty may be said to depend upon the essential nature of the operation by which the replacement is effected in each particular case. In some cases that operation is, logically speaking, equivalent to a discharge of the function of supplying a suitable instrumentality. Under such circumstances the liability of the master for the negligence of an employee to whom that function is deputed cannot be consistently denied by any court which concedes the duty of supply to be nondelegable. For the purposes of this principle it is plainly immaterial whether the substitution is that of an entire instrumentality, or merely one of its constituent parts. *Lehigh Valley Coal Co. v. Warrek* (1898) 28 C. A. 540, 55 U. S. App. 437, 84 Fed. 866 (blocks furnished for checking the speed of coal cars were defective to the knowledge of the superintendent); *Mulvey v. Rhode Island Locomotive Works* (1883) 14 R. I. 204 (superintendent had notice that an elevator chain was defective, but failed to furnish a new one).

A machine may be so constructed, and its operation may be such, as to call for a frequent replacement of one or more of its constituent parts. Such parts when adjusted in the machine become as much a part of it as if included

was performing a service ordinarily performed by a fellow servant. In that as in this case he was performing a duty which was imposed upon him by reason of the fact that he had charge of the force and of the hand car, the brakes of which it was his peculiar duty to manipulate. In the case of *Illinois C. R. Co. v. Coleman*, 22 Ky. L. Rep. 878, 59 S. W. 13, this court held that a yard master was not a fellow servant of one of the servants employed in the yard when he was assisting that servant in the manipulation of car couplings.

It is urged that the deceased was negligent in not supporting himself by holding to the lever on the car while it was traveling at the rate of speed it was when the accident happened. The testimony offered by the defendant tends to show that he was not thus supporting himself. In our opin-

ion, instead of that testimony aiding the defendant, it had the contrary effect. If he was standing upon the hand car without any support, then the greater reason why the section foreman should not have applied the brakes to the car so as to suddenly check its speed. The foreman could see his position, and must have known the peril in which he would be placed if the car was suddenly checked. According to the testimony of all the witnesses in this case, there was no occasion for stopping the car at the place where the accident happened. The appellant did not endeavor to show that it was necessary to apply the brakes at that place, except in an effort to protect the deceased when he was discovered falling from the car.

The instructions which the court gave the jury were more favorable to the defendant than it was entitled to receive. Under them

in the original construction, and a defect in one of them is a defect in the machine. The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant. The defendant could not, therefore, avoid responsibility by delegating this duty to persons whom it believed to be competent, and who in fact were competent to perform it. If the injury to the plaintiff was due to a defect in the punch, which might have been discovered by the exercise of reasonable care on their part, but was not, the defendant is liable for their negligence. *Foy v. United States Cartridge Co.* (1893) 159 Mass. 313, 34 N. E. 461. See also the quotation from the opinion in *Moynihan v. Hill Co.* (1888) 146 Mass. 586, 16 N. E. 574, as given in VII. b. *infra*.

Upon general principles, it would seem that that species of replacement which would be incident to the preparation of instrumentalities as part of the work, or to any of the other operations discussed in VI. *infra*, would not constitute the exercise of a nondelegable function; but no case is known to the writer in which this precise point has been considered.

The control of the repairs is deemed to be rather with those who are to provide the apparatus than with those who are to work with it, where the means of replacing defective parts are not supplied to the person in charge of it until he asks for what is needed. *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690.

In other cases the operation of replacement is associated with the function of maintenance, in that substitution represents the most appropriate, as possibly the only available, method by which a defective instrumentality can be prevented from falling below the legal standard of safety. So far, therefore, as the doctrine that this function is one pertaining to the absolute obligations of the master is not limited by the principle explained in V. j., and VII., *infra*, it is clear that the master must answer for the negligence of all employees whose duty it is to see that the instrumentalities or their parts are renewed, whenever this is the course which a prudent man would adopt under the circumstances. See, for example, *Houston & T. C. R. Co. v. Dunham* (1878) 49 Tex. 181 (railroad company held liable for an injury to a brakeman resulting from failure of the roadmaster and section men to replace rotten ties with sound ones).

g. Duty to furnish proper medical treatment to sick or injured servants.

A shipowner cannot escape liability for the
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negligence of the captain of a ship in failing to follow the advice of a physician as to the proper treatment of a member of the crew who is injured in the course of his employment. *Scarff v. Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796.

h. Duty to hire suitable servants.

In the nature of the case this duty must be regarded as one which, for the purpose of practical litigation, has relation solely to original supply or replacement. The maintenance of a human being in a condition of efficiency is not a function which can be viewed as the subject-matter of an obligation in the same sense as that which is contemplated by the law where unintelligent agencies of work are concerned. To make out a certain parallelism between the two cases would doubtless be possible, but the analogies evolved by such an investigation would be of merely scholastic interest. For example, it may fairly enough be maintained that a master who, instead of resorting to the customary remedies of dismissal, suspension, or change of work, where a servant has become so incapable, through bodily or mental infirmities, as to endanger the safety of his collaborators, retains him in the same employment, is subject to the duty of seeing that everything is done that can reasonably be done under the circumstances to bring him back to health and vigor by appropriate treatment. But the writer is not aware that the enforcement of such a duty has ever been discussed. The obligation of the master to provide medical treatment for a sick or injured servant has never been viewed as one creating legal rights in favor of co-servants. The only absolute obligation, therefore, to which it is necessary to advert in the present connection is that of "exercising proper diligence in the employment of reasonably safe and competent men to perform their respective duties." *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

There is complete unanimity as to the doctrine that the negligence of one who represents the employer in hiring and discharging men is chargeable to the employer. *Oleson v. Andrews* (1897) 168 Mass. 261, 47 N. E. 90; *Bosworth v. Rogers* (1897) 27 C. C. A. 385, 53 U. S. App. 620, 82 Fed. 975; *Baltimore & O. R. Co. v. Hawthorne* (1896) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634; *Walker v. Bolling* (1853) 22 Ala. 294; *Tyson v. South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8; *Matthews v. Bull* (1897; Cal.) 47 Pac. 773; *Murphy v. Hughes* (1898) 1 Penn. (Del.) 250, 40 Atl. 187; *Justice v. Pennsylvania Co.* (1892) 130 Ind. 321, 30 N. E. 303; *Quincy Min. Co. v. Kitts*

the plaintiff could only recover compensatory damages by showing gross negligence. The administratrix was entitled to compensatory damages if the death resulted from negligence, and to punitive damages if it was the result of gross negligence. Section 6, chap. 1, Ky. Stat. There are many decisions of this court to that effect. It is only by virtue of the Constitution and the statute that there can be a recovery of damages for the loss of life occasioned by negligence. If the accident had not resulted in Josey's death, and he had sustained injuries thereby, he could have maintained his action by showing that it was the result of gross neg-

ligence. This peculiar condition of the law results from the facts that the right of action for the loss of life is given by the Constitution and statute, and the other right to recover for injuries exists at common law.

Counsel urge that the case should be reversed because of objectionable argument or language employed by counsel for appellee on the argument of the case before the jury. The bill of exceptions does not even show what counsel said in arguing the case before the jury; hence there is nothing for the court to consider in respect to that matter.

The judgment is affirmed.

(1879) 42 Mich. 84, 3 N. W. 240; Brown v. Gilchrist (1890) 80 Mich. 56, 45 N. W. 82; Brown v. Winona & St. F. R. Co. (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; Harper v. Indianapolis & St. L. R. Co. (1871) 47 Mo. 567, 4 Am. Rep. 353; Mann v. Delaware & H. Canal Co. (1883) 91 N. Y. 495 (conductor put a man on the list of extra brakemen, without any inquiry as to his qualifications, or instructing him as to the rules of the company); O'Laughlin v. New York C. & H. R. Co. (1887) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384, Affirmed in (1889) 113 N. Y. 623, 20 N. E. 876; Sullivan v. Metropolitan Street R. Co. (1900) 58 App. Div. 89, 65 N. Y. Supp. 842 (special point raised was that the delinquent went beyond the scope of his proper duties); Frazier v. Pennsylvania R. Co. (1860) 38 Pa. 104, 80 Am. Dec. 467; Texas Mexican R. Co. v. Whitmore (1888) 58 Tex. 276 (foreman of bridge gang knew that engineer of pile driver was incompetent).

The New York cases cited above are in accord with the decision of the supreme court in Wright v. New York C. R. Co. (1858) 28 Barb. 80, which was not explicitly concurred in as to this point by the court of appeals, where it was observed ([1862] 25 N. Y. 562) that the responsibility of the master was a debatable question on the evidence that there was declared to be at all events no negligence as regards the selection of the delinquent servant. These decisions may be regarded as having discredited *Kidwell v. Houston & G. N. R. Co.* (1877) 8 Woods, 313, Fed. Cas. No. 7,757, where, in discussing a contention of plaintiff's counsel that the averment in the petition, charging that the "master mechanic was advised of the habitual negligence and general bad habits of said car inspector, and that he failed and refused to discharge him," takes this case out of the general rule, as being equivalent to a charge that the company had employed an unskilful or incompetent car inspector, the court said: "The charge, thus vaguely made, seems to me only to amount to a charge of negligence on the part of the master mechanic in not reporting the character of the car inspector to the officers of the company, and does not, therefore, constitute an exception to the general rule that a railroad company is not liable to one of its employees for the mere negligence of another employee. It does not appear that the master machinist was anything more than a fellow servant of the car inspector and the plaintiff, without the power of appointment or removal. Under these circumstances the defendant company could not be made liable."

A complaint framed on the theory of negligence in retaining an incompetent servant need not contain a specific averment that he had authority, by virtue of his employment, to do the act which produced the injury. *Gulf, C. & S. F. R. Co. v. Pierce* (1894) 7 Tex. Civ. App. 597, 25 S. W. 1052. The acceptance of this doctrine 54 L. R. A.

involves the consequence that it is quite immaterial whether the negligent person was a partner or an employee of the defendant, since the servant must succeed on either theory. *McMahon v. Davidson* (1867) 12 Minn. 357, Gil. 232.

Negligence which consists in transferring persons already in the service from duties which they are competent to perform to duties for which they are unfitted is deemed to be a breach of the personal obligation now under review. In such a case the inference of liability follows immediately upon proof that the official who made the transfer was acting within the scope of his powers. *Blackman v. Thomson-Houston Electric Co.* (1897) 102 Ga. 64, 29 S. E. 120; *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353 (engineer viewed as a vice principal in permitting a fireman to run his engine); *Lytle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571 (promise of yardmaster that a fireman should not run an engine held to be binding on a railway company. In this doctrine, which was adopted at a very early stage in the development of the law of employers' liability, we find the first recognition of the fact that there is a logical inconsistency involved in declaring a master to be subject to an absolute duty and yet not responsible for the negligence of the person to whom that duty has been delegated. See the opinion of Shaw, Ch. J., in *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339.

That the principle to which this fact points was applied to the duty of hiring suitable servants several years before the courts advanced to the conception of a generalization on the same lines, with respect to the entire class of absolute duties, seems to have been a result of the prominence which, from the very outset, was given to the conception that the doctrine of common employment is subject to the qualification that the servant, "when he engages to run the risks of his service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care." *Hutchinson v. York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837, per Alderson, B. See note to *Smith v. St. Louis & S. F. R. Co.* (1889; Mo.) 48 L. R. A. 369.

The connection between the doctrine in its positive form and as a mere qualification of the doctrine of common employment is well shown in *Walker v. Bolling* (1853) 22 Ala. 294. There Phelan, J. (p. 314), after stating the two doctrines established by the earlier cases to be that the master is bound to use ordinary care in providing competent servants, and that the servant impliedly stipulates to run the ordinary risks of the service, among which are to be con-

CALIFORNIA SUPREME COURT.

Thomas F. TEDFORD, *Respt.*,
v.
LOS ANGELES ELECTRIC COMPANY,
Appt.

(.....Cal.....)

1. It is the duty of an electric company to warn of the danger an employee who is hired to dig holes, repair poles, and to do other work on the ground, and who to its knowledge is unacquainted with the dangerous character of the work of a line-

man, upon ordering him to ascend a pole and scrape a wire, and it cannot relieve itself from liability for injuries caused by noncompliance with such duty by delegating its performance to a foreman who is in a general sense a fellow servant of the person injured.

2. A verdict for \$15,000 in favor of an employee of an electric company, who was badly injured by falling from a pole on account of contact with a live wire, for which the company was responsible, will not be set aside by the appellate court as excessive.

(August 30, 1901.)

considered acts of negligence on the part of a fellow servant, proceeded thus: "But the master does not discharge this duty, or, in other words does not use due care, when he exposes the servant to danger by associating with him in a service of peril those who are wanting in ordinary skill and prudence; and if the master chooses to do this, or his agent does it, the former will be held accountable and it is no excuse for him to say, 'I delegated a duty arising from the relation I occupy to a third person, who was in all respects competent to discharge it, and his neglect was one of the risks which the servant took.' The answer would be, that the agent must be regarded as the master, and not as the servant, so far as this duty was concerned. In the present case the evidence shows gross negligence, and a criminal inattention to his duties, on the part of the engineer. It was the duty of the captain to protect the subordinate agents, employed in the common business, from the probable consequences of such neglect by the prompt discharge of the person who, by his carelessness and recklessness, was endangering the lives of all on board; and this duty, as we have already said, devolved upon him, not as the servant, but as the master, as the representative of the owner. This duty he did not discharge: and for the injurious consequences of this neglect the owner is responsible. . . . But an important inquiry meets us here, not embraced by these principles, and which we do not find to be covered by any of the adjudicated cases. It is this: When there is a general manager or superintendent of the service, with inferior agents or servants, or classes of agents or servants, under him, and such general manager or superintendent is invested by the common employer with the duty and authority of employing and dismissing those who are under him, are acts of negligence on the part of such general manager to be considered as falling within the ordinary risks of the service, for which the common employer is not responsible? And again: even if other acts of negligence will be so regarded, are we so likewise to regard his acts of negligence in not exercising reasonable care and diligence in not employing competent inferior officers and servants, or in not dismissing such as prove incompetent? In regard to all other acts of negligence on the part of the general manager or superintendent, I decline to express an opinion until the case arises. But with respect to the last-mentioned kind of negligence, namely: that of failing to exercise reasonable care in procuring competent inferior officers and agents, where that falls within the scope of his duty, or in dismissing such as prove to be incompetent,—I must hold that they cannot be included among the risks for which the master or common employer shall not be held responsible. To hold otherwise would be, as I maintain, to destroy the valuable general principle recognised and established in the very 54 L. R. A.

cases which have been quoted, in which it is held to be the duty of every master or principal to provide men of ordinary care and skill for each particular station, for the safety and protection, not only of strangers, but of those engaged in his service. This duty of the master is expressly retained in the very cases where he is held not to be subject further than this for injuries which may result to one servant from the acts of negligence of his fellow servant. Whether the master will do this or not is no part of the ordinary risks of the service; he is strictly held to the performance of it at all times. . . . It follows, also, that the law will not allow any shift by which that may be done indirectly which cannot be done directly; in other words, the law will not allow a master, whose duty it is to employ none but men of ordinary care and skill, in all branches of the service, to devolve the duty of making such employment on his general manager, who may be irresponsible, and by such means become irresponsible himself, for a neglect of this important duty. As to that much, the general manager must, upon principle, be held to be the agent of the master, not only to the world at large, but to his inferior officers and servants; and his neglects in this regard will be the neglects of the common employer even as to them. If he employs or retains incompetent subordinates, the master will be responsible for such an act of negligence on the part of his general manager, even to a person engaged in the same service with the general manager." See also the comments on this case in *Tyson v. South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8.

1. *Duty to employ servants sufficient in number for the work in hand.*

An absolute duty which, logically speaking, may be connected with the hiring of competent servants or the institution and maintenance of a safe system, is the duty of seeing that the number of persons employed is sufficient to prevent each of them from being exposed to that class of risks which results from an inadequacy of the force available for the work in hand. In *Flike v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545, the leading case on this doctrine, it was contended by counsel for defendant, (1) that the company was not liable, because the agent had, in fact, employed a third brakeman to go upon this train, who, by reason of oversleeping, failed to get aboard in time, and hence, that the injury must be attributed to his negligence, and (2) that such negligence, if attributable to the general agent in not supplying his place with another man, must be regarded as committed while acting in the capacity of a mere coservant. But the court said: "Neither of these positions is tenable. The hiring of a third brakeman was only one of the

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gibbon & Halsted and W. A. Cheney for appellant.

Messrs. Henry T. Gage and W. L. Foley, for respondent:

Respondent was inexperienced. Appellant owed him the personal duty of warning and instructing him about the dangers connected with the transformer or converter. Appellant's delegation of the performance of this duty to Burge did not shift its liability to respondent because of Burge's failure to warn and instruct. His failure to warn and instruct respondent of the danger

from the converter and wires at the time of the accident was the failure of appellant to perform a personal duty, and it is liable for negligence.

1 Shearm. & Redf. Neg. 5th ed. § 206; Buswell, Personal Injuries, § 202; *Myham v. Louisiana Electric Light & Power Co.* 41 La. Ann. 964, 7 L. R. A. 172, 6 So. 799; *Ingerman v. Moore*, 90 Cal. 420, 27 Pac. 306; *Ryan v. Los Angeles Ice & Cold Storage Co.* 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471; *Gibson v. Sterling Furniture Co.* 113 Cal. 6, 45 Pac. 5; *Verdelli v. Gray's Harbor Commercial Co.* 115 Cal. 523, 47 Pac. 364; *Foley v. California Horseshoe Co.* 115 Cal. 195, 47 Pac. 42; *Hanley v. California Bridge & Constr. Co.* 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 579; *Higgins v. Williams*, 114 Cal. 182, 45 Pac. 1041.

The duty of appellant to warn and in-

steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery, and properly despatch, the train in question, and this duty remained to be performed although the hired brakeman failed to wake up in time, or was sick, or failed to appear for any other reason. It was negligent for the company to start the train without sufficient help. The acts of Rockefeller [the head conductor] cannot be divided up, and a part of them regarded as those of the company, and the other part as those of a coservant merely, for the obvious reason that all his acts constituted but a single duty. His acts are indivisible, and the attempt to create a distinction in their character would involve a refinement in favor of corporate immunity not warranted by reason or authority. As well might the company be relieved if the train was started without an engineer, or without brakes or with a defective engine. The same duty rested upon the company, though every man employed had died or run away during the night, and if negligent in discharging it, either by acts of commission or omission, whether in employing improper help, or not enough of it, or in not requiring their presence upon the train, it is, upon every just principle, responsible for the consequences. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. The only effect of that circumstance would be to make the negligence contributory with the brakeman, but would not affect the liability of the company." This case was followed in *Booth v. Boston & A. R. Co.* (1878) 73 N. Y. 38, 29 Am. Rep. 97 (involving similar facts); *Heiner v. Heuvelman* (1879) 13 Jones & S. 88. See also, to the same effect, *Boden v. Demwolf* (1893) 56 Fed. 846; *Cheney v. Ocean S. S. Co.* (1893) 92 Ga. 726, 19 S. E. 33. On the authority of this last case it has been held that an employer does not discharge his full duty in keeping a place reasonably safe by giving warnings of threatened or impending danger when the employee charged with the duty of giving the warnings is so engrossed and busy with his other duties that he cannot properly and efficiently give the necessary warnings. *The Pioneer* (1897) 78 Fed. 600.

Where no employee at all has been assigned for the performance of a duty connected with the operation of machinery the master cannot take advantage of the rule that the neglect of an employee who is furnished with the means and conveniences for keeping machinery in proper condition for safe operation, and charged with that duty, is not chargeable to the master in case of an injury to another employee. *Prescott v. J. Ottman Lithographing Co.* (1897) 20 54 L. R. A.

App. Div. 397, 46 N. Y. Supp. 812 (no other appointed for machinery). Distinguishing *Webber v. Piper* (1888) 109 N. Y. 496, 17 N. E. 216, and similar cases. See VII. d, *infra*.

j. Duty to frame rules and regulations for the conduct of the business.

All the American courts are agreed that the duty of framing such general rules and regulations as a prudent man would, under the circumstances, see to be necessary for the elimination of dangers of certain classes, belongs to the category of those which the master cannot, except at his peril, assign to a servant. *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Dana v. New York C. & H. R. R. Co.* (1883) 92 N. Y. 639; *Sheehan v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 332; *Slater v. Jewett* (1881) 85 N. Y. 61, 39 Am. Rep. 627; *Ford v. Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454, 28 N. E. 1101; *Bosworth v. Rogers* (1897) 27 C. C. A. 385, 53 U. S. App. 620, 82 Fed. 975; and the cases cited below.

The earliest suggestion of the doctrine seems to be that reported in *Little Miami R. Co. v. Stevens* (1851) 20 Ohio, 415, where the Ohio doctrine as to superior servants was laid down. Chief Justice Hitchcock thought that, on the facts, the case might be decided in the same way without running counter to *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, and others of a like character. He considered that the negligence was really that of the company itself, or its immediate agent, the superintendent, in omitting to see that the engineers and conductors of both trains had the same time cards.

Apparently the same principle is accepted in England, though the specific authority on this point is less unequivocal than that for the non-delegable quality of the duty of supplying safe instrumentalities.

In *Smith v. Baker* (1891) A. C. 325, 353, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, Lord Watson laid it down that the master is "no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself." This remark was made in a case tried after the passage of the employers' liability act. But the authorities cited were the statements made by Lord Chelmsford in *Bartonshill Coal Co. v. McGuire* (1858) 3 Macq. H. L. Cas. 310, 4 Jur. N. S. 773, and by Lord Wenleydale in *Weems v. Mathleson* (1861) 4 Macq. H. L. Cas. 226, both decided under common-law principles. See

struct respondent because of his inexperience and the hazardous nature of the business in which he was employed was personal to it, and, although it delegated its performance to Burge, its personal duty did not shift from it because of Burge's failure to warn and instruct.

1 Shearm. & Redf. Neg. § 204; Buswell, Personal Injuries, § 202, p. 334; *Miller v. Missouri P. R. Co.* 109 Mo. 350, 19 S. W. 58; *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Dayharsh v. Hannibal & St. J. R. Co.* 103 Mo. 570, 15 S. W. 554; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 264, 28 N. E. 183, 611; *Wolski v. Knapp-Stout & Co.* 90 Wis. 178, 63 N. W. 87; *Hillsboro Oil Co. v. White* (Tex. Civ. App.) 54 S. W. 432; *Galveston, H. & S. A. R. Co. v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264; *James v. Rapides Lumber Co.* 50 La. Ann. 717, 44 L. R. A. 33, 23 So. 469;

Bannon v. Lutz, 158 Pa. 166, 27 Atl. 890; *Brennan v. Gordon*, 118 N. Y. 489, 8 L. R. A. 818, 23 N. E. 810; *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 518; *McQuillan v. Willimantio Electric Light Co.* 70 Conn. 715, 40 Atl. 928.

The personal duties of the master are nontransferable, and liability remains even after the delegation of their performance to a superintendent, agent, or fellow servant.

Daves v. Southern P. Co. 98 Cal. 24, 32 Pac. 708; *Mullin v. California Horseshoe Co.* 105 Cal. 77, 38 Pac. 535; *Verdelli v. Gray's Harbor Commercial Co.* 115 Cal. 524, 47 Pac. 364; *Callan v. Bull*, 113 Cal. 600, 45 Pac. 1017; *Higgins v. Williams*, 114 Cal. 181, 45 Pac. 1041.

The question of the sufficiency and explicitness of instructions given or supposed to be given by a master to a servant is one of fact, to be determined by the jury.

Buswell, Personal Injuries, pp. 336, 337;

also the observations of Lord Cranworth in *Bartonskill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, which are equally explicit as to the master's liability for an unsafe system.

It is the duty of the master to supervise, direct, and control the operation and management of his business so that no injury shall ensue to his employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, for whom he must stand sponsor. *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 602.

If, therefore, he chooses to leave to an employee the regulation of matters which he ought to have provided for by specific rules, such employee will be regarded as his representative. *Hannibal & St. J. R. Co. v. Fox* (1884) 31 Kan. 586, 3 Pac. 320 (car repairer held entitled to maintain an action, where the company had made no rules, and furnished no flags as signals, and left everything which concerned the work to the management of the foreman); *Pool v. Southern P. Co.* (1899) 20 Utah, 210, 58 Pac. 326 (similar facts); *Louisville, E. & St. L. Consol. R. Co. v. Hanning* (1892) 131 Ind. 528, 31 N. E. 187 (foreman of car repairers did not set a signal flag to protect a workman—no rules on the subject); *Luebke v. Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870 (employee not, as matter of law, free from liability where the injury was due to a lack of proper precautions, though the immediate cause of the accident was his obedience to the order of his foreman, a fellow servant, in directing him to work without seeing that he was protected in some way); *Bedington v. New York, O. & W. R. Co.* (1895) 84 Hun, 231, 32 N. Y. Supp. 535 (no rules provided for the loading of cars in such a manner as to prevent unnecessary danger to servants coupling them).

In *Tully v. New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29, the plaintiff, owing to there being no light between the decks of a ship, fell into an uncovered hatchway, and it was contended, in behalf of the defendant, that, as it had provided sufficient lamps for the use of employees, the want of light was attributable, not to its negligence, but to theirs. But the court said: "There is evidence tending to prove that, when a vessel arrives at the dock, men appearing about there are employed to take off the cargo and to reload it with freight, and that they may have had no experience in the work they are called upon to perform in that service. They, unadvised, may not know of the facilities which can be afforded them when cir-

cumstances render their use and application desirable for safety. Conditions like that which caused the failure of the plaintiff to avoid the danger which he encountered, it may be assumed, are liable to arise and be produced in like manner. It would therefore seem to be reasonably incumbent upon the defendant to have some system by way of rules or regulations. The availability of protective means and appliances to the workmen is not necessarily of any benefit to them unless they are advised of it. It may be that, if the defendant had provided rules which required those in charge of the work to advise the workmen of the precautionary means of protection which could be had, the plaintiff's misfortune might not have occurred. . . . It does not appear that the defendant had, by any rules or regulations whatever, required or directed the agents to advise workmen temporarily employed to work upon the steamships, in loading and unloading, of any precautionary means which it might, for their safety, be or become desirable to use. For this reason we think that the question whether the defendant was chargeable with negligence was for the jury."

In *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407, where the plaintiff was injured through the defective loading of a railroad car, the defendant relied upon its "system," which was to let the shipper load and stake, while, as to inspection, its evidence only tended to show that if, in the general performance of the duties of their employment, the station agent found anything out of the way, he should correct it, or if the conductor or brakeman saw a defect, he should report it to the station master. No special duty was imposed on either in regard to inspection, nor direction given as to its manner. The court said: "The . . . proposition of the defendant is, that 'it is not necessary in this case to decide whether the stakes in question were or were not appliances or machinery within the meaning of the rule invoked by the supreme court at the general term' . . . 'for the reason that the system under which they were furnished, inspected, and employed was perfectly well known to the plaintiff, and he took the risks of the consequences of that system.' There was no system as to this matter. If the evidence shows that such practices had obtained before, it merely shows that the defendant chose to delegate a duty to the shipper which the corporation should have performed. It is equally responsible for his negligence; his negligence is its negligence."

So, also, if the servants whose acts caused

Chopin v. Badger Paper Co. 83 Wis. 192, 53 N. W. 452; *Verdelli v. Gray's Harbor Commercial Co.* 115 Cal. 525, 47 Pac. 364; *Hanley v. California Bridge & Constr. Co.* 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 581.

Respondent was ordered by Burge to a post of danger under the assurance that the same was safe. While working at that post, in obedience to the rules of appellant, the risk was increased without respondent's knowledge and without his fault. Burge failed to perform appellant's personal duty of warning respondent of the new danger, and the failure resulted in his injury. Burge, in so far as he failed to perform this personal duty, was not a fellow servant, but a vice principal and appellant's *alter ego*, and appellant became liable for his acts and omissions.

Illinois Steel Co. v. Schymanowski, 162

the injury were "acting without any known rule or regulation, and simply following a dangerous practice sanctioned by time and custom, the result might be imputed to the neglect of the defendant in omitting to change the method of doing the work and adopting a safer one." *Doling v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028.

This is the *rationale* of the decision in *Sword v. Cameron* (1889) 1 Dunlop, B. & M. Sc. Sess. Cas. 493, where the master was held to be liable to a quarryman who was injured by the firing of a blast before he had time to reach a place of shelter, the evidence being that the shot was fired in accordance with the usual and inveterate practice of the quarry. This case was cited in *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 787, in support of the proposition that the doctrine of common employment was unknown to the law of Scotland, but Lord Cranworth pointed out that the decision did not turn upon the negligence of the fellow workmen who fired the shot, and expressly stated that it was justifiable, on the ground that "the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions." A similar construction was put upon the case by Lord Chelmsford in *Bartonshill Coal Co. v. McGuire* (1858) 3 Macq. H. L. Cas. 310, 4 Jur. N. S. 773.

A servant who, acting upon the authority conferred on him, has made a rule which is reasonably necessary for the protection of his subordinates, is, of course, a representative of the master in regard to the suspension or abrogation of that rule. *Richmond Granite Co. v. Bailey* (1896) 92 Va. 554, 24 S. E. 232.

k. Duty to bring regulations to the knowledge of employees.

The duty of framing suitable rules being certainly nonassignable, it would seem to be a necessary inference that the subsidiary duty of publication, without the performance of which the framing would be an idle formality, must also be nonassignable. The authorities upon the subject, however, are very meagre, and, such as they are, conflicting. On the one hand, it is held that a section foreman on whom is devolved the duty of informing his hands of a rule that extra trains may be expected at any time without notice, is *pro hac vice* the representative of the company. *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866. Compare the argument of the court in *Tully v. New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29, as quoted in the 54 L. R. A.

Ill. 455, 44 N. E. 876; 1 Shearm. & Redf. Neg. pp. 374, 375, § 233, pp. 417, 418; *Daves v. Southern P. Co.* 98 Cal. 24, 32 Pac. 708; *Callan v. Bull*, 113 Cal. 600, 45 Pac. 1017; *Nixon v. Selby Smelting & Lead Co.* 102 Cal. 458, 36 Pac. 803; *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 486; *McGovern v. Central Vermont R. Co.* 123 N. Y. 288, 25 N. E. 373; *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 264, 28 N. E. 183, 611; *Galveston, H. & S. A. R. Co. v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264.

Where a servant is transferred to new duties, and the risks are more hazardous than he has a right to expect, he does not assume such risks, and the omission of the master to instruct or warn him is actionable negligence.

preceding subdivision. On the other hand, the supreme court of West Virginia has quoted in *Oliver v. Ohio River R. Co.* (1896) 42 W. Va. 703, 26 S. E. 444, with approval the following passage from a recent textbook: "It is not required that the master should see to it personally that notice comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent servants to receive and transmit the necessary orders, the negligence by them in the performance of it is a risk of the employment that the coemployee takes when he enters the service." See *Bailey, Master's Liability for Injuries to Servant*, pp. 77, 85. The learned author considers that "after the person whose duty, on the part of the master, it is to promulgate rules, or communicate them to those engaged in the service, has performed his duty, by communicating them to a servant, who in turn is to observe them, or communicate them to another, then the omission or neglect of such other is the omission or neglect of a fellow servant, to the same extent as his disobedience of an order or rule, after receipt or knowledge. . . . would be such an act." Yet at the same time he declares that, "as to those orders or rules relating to the appliances and ways, it being the absolute duty of the master to see that such appliances and ways are reasonably safe, the master should be held to a strict liability to see that they were actually received and known." With due deference it is submitted that the distinction here relied on is logically unsound, and wholly inconsistent with the theory which makes the duty of protecting the servant by suitable rules an independent obligation co-ordinate with the obligations of seeing that the material substances which compose the instrumentalities themselves come up to the required standard. If the master is bound at all to prescribe a certain system for the guidance of his servants, it surely can make no difference whether the object aimed at is that the instrumentalities shall be of a certain quality, or that they shall be used in a certain way. In either case the obligation is referable to the general principle that he must use proper care to secure the safety of his servants, and it seems impossible to argue, with any show of reason, that one obligation arising out of that principle can be less absolute than the other. The true doctrine, we take it, is that the duty of bringing the rules to the knowledge of the servants is equally nonassignable, whatever the subject-matter may be, and that the question whether it has been performed is to be determined, not by considering the rank or number of subordinates through whom they are transmitted to the persons concerned, but

Clark v. Liston, 54 Ill. App. 578; *Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915; *Burke v. Anderson*, 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814; *Anderson v. Jersey City Electric Light Co.* 63 N. J. L. 387, 43 Atl. 655; *McAdam v. Central R. & Electric Co.* 67 Conn. 445, 35 Atl. 341; *Harroun v. Brush Electric Light Co.* 12 App. Div. 126, 42 N. Y. Supp. 720; *Spaulding v. Forbes Lithograph Mfg. Co.* 171 Mass. 271, 50 N. E. 543; *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 206, 37 Am. Rep. 491; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546; *Coppins v. New York C. & H. R. R. Co.* 122 N. Y. 557, 25 N. E. 915.

The burden was upon appellant to show that respondent was aware of the risks and danger, and the case was properly left to the jury.

by considering whether the steps taken are such that the servants, if they exercise ordinary care, cannot fail to ascertain that the rules have been framed, and that obedience to them is expected. It may be remarked, moreover, that if this duty be removed from the class of those which are nondelegable, there will be considerable difficulty, not to say impossibility, in avoiding the virtual nullification of another doctrine which regards the subject from the standpoint of the servant's obligation to observe the rules made for his benefit, *viz.*, that his failure to comply with a rule not brought to his notice is not contributory negligence. See also note to *Nolan v. New York, N. H. & H. R. Co.* (1898; Conn.) 43 L. R. A. 356.

L. Duty to carry out regulations, how far absolute; generally.

In some cases it is laid down in quite general terms that the master is absolutely bound "to exercise such supervision as will make it reasonably certain that the business is being carried on pursuant to the rules" as framed. *McElligott v. Randolph* (1891) 61 Conn. 157, 22 Atl. 1094. Quoted in *Gerrish v. New Haven Ice Co.* (1893) 62 Conn. 9, 16, 27 Atl. 235.

So, also, it has been laid down, *arguendo*, that a railroad company is not only bound to adopt proper rules for the running of its trains, but is bound to enforce them. *Nolan v. New York, N. H. & H. R. Co.* (1898) 70 Conn. 159, 43 L. R. A. 305, 39 Atl. 115. But the question was not actually involved here.

But a more exact statement of principles would seem to be this: The quality of the duty in question depends upon the essential objects of the regulations which the alleged representative of the master has failed to carry out. All regulations, it is manifest, may be divided into two categories. In one we have a statement of the method by which the employer proposes to discharge some nondelegable obligation. The other relates to matters of detail with which servants may legitimately be left to deal except where the unusual complexity of the business organism creates a duty on the master's part to inform them in what manner they should perform their respective functions in order to avoid injuring themselves and their coworkers. The propriety of applying a different standard of responsibility to each of these categories is sufficiently obvious. It cannot be contended with any show of logic that the obligation of the master in respect to the supervision of mere details is rendered more extensive by the mere fact that, under the circumstances, he was bound to systematize the

Alexander v. Central Lumber & Mill Co. 104 Cal. 532, 38 Pac. 410.

McFarland, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries alleged to have been suffered by plaintiff through the negligence of defendant. The jury returned a verdict for the plaintiff in the sum of \$15,000. Defendant appeals from an order denying its motion for a new trial.

Defendant is a corporation engaged in furnishing, carrying, and distributing electricity through the city of Los Angeles for lighting, motive power, etc., over poles and running wires along the streets and public places of said city. Plaintiff was an employee of defendant, and at the time when the injuries complained of were received

execution of those details by issuing general orders for the guidance of his servants. Such general orders do not alter the character of the acts to which they relate. This consideration seems to have been ignored in *Mase v. Northern P. R. Co.* (1893) 57 Fed. 283, where the court took the broad ground that any servant to whom is given the duty of seeing that a rule is observed is a vice principal, and held that the duty assigned to a railroad employee by the rules of the company, not to leave a switch which has been opened until it is closed or he is relieved by another employee, is one of the nondelegable duties owed by the employer to its employees.

Another decision which is questionable for the same reason is one to the effect that a railway company is not, as matter of law, free from liability, where a car repairer is injured by a car which a conductor negligently shunted onto the repair track without any brakeman upon it. *Murphy v. New York C. & H. R. R. Co.* (1890) 118 N. Y. 527, 23 N. E. 812. But the correctness of this case is doubted in *Potter v. New York C. & H. R. R. Co.* (1892) 136 N. Y. 77, 32 N. E. 603. The same remark is applicable to the cases cited at the end of the next subdivision.

Some of the language used by the court in *Gerrish v. New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235, might also seem to lay the court open to the same imputation. There an ice company is guilty of negligence rendering it liable to an employee injured by the starting up of the machinery in a slide while he was at work therein under orders from the superintendent and general manager, where the latter went away from his post at a bell-cord intended to notify the engineer when to start, and failed to conform to a rule of the company requiring the engineer to be notified when any person was in the slide so that the engine would not be started at a signal from the bell without such orders, and the falling of a piece of material thrown by such employee from the slide struck the bell cord, rang the bell, and caused the engineer to start the machinery. But the case was, it would seem, really decided on the ground that the negligent act was done by the superintendent in his official capacity. See note to *O'Neil v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 503.

The situation which supervenes upon the issuance of regulations expressive of the methods by which the master thinks fit to perform a personal duty is precisely the converse of this, and may reasonably be regarded as entailing entirely different consequences. There would be a palpable inconsistency in asserting that the obligation to perform the acts prescribed by such regulations is not as absolute as the obli-

was at work, about 18 feet above the ground, on one of the poles of defendant's system. He was standing on a small platform attached to the pole, and was engaged in scraping one of the wires, when he suddenly fell to the ground, and was badly injured. It is not contended that the place where plaintiff was working was unsafe on account of its height, or for any defect in the platform. It is averred, however, in the complaint, that his fall was caused by a strong electrical shock, which rendered him unconscious, and threw him backwards to the ground; and there was sufficient evidence to warrant the jury in finding that this averment was true. At the time of the action, plaintiff was working under the directions of one Burge, who was a foreman in charge of a gang of men of which plaintiff was one, and at this time Burge was himself working on

the same pole, several feet above the platform on which plaintiff stood. The evidence does not make it entirely clear how the current of electricity came in contact with plaintiff's person. It is averred in the complaint that at the time plaintiff reached the platform there was a strong current running at that point through the wires, parts of which were not insulated. Defendant contends that this was not true; that the wires then were all "dead;" and that, if plaintiff was touched by a current at all, such current was turned on afterwards by the said Burge. And therefore defendant contends that, if plaintiff was injured at all by a current of electricity which was negligently permitted to pass through the wires where he was working, the negligence was that of Burge; that the latter was a coemployee and fellow servant with plain-

tion to afford the servants that particular kind of protection which they will receive if the duty to which the regulations have reference is adequately discharged. Hence the accepted doctrine is that "whenever the act is that of the master, or the duty to be performed is particularly his duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master." *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466. Or, as it has also been put in another case, a master cannot relieve himself from liability for an injury to an employee, resulting from a failure on his part, through his agents, actually to use such care for the safety of employees as the law makes it necessary for him to use, by any regulations, however stringent and however completely enforced, which do not actually result in the use of such care by his agents. *Missouri P. R. Co. v. McElroy* (1888) 71 Tex. 386, 1 L. R. A. 411, 9 S. W. 313.

A master, therefore, is liable for the negligence of an employee to whom is deputed the performance of the one special act without which a rule prescribed with a view to making the place of work safe would be wholly inefficacious. *Evansville & T. H. R. Co. v. Holcomb* (1894) 9 Ind. App. 198, 36 N. E. 39, where a railroad company was held liable for the injuries received by a car repairer in consequence of the negligence of a brakeman, who was directed to notify him, in accordance with a rule of the company, that an engine was about to enter upon the track where he was working.

Compare *Chicago & N. W. R. Co. v. Taylor* (1873) 69 Ill. 461, 18 Am. Rep. 626. In that case injury to a station agent and switchman at a way station was caused by the negligence of other servants of the company whose duty it was, under the rules, to see that cars should not go out upon the road without proper lights and proper brakes. The common master was held liable, and the servant recovered damages.

The great extension which the master's responsibility for dangers of the transitory class receives as a result of conceding a right of action on such a ground is made especially manifest by the decisions adverted to in the following subdivisions. Attention may here be drawn to the fact that in any case where the delinquency complained of was that of an employee who, according to the view accepted in the jurisdiction where the accident occurred, was a vice principal by virtue of his superior rank (see note to *O'Neill v. Great Northern R. Co.* [1900; Minn.] 51 L. R. A. 588, 589), the 54 L. R. A.

master's liability is referable indifferently, either to the theory that the enforcement of rules is a nondelegable obligation, or to the theory that negligence in carrying out rules is reckoned among the official acts of a vice principal. Thus, if one of the rules of the railroad company, furnished to a section foreman for his guidance, provides that "extra trains may pass over the road at any time, without previous notice, and the foreman [of a gang of trackmen] must be always prepared for them;" and another rule provides that "he must run the hand cars with great caution, and he must not permit them to be used unless he accompany them;" and another rule requires him "to compare his time each day with the clock at the nearest telegraph office, or with the conductor on the train,"—these rules, as well as the law, require him to use the opportunities thus daily afforded, or any other opportunities, to ascertain what trains are expected to run over his section of the track by previous arrangements and when, so that he may be prepared for them as well as he can be, and thus diminish the risk of a collision of extra trains with the hand car. If he neglects this duty, and, without any fault of one of the laborers under him, his hand car comes in collision with an extra train, which, had he performed his duty, would not have occurred, and the laborer on the hand car is killed or injured, the railroad company will be liable for the damages so sustained. *Criswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31.

So, also, in *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588, where it was held that the servant of a railway company may rely on the vice principal's promise to protect him while at work on a side track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work, the court said: "It being conceded, as it must be, that the company owed a duty to the men under the car to provide for their safety, can it be that the foreman had no authority in an emergency to use any other means than those adopted by the company? That the red flags, and nothing but the red flags, was the means he was to employ? If for any reason that would clearly, in a given case, have been insufficient as a warning, can it be possible that the foreman would be restricted to the use of the red flags? Or if, in such case, he had had the red flag set up, and one of the men was injured in consequence of its insufficiency to give the warning, that the company would not be liable to the injured party? Has it discharged its duty by simply adopting a means of protection ordinarily suffi-

tiff; and that plaintiff cannot recover of the employer, the defendant, for injuries caused by the negligence of the fellow servant, Burge. There is no doubt that plaintiff and Burge were, in a general sense, fellow servants. This relation between them was not changed by the fact that Burge occupied a superior position in the general service. *Donovan v. Ferris*, 128 Cal. 48, 60 Pac. 519, and cases there cited. If, therefore, plaintiff was injured by the negligence of Burge, and the negligence did not involve a duty which the defendant, as employer, owed personally to plaintiff, as employee, then the offending fellow servant was alone responsible, and the judgment against defendant was unwarranted, as there is no claim that there was any want of care in selecting Burge, or that he was in any way incompetent. But there are certain duties which an employer

owes personally to his employees, and he cannot avoid responsibility for injury to one servant, caused by the failure to perform such duties by delegating their performance to another servant. In such case the fellow servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer,—sometimes called a vice principal. In such case the negligence of the servant is the negligence of the principal, for which the latter must answer. See *Davis v. Southern P. Co.* 98 Cal. 13, 32 Pac. 646; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Elledge v. National City & O. R. Co.* 100 Cal. 282, 34 Pac. 720; *Nixon v. Selby Smelting & Lead Co.* 102 Cal. 458, 36 Pac. 803. Some of such duties, well established in the law, are to furnish proper machinery and appliances and keep them in repair, to

dent, when the person in charge of the work knows that, in the particular case, it is not a sufficient warning? If the foreman has authority in such an emergency, that authority results from his general authority to perform the duty of the company in protecting the employees under his control in the performance of a dangerous work for the company, and he was authorized to make the promise to the plaintiff for the company, and undertook to set out the red flags in his possession, or to adopt any other means necessary to secure the safety of the men, thereby absolving them from the duty of setting out the flag, or setting the watch."

It should also be noted that by thus segregating regulations into two categories determined by their subject-matter, we obtain a fairly satisfactory ground on which to meet the point made by some courts that the "superior-servant doctrine" is legitimately deducible from the doctrine that an employee who promulgates or carries out regulations is a vice principal. See note to *O'Neill v. Great Northern R. Co.* (1900: Minn.) 51 L. R. A. 546, 547.

In *Card v. Eddy* (1893: Mo.) 24 S. W. 746, it was held that a section foreman in charge of a gang of laborers at work along a railway is not a fellow servant with a locomotive fireman while the latter is delivering a message from the road master by throwing it, while tied to a lump of coal, from a passing train, as in so delivering the message he represents the master. Replying to the argument of defendant's counsel that the fireman, as to the act in question, was temporarily in the road department, and thus a fellow servant of the section foreman, the court said: "But this line of argument is intercepted by another proposition. It is the master's personal duty to give direction to the work in hand, and in the matter of communicating necessary directions for that work, by authority of the master, all employees represent the master. For a want of ordinary care in the transmission of such directions or orders the master is liable, if injury results. It has been expressly so held in this state, where the negligent act was performed by a train despatcher in transmitting an order for the movement of trains. *Smith v. Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129. The principle underlying that judgment is applicable to the facts now before us. There is positive proof here that for many years the practice had prevailed to deliver orders to the section foremen, while engaged at work along the road, by the intervention of employees on the trains to pass the points where the foremen were working. This practice was so general and long continued that it might fairly be found that

the master was chargeable with knowledge of it. The proof, however, goes further than that, and positively shows that the practice was part of the method adopted by the road-master himself for communicating orders to his subordinate foremen. Such being the case, it seems to us that in delivering such messages through the agency of the trainmen, the road master represented the defendants, and that the latter should be held answerable for negligence in the transmission of such orders, whereby the plaintiff suffered the injury which forms the basis of this action."

The analogy thus emphasized evidently loses at least a part of its force when we advert to the fact that the quality of the master's obligations with respect to general directions for the conduct of the work varies according to circumstances.

m. Duty to carry out regulations with respect to the movements of trains.

The principles explained in the preceding subdivision have been extensively discussed in that important class of cases which deal with the liability of railway companies for the negligence of employees concerned with the movements of trains. The cases referred to below show that, on the whole, the courts are agreed as to the propriety of making a distinction between the officials ordinarily known as train despatchers and the employees who communicate the direction of those train despatchers to the servants operating the trains. But it is often quite difficult to say whether the act which caused the injury should be treated as one incident to functions of control or to the discharge of ministerial duties merely.

1. Doctrine that train despatchers are vice principals; generally.

It is settled law in most jurisdictions in this country that any employee who is invested with a discretionary power to regulate the running of the trains over an entire railway system or one of its subdivisions represents the railway company in respect to anything which he does in the exercise of that power, whether the despatch of trains is his sole function (*Oregon Short Line & U. N. R. Co. v. Frost* [1896] 21 C. A. 186, 44 U. S. App. 606, 74 Fed. 965; *Crew v. St. Louis, K. & N. W. R. Co.* [1884] 20 Fed. 87; *Clyde v. Richmond & D. R. Co.* [1895] 69 Fed. 673; *Little Rock & M. R. Co. v. Barry* [1893] 58 Ark. 198, 25 L. R. A. 386, 23 S. W. 1097; *Darrigan v. New York & N. E. R. Co.* [1885] 52 Conn. 285, 52 Am. Rep. 590 [Granger,

exercise care in selecting competent servants, to take reasonable care for the safety of the employees, etc. It is also one of these duties to give careful instructions, directions, and warnings to a youthful or inexperienced servant of unusual and hidden dangers of which the employer is aware, and of which the servant, to the employer's knowledge, is ignorant. *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, and authorities there cited; *Ryan v. Los Angeles Ice & Cold Storage Co.* 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471; *Gibson v. Sterling Furniture Co.* 113 Cal. 1, 45 Pac. 5; *Verdelli v. Gray's Harbor Commercial Co.* 115 Cal. 517, 47 Pac. 384; *Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1041; *Mullin v. California Horse-shoe Co.* 105 Cal. 77, 38 Pac. 535; *Hanley v. California Bridge & Constr. Co.* 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 577. And in

such case the employer cannot escape the responsibility by delegating this duty to a fellow servant of the person injured. See cases above cited. Now, in the case at bar it is averred in the complaint that plaintiff was employed by defendant as a common, unskilled laborer, to do "the ordinary work of digging holes for electric poles, repairing electric poles, driving a horse and wagon, and in performing other street work for the maintenance of said poles and wires used in said business of the defendant; and said work was not of a skilled kind, nor was said work of a dangerous character." It is further averred that the work of a "line-man" in defendant's business required great skill and care, and was of a dangerous character; that the dangerous character of such work was well known to defendant, but that plaintiff was wholly unacquainted with the

J., dissenting); *Chicago, B. & Q. R. Co. v. Young* [1858] 26 Ill. App. 115; *Louisville, N. A. & C. R. Co. v. Heck* [1898] 151 Ind. 292, 50 N. E. 988 [Overruling *Robertson v. Terre Haute & I. R. Co.* (1881) 78 Ind. 77, in so far as it recognized no distinction between train despatchers and mere telegraph operators]; *Hannibal & St. J. R. Co. v. Kanaley* [1888] 39 Kan. 1, 17 Pac. 324; *Louisville, C. & L. R. Co. v. Cavens* [1873] 9 Bush, 559; *McLeod v. Ginther* [1882] 80 Ky. 399; *Goodman v. Delaware & H. Canal Co.* [1895] 167 Pa. 332, 31 Atl. 670; *Madden v. Chesapeake & O. R. Co.* [1886] 28 W. Va. 610, 57 Am. Rep. 695; and the cases cited in the following subdivisions [A word sometimes used to designate train despatchers is "train master." *Goodman v. Delaware & H. Canal Co.* (1895) 167 Pa. 332, 31 Atl. 670; *Crew v. St. Louis, K. & N. W. R. Co.* (1884) 20 Fed. 87], or that function is combined with the duties of some other office; as that of superintendent (*Laaky v. Canadian P. R. Co.* [1891] 83 Me. 461, 22 Atl. 367; *O'Laughlin v. New York C. & H. R. R. Co.* [1887] 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384; *Haynes v. East Tennessee, V. & G. R. Co.* [1866] 3 Coldw. 222; *Washburn v. Nashville & C. R. Co.* [1859] 3 Head, 638, 75 Am. Dec. 784; *Cincinnati, N. O. & T. P. R. Co. v. Clark* [1893] 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125); or division superintendent (*Northern P. R. Co. v. Poirier* [1895] 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881; *Chicago, B. & Q. R. Co. v. McLallen* [1876] 84 Ill. 109; *Chicago, B. & Q. R. Co. v. Young* [1888] 26 Ill. App. 115; *Galveston, H. & S. A. R. Co. v. Arispe* [1893] 5 Tex. Civ. App. 611, 23 S. W. 928, Rehearing denied in 5 Tex. Civ. App. 617, 24 S. W. 33; *Chicago, B. & Q. R. Co. v. McLallen* [1876] 84 Ill. 109 [assistant superintendent held to be vice principal in respect to giving orders as to the running of a wild train]); or master mechanic. *Northern P. R. Co. v. Poirier* (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881; *McKune v. California Southern R. Co.* (1885) 66 Cal. 302, 5 Pac. 482 (train sent out without a light).

Such employees are regarded as agents to whom is "delegated supreme authority in the special service" (*Cincinnati, N. O. & T. P. R. Co. v. Clark* [1893] 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125), and to whom is given full control in the management of trains through the telegraph. *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502.

The duty of such employee pertains to management and direction, while the duty of a trainman pertains to obedience. *Smith v. Washash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129. Compare *Darrigan v. New York & 54 L. R. A.*

N. E. R. Co. (1885) 52 Conn. 285, 52 Am. Rep. 590, which also dwells on the fact that in emergencies such an employee must promptly obey the orders of his superiors.

The plaintiffs in most of the cases in which the company's liability is affirmed were train hands, but the right of other employees, such as track repairers, to recover for negligence in directing the movements of a train is equally unquestionable. *Haynes v. East Tennessee, V. & G. R. Co.* (1866) 3 Coldw. 222 (plaintiff was a track repairer); *Galveston, H. & S. A. R. Co. v. Smith* (1890) 76 Tex. 611, 13 S. W. 562 (plaintiff was a laborer traveling on a work train).

2. Train despatchers represent the company as to special orders suspending regular time-tables.

For the cases turning upon the theory that the act of some servant is negligent for the reason that he disobeys some general rule by the command of a superior who has no authority to waive it, see note to *Nolan v. New York, N. H. & H. R. Co.* (1898; Conn.) 43 L. R. A. 348.

Most of the accidents due to the negligence of train despatchers are naturally the result of special orders rendered necessary by the movements of extra trains not provided for in the regular time-tables, or by the failure of the trains specified in such time-tables to arrive at certain stations at the hours appointed. That such orders are issued by train despatchers as agents of the companies is recognized by all the courts which regard them as vice principals. In fact there would be little or no utility in holding them to be vice principals if the doctrine were taken to be inapplicable under such circumstances. In *Lewis v. Seifert* (1887) 116 Pa. 628, 11 Atl. 514, the court reasoned thus: "It is . . . clear that it was its [the company's] duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty which the company owed its employees, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employee. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty; and, while a corporation is compelled to act through agents, yet the agents in performing duties of this character stand in the place of, and represent, the principal. In

duties and dangers of such work, and wholly unskilled therein,—“all of which was at all times herein stated known to said defendant; and said plaintiff did not know, nor was he ever informed by said defendant, nor by anyone else, of the dangerous character of such work, nor of the risk incident thereto.” And it is further averred that, being thus, to defendant’s knowledge, inexperienced, and ignorant of the dangers of the work of a lineman upon wires, he was, without any instructions or warning, and without being furnished with rubber gloves or other protective appliances used by linemen, negligently ordered by defendant to ascend said pole and scrape the wires. While there was some conflict in the testimony as to some of these averments, there was sufficient evidence to warrant the jury in finding that they were true; and, this being so,

other words, they are vice principals. If it be the duty to provide schedules for the moving of its trains which shall be reasonably safe, it follows logically that when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employees engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders. At the time of the collision referred to, Wellington Bertolette was the general despatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company or anyone else. For the purpose of sending out the trains, he wielded all the power of the company. He could send a train out on schedule time or he could hold it back. He could change the schedule time or make new schedules as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order the train was bound to move as he directed. The engineer and conductor had but one duty, and that was obedience.

... It is true the order in this case was sent by John J. Sellers. But Sellers was the assistant of Bertolette, and in his absence was clothed with all his powers. For the purposes of this case Sellers was Bertolette and Bertolette was the company. The distinction between a general despatcher—one who has the absolute control of all the trains upon the road—and the conductor or engineer of a train is manifest. The latter have the duty of obedience. Their business is to run their trains under orders from the despatcher, and if an employee is injured as the result of their negligence, the company is not liable. They are in the same common employment, and are laboring together to the same end, under orders from superior authority. The argument for the plaintiff in error, if carried to its logical conclusion, would wholly obliterate all distinction between railroad employees from the president down, as they may all be said to be in one sense in the same common employment and paid by the same corporation.”

The same view has been adopted in New York, where a railroad company has been held liable for the negligence of a train despatcher, the reasoning of the court being as follows: “In this case the evidence would seem to be quite conclusive that the defendant had fully discharged the duty which it owed its employees in the way of establishing and promulgating ap-
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it was the duty of defendant to inform and warn plaintiff of the peril to which he ignorantly exposed himself by coming in contact with an invisible and dangerous electrical current. The contention, therefore, that under the law the verdict was not warranted by the evidence, cannot be maintained.

There are a number of exceptions to instructions given by the court on its own motion, to instructions given at the request of plaintiff, and to the refusal of instructions asked by defendant. We do not, however, deem it necessary to discuss these instructions in detail. If the law be as above stated,—that is, if the duty to instruct and warn plaintiff as above stated was a duty which defendant personally owed to plaintiff, and which it could not avoid by delegating it to Burge,—then the rulings of the

proper and sufficient rules and regulations for the government and operation of the various trains upon its road and its furnishing general time-tables pertaining thereto. Whether the train despatcher violated one or all of such rules is not material in the view we take of the case, because the defendant had not performed its whole duty in promulgating rules, nor is a defense made out when it is shown that, if the train despatcher had obeyed the rules, the accident would not have occurred. If the defendant owed a duty as master to give correct orders to these trains, or at least to take due and reasonable care to give them, the failure to perform that duty is the failure of the master in his character as such, although he intrusted the performance of the duty to the train despatcher. These trains were being run without regard to their ordinary time-tables; they were several hours late, proceeding in opposite directions, and each was approaching the other in entire ignorance of the other’s whereabouts. Both were necessarily dependent upon the special orders they received from Hornellsville. As was said in *Slater v. Jewett* (1881) 85 N. Y. 62, 29 Am. Rep. 627, the master had the right to vary from the regular time schedules laid down for these trains. It was part of the details incident to the operation of the road, but when a variation, or, in other words, when a special time-table is made out for two trains by which they are to run, it is the duty of the master, not alone to take reasonable care that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation ordered, and by which the trains are run, shall not necessarily or probably lead to disaster when obediently carried out. Reasonable care in originating and formulating the order is necessary, and is the duty of the master. When the train despatcher originates and promulgates such orders as were given in this case, he is acting as the master, or, as it is said, his *alter ego*, and the master is liable for the negligence of the agent he has employed to do his, the master’s, particular work.” *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. E. A. 396, 37 N. E. 466, Reversing 55 Hun, 51, 8 N. Y. Supp. 272.

Similarly, it is held in Connecticut that the effect of certain rules as to running trains by special orders, by one of which it is provided that all orders shall be given by a superintendent, or by a despatcher under the direction of a superintendent, and by another that superintendents are supreme in their own divisions, and responsible only to the management for such orders as they may give, is to delegate to the

court in giving and refusing instructions were correct. The main objection made by defendant to these rulings is that they should have been made upon the theory that Burge and plaintiff were fellow servants, and that the general rule as to injuries caused by the negligence of a fellow servant should be rigidly applied to the case at bar, and that defendant was not responsible if Burge neglected to inform and warn plaintiff of the dangers, to him unknown, to which a compliance with Burge's order exposed him. In the instructions on other points we see no

error. Questions of fact were properly submitted to the jury.

It is strenuously contended that the verdict is excessive. The amount of damages awarded by the jury was, under the circumstances, quite large. A smaller amount would, perhaps, have been more just. But we cannot say that, as a matter of law, the verdict should be set aside on the ground of excessive damages.

The order appealed from is affirmed.

We concur: Temple, J.; Henshaw, J.

train despatcher the whole power of the corporation in respect to moving the trains safely, and therefore to make him the representative of the company in that regard. *Darrigan v. New York & N. E. R. Co.* (1884) 52 Conn. 285, 52 Am. Rep. 590. The court said: "It is the duty of a railroad corporation to prepare a timetable and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them,—a train despatcher acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer?"

In *Galveston, H. & S. A. R. Co. v. Smith* (1890) 76 Tex. 611, 13 S. W. 562, the court said: "Upon the hypothesis that the company is bound to inform its servants and warn them of what is necessary to avoid collisions with trains, and that it cannot shift its own duty to a servant and then in case of injury claim that it was the result of negligence of a fellow servant, the foregoing cases will stand upon the same principle. A failure to perform this duty increases the risk of employees on and operating trains, and exposes them to risk not embraced in their implied contract. The company ought to know where its trains are, and if the operators do not know it is the duty of the company to inform them, and give such orders as are reasonably necessary to avoid increased peril." See also the following cases to the same effect: *Missouri, K. & T. R. Co. v. Elliott* (1900) 42 C. C. A. 188, 102 Fed. 96; *Nolan v. New York, N. H. & H. R. Co.* (1898) 70 Conn. 159, 43 L. R. A. 305, 39 Atl. 115; *Cincinnati, I. St. L. & C. R. Co. v. Lang* (1889) 118 Ind. 579, 21 N. E. 317 (company bound to see that a section-hand sent by a special order on a hand car along the track is not exposed to the danger of a collision with a wild train); *Missouri, K. & T. R. Co. v. Elliott* (1899; Ind. Terr.) 51 S. W. 1067; *McLeod v. Ginther* (1882) 80 Ky. 399 (telegram worded so as to mislead the conductors of two trains); *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502 (instruction to engineer to wait for another train at a certain point); *Smith v. Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 350, 4 S. W. 129; *Sheehan v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 332; *McChesney v. Panama R. Co.* (1892) 49 N. Y. S. R. 148, 21 N. Y. Supp. 207 (irregular train so run as to cause accident); *Goodman v. Delaware & H. Canal Co.* (1895) 107 Pa. 332, 31 Atl. 670 (wild train sent out collided with another); *Washburn v. Nashville & C. R. Co.* (1859) 3 Head, 638, 75 54 L. R. A.

Am. Dec. 784 (superintendent started a train out of time, without any precaution to avoid a collision with a train coming in the opposite direction); *Hogan v. Missouri, K. & T. R. Co.* (1895) 88 Tex. 679, 32 S. W. 1035; *Galveston, H. & S. A. R. Co. v. Arispe* (1893) 5 Tex. Civ. App. 611, 23 S. W. 928, Rehearing denied in 5 Tex. Civ. App. 817, 24 S. W. 33 (conflicting orders caused collision); *Houston & T. C. R. Co. v. Stuart* (1898; Tex. Civ. App.) 48 S. W. 799, Reversed on other grounds in (1899) 92 Tex. 540, 50 S. W. 333; *Phillips v. Chicago, M. & St. P. R. Co.* (1885) 64 Wis. 475, 25 N. W. 544.

By some rules it is expressly stated that they may be suspended by the special order of some specified agent of the employers. See *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 37 Ohio St. 549, where the rule under discussion, which regulated the movements of freight trains, provided for its suspension by the company's superintendent, and for the precautions to be observed during such suspension.

No trainman has any voice in running a train by special order, but is simply charged with the duty of carrying out the orders that come to him from the train despatcher's office. *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466. Compare also, as to this consideration, the *Pennsylvania* and *Connecticut* cases cited, *supra*.

The mere fact that the orders given by the train despatcher were verbal instead of written, where the rules call for the latter, makes no difference. *Smith v. Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129.

But the right to rely implicitly upon the propriety of a special order from a train despatcher cannot be extended to cases in which the circumstances are such that a prudent man would feel bound to seek some further information as to the reason why the regular routine of the business has been in this instance departed from. In *Wescott v. New York & N. E. R. Co.* (1891) 163 Mass. 460, 27 N. E. 10, the conductor of a train was held to be negligent in starting the train, when he knew that, under the rules, he had no right to do so until the arrival of a certain train, without inquiring of the despatcher on that section of the road whether he had received any special information which would make it safe to leave the station. The court said that, even supposing that it was ordinarily his duty to obey the orders of the despatcher, even if they were in violation of the rules of the road, this particular order was so obviously wrong, and was likely to involve such dreadful consequences, that it was manifestly negligent to act upon it without inquiring the reason for it.

One form of special order consists in the substitution of a temporary for the regular timetable. The promulgation of the former, no less than the latter is deemed to be an act done in pursuance of the company's absolute duty. *Frost v. Oregon Short Line & U. N. R. Co.* (1895) 69 Fed. 936, where it was held that a telegraph operator in giving notice to an engineer of a temporary change in the running

time of his train was performing a duty of the company. The distinction taken in *Baltimore & O. R. Co. v. Camp* (1895) 13 C. A. 233, 31 U. S. App. 213, 65 Fed. 952, (see III. m. 4, *infra*), was disapproved. The company is, of course, no less liable where the train despatcher has failed altogether to issue the orders required by the emergency (*Chicago, B. & Q. R. Co. v. McLallen* [1876] 64 Ill. 109; *Sutherland v. Troy & B. R. Co.* [1899] 28 N. Y. S. R. 201, 8 N. Y. Supp. 83 [despatcher should have sent orders to have a train stopped by signal at a certain station]; *McChesney v. Panama R. Co.* [1892] 49 N. Y. S. R. 148, 21 N. Y. Supp. 207, [1893] 74 Hun. 150, 26 N. Y. Supp. 245 [injury partly caused by the instructions actually issued, and partly by the lack of full instructions]; *Louisville, C. & L. E. Co. v. Cavens* [1873] 9 Bush, 559 [despatcher failed to stop a train following another which had been "stalled" on a gradient]); or to give obligatory information as to the movements of trains (*Louisville, N. A. & C. R. Co. v. Heck* [1898] 151 Ind. 292, 50 N. E. 983, which holds that a train despatcher's disregard of a rule prescribing that an extra train despatched after a work train has already gone out on the road shall be notified to protect itself against such work train is such negligence as will render the company liable for injuries caused by a collision between the two trains; *Clyde v. Richmond & D. R. Co.* [1895] 69 Fed. 673 [engineer injured owing to the fact that a station master was not notified as to the coming of an extra freight train]; *Galveston, H. & S. A. R. Co. v. Smith* [1890] 76 Tex. 611, 13 S. W. 562. See also *Northern P. R. Co. v. Charles* [1892] 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562, where it was laid down in general terms that it is the duty of a railroad company to keep the hands employed on a certain section informed as to the movement of trains over it, and that it is therefore liable for injuries resulting to one of them from the neglect of a telegraph operator to communicate such information. The question of the responsibilities generally of a telegraph operator was expressly waived, the case being decided on a demurrer to a complaint which alleged the existence of the above duty and its breach), than it is for his negligence in sending improper orders.

The single prerequisite of liability under the above doctrine is that the delinquent should have been an employee intrusted with discretionary powers to regulate the movements of the trains as seems most conducive to the interests of the company. This conception is emphasized in *McChesney v. Panama R. Co.* (1892) 49 N. Y. S. R. 148, 21 N. Y. Supp. 207. See also the extracts quoted *supra*.

Hence a train despatcher clothed with the powers of a general train despatcher in his absence, is no less a vice principal than the official whose place he takes. *Lewis v. Seifert* (1887) 116 Pa. 628, 11 Atl. 514. Compare also the cases cited *infra*.

Nor is the company allowed to escape responsibility simply because the party who sends the orders respecting the trains issues them in the name of some superior official, such as a division superintendent (*Louisville, N. A. & C. R. Co. v. Heck* [1898] 151 Ind. 292, 50 N. E. 983); or an assistant superintendent.

In *Chicago, B. & Q. R. Co. v. McLallen* (1876) 64 Ill. 109, the court reasoned thus: "As between the conductor and the company the assistant superintendent to whose orders the trains are all subject is the representative of the corporation. His orders to the conductor of a train are essentially the orders of the employer. This rule applies as well to all orders issued by his assistants in his office and issued in his name. These orders were all signed in the 54 L. R. A.

name of Chappell, the assistant superintendent. If those intrusted by him with the management of the business of the corporation by orders issued in his name neglect to issue a necessary order, that is his neglect and the negligence of the corporation."

Still less is such a circumstance a bar to the action, where the ordinary routine of a railway office, acquiesced in by the general superintendent and other officials, is that the despatches are sent in such superintendent's name, and the evidence is that he was absent when the despatch in question was sent. *Lasky v. Canadian P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367. The court said: "The defendants assail the plaintiff's case from another position. Inasmuch as the despatch to the plaintiff was really sent in the superintendent's name by the train despatcher at Brownville, the superintendent not being there at the time and not cognizant of it, the plaintiff himself being fully aware of the facts, it is contended that the plaintiff cannot prevail in the action because he and the train despatcher were fellow servants in the same employment. We do not assent to this position. It appears that it was customary for the train despatcher thus to use the superintendent's name, and that the practice was acquiesced in by the superintendent and other officials connected with the road. An act done for the superintendent by his authority, either general or special, is his act. The employee is not required nor permitted to investigate the question of authority. The superintendent's name conclusively imports authority, unless it be forged. The servant must obey or be discharged from his employment. It would greatly demoralize the service if it were otherwise. Performance of duty to the road places all consequent liabilities upon the road."

Another way of arriving at the same result is to say that, for the purpose of fastening liability of the company, any officer acting by the authority of the superintendent is put upon the same footing as the superintendent himself. *O'Laughlin v. New York C. & H. R. R. Co.* (1887) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384.

3. Doctrine that train despatchers are not vice principals.

The decisions in which superintendents and train despatchers have been held to be mere co-servants of trainmen are either rulings by courts in which the general doctrine of common employment was relied on, and the effect of the distinction between the master's assignable or non-assignable duties was not adverted to or discussed (*Robertson v. Terre Haute & I. R. Co.* [1881] 78 Ind. 77, 41 Am. Rep. 552; *Millsaps v. Louisville, N. O. & T. R. Co.* [1891] 69 Miss. 423, 13 So. 690; *Wonder v. Baltimore & O. R. Co.* [1870] 32 Md. 411, 3 Am. Rep. 143); or cases in which the negligence alleged had no relation to the operation of trains (*Norfolk & W. R. Co. v. Hoover* [1894] 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994); or which turned upon some special grounds, as that the plaintiff did not offer evidence tending to show that no co-service existed. *Blessing v. St. Louis, K. C. & N. R. Co.* (1883) 77 Mo. 410.

It seems doubtful whether, even in Missouri itself, this last case would now be followed (see *Smith v. Wabash, St. L. & P. R. Co.* [1887] 92 Mo. 359, 4 S. W. 129); but, at all events, it carries a useful warning to practitioners.

4. Liability of railway companies for the negligence of servants who transmit the orders or see that they are carried out.

In *Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952

(cited III. m. 2, *supra*), it was laid down that a train despatcher, in devising a temporary timetable which, in a sudden emergency, is to take the place of the regular time-table, and in issuing telegraphic orders for the operation of the trains under the new schedule, acts as a vice principal; but a telegraph operator who merely transmits to the trainmen the directions he receives from the train despatcher as to the movements of the trains is a fellow servant of the engineer. To the same effect, see *Cincinnati, N. O. & T. P. R. Co. v. Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125.

When the proper servant is so informed and ordered, and he then neglects his duty or violates his orders, causing injury to another servant, the negligence is his, and the doctrine of fellow servants would apply. *Galveston, H. & S. A. R. Co. v. Smith* (1890) 76 Tex. 618, 18 S. W. 562, where it was held that, if the delinquent roadmaster had control of the train men operating a work train and its movements, and was guilty of negligence in moving the train from a certain station without notification as to the approach of specials with which there was danger of collision, or if his neglect consisted in having the train stopped at another station for such time as rendered the danger of collision with other trains imminent, the negligence would be his own as a servant of the company, and not the negligence of the company.

As already remarked, the line which separates the two breaches of duty here contrasted is sometimes rather thin, but it seems more than probable that the cases referred to *infra* would not be approved in all jurisdictions.

The omission of a telegraph operator at a way platform to see that a despatch was understood by the conductor of a train, by whose negligence the plaintiff, the engineer of another train, was injured, is an act for which the company is responsible. *Madden v. Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695.

Neither the conductor of a train coming into collision with a car having section hands on board standing upon the track at a station, because of such conductor's disregard of signals displayed at the station, nor a telegraph operator at such station who displays improper signals, can be regarded as a fellow servant of such section hands. *Haney v. Pittsburgh, C. C. & St. L. R. Co.* (1893) 38 W. Va. 570, 18 S. E. 748.

The telegraph operator in charge of a signal station, who controls by signal orders the running of trains over a block section of a railroad, is not the fellow servant of a brakeman injured on such section by the operator's negligent management of the running of trains. *Flannegan v. Chesapeake & O. R. Co.* (1895) 40 W. Va. 436, 21 S. E. 1028, following the last-cited case. The court said: "In this case the defendant, seeking to discharge its personal duty, and provide a safe track, and at the same time facilitate the rapid movement of trains, established the signal station, and placed the operator in charge with full authority, by means of a code of signal orders equally as effective as any other kind could possibly be, to control the running of all trains over this block; and all trainmen of every train were under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties, she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master; yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow servant of the train men, who are entirely at her command, and who can neither influence nor control her own independent actions? She is as much the master of her section block as the master is of the whole road." 54 L. R. A.

A station agent charged with the duty to see that all cars were so placed on the sidetracks as to be clear from trains passing on the main line is not a fellow servant of a section hand upon a work train passing such station. *St. Louis, A. & T. H. R. Co. v. Biggs* (1894) 53 Ill. App. 550.

Some other doubtful decisions are noted in the preceding section.

n. Duty to impart information as to permanent dangers normally incident to the work at the time it is entered upon.

Contrast V. n, infra.

In any case in which, for one or other of the reasons explained in the note to *James v. Rapides Lumber Co.* (1898; La.) 44 L. R. A. 33, a master owes his servant the duty of explaining to him the nature of the dangers to which the work will regularly and normally expose him, and the most effectual means by which to avoid them, that duty is not discharged by delegating the performance of it to an agent.

If he cannot perform the duty himself he must provide a competent person to give such necessary instruction; and, whether the person selected for that purpose be a coemployee of the promoted servant or not, the employer must see to it that he is a competent and trustworthy instructor; otherwise he will be liable for the consequences of his incompetency or negligence. The person to whom the duty of giving the necessary instruction in such cases is delegated represents the employer and *pro hac vice* occupies the position of vice principal. *Lebbering v. Struthers* (1893) 157 Pa. 812, 27 Atl. 720.

In *Wheeler v. Wason Mfg. Co.* (1883) 135 Mass. 297, the defendant presented the question whether the master's duty of giving notice to his servant of risks and perils to which the latter will be exposed in the course of his employment, when such duty exists, is an absolute one, or whether it is merely the duty of taking reasonable and proper pains to inform the servant of them. This question arose in three forms: (1) In the refusal to instruct the jury that, if the defendant's foreman directed a coservant of the plaintiff to give proper instruction and caution to the plaintiff, the latter could recover by reason of such coservant's failure to do so, if he was a competent person for that purpose; (2) in the instruction that, if there were dangers in the business known to the defendant, which by reason of the plaintiff's inexperience were unknown to him, and which by the exercise of ordinary care he could not have known, the defendant is bound at its peril to give him reasonable warning of them; and (3) in the exclusion of the evidence of what the foreman told the coservant to do, in instructing the plaintiff. The court said: "That question was somewhat considered in *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 596, 3 Am. Rep. 506. But the question here is the more general one, whether it is an affirmative, positive duty resting upon the master, for the non-performance of which he will be liable, or whether it can be delegated to a proper substitute, and he be thereby relieved from responsibility. We are of opinion that the duty resting upon the master is not merely one of reasonable care and diligence to give a proper notice; but that he is responsible in case the servant suffers through a want of receiving a proper notice of the risks to which he is exposed. The servant does not assume, and is not to bear the risk of, unknown and undisclosed perils; but he is held to take those risks which he knows, or which, by the exercise of ordinary care, he ought to know, to be incident to the nature of the business in the place where and the manner in which it is carried on. The master's duty is

to provide machinery which is reasonably safe and proper; and if the use of it is attended with special peril, such as his servants ought to know, and if there is, accordingly, under the circumstances of the particular case, a duty resting upon him in respect to giving notice to the servants of such special peril, that duty is not discharged by delegating the performance of it to a third person. The servants should not be held to assume and undertake to bear the risk of latent and concealed perils, merely because the master takes reasonable care and pains to give notice of them. It is more reasonable to hold that, where the danger is known to the master and unknown to the servant, the master should be held to see to it that the servant, when put upon work which exposes him to danger, should be informed of it. The master must not expose his servant to an unreasonable risk. Where the servant is as well acquainted as the master with the dangerous nature of the machinery or instrument used, or of the service in which he is engaged, he cannot recover. But where the master employs a servant in the use of machinery which he knows, but the servant does not know, to be attended with peculiar danger, we are all of opinion that he must be held responsible for an injury which occurs in consequence of his failure to see to it that a proper notice is given."

In *Brennan v. Gordon* (1890) 118 N. Y. 480, 8 L. R. A. 818, 28 N. E. 810, it was held that there was error in a charge given at the request of defendant that, "If the jury find, as matter of fact, that the plaintiff was put under instruction of a competent instructor, and that the instructor was as well acquainted as defendants with the nature and character of the service which he undertook to perform, he cannot recover." The court said: "The jury could not otherwise understand this instruction than to mean that the defendants' whole duty to the plaintiff was performed when they assigned as competent an instructor to plaintiff as the defendants were. This was erroneous in two respects. The degree of the instructor's competency was gauged by the competency of the defendants. The plaintiff was entitled to have, and the defendants were bound to provide him with, an instructor competent to teach the art of managing an elevator, regardless of the competency of the defendants in that respect, and of which there was no proof whatever in the case. But the defendants were not only bound to furnish plaintiff with an instructor absolutely competent to manage an elevator, but the defendants were also bound to provide such an instructor for a reasonable length of time to teach the plaintiff how to manage the elevator, and that the instructor should be guilty of no negligence to the injury of the plaintiff while he was being instructed. These relations spring from the fact that during this period the instructor is doing the work and standing in the place of the defendants, the masters." To the same effect are the following cases: *Sullivan v. India Mfg. Co.* (1878) 118 Mass. 386; *Verdell v. Gray's Harbor Commercial Co.* (1897) 115 Cal. 517, 47 Pac. 364; *Felice v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 345, 43 N. Y. Supp. 922; *Emma Cotton Seed Oil Co. v. Hale* (1892) 54 Ark. 232, 19 S. W. 600; *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Keller v. Gaskill* (1898) 20 Ind. App. 502, 50 N. E. 863; *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 966; *Consolidated Coal Co. v. Wombacher* (1890) 134 Ill. 57, 24 N. E. 627; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (1899) 97 Fed. 245; *Addicks v. Christoph* (1899) 62 N. J. L. 786, 43 Atl. 196; *Lebbering v. Struthers* (1893) 157 Pa. 312, 27 Atl. 720; *Smith v. Hillside Coal* 54 L. R. A.

& *I. Co.* (1898) 186 Pa. 28, 40 Atl. 287; *Strauss v. Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425.

It follows, therefore, that in cases where the injured employee is an infant or inexperienced, the rule as to fellow servants "only holds good when it appears that such employee has been properly instructed by his employer as to the dangers of his employment, or has acquired knowledge of such dangers from other sources" (*Jones v. Florence Min. Co.* [1886] 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207); and that the mere fact that a defect in a machine is due to the fault of a coemployee will not absolve a master from the duty of instructing a servant, where the danger resulting from the defect is one which is not within his comprehension. *Bjbjlan v. Woonsocket Rubber Co.* (1893) 164 Mass. 214, 41 N. E. 265.

Ordinarily the employee who was in control of the injured servant will be regarded as the person upon whom, as the master's agent, the duty of instruction devolved. It was doubtless this customary apportionment of functions which has influenced the choice of phraseology in the remark of the supreme court of Indiana that, "If the agent or servant upon whom the power to command is given exercises the power, and fails to discharge the obligation, to the hurt of the servant who is without fault, the failure is that of the master, and he must respond." *Atlas Engine Works v. Randall* (1885) 100 Ind. 296, 50 Am. Rep. 798.

As in the case of other absolute duties the control exercised by the employee upon whom devolved the function of giving instruction may be of such a character that he is a vice principal simply by virtue of his position of superiority. Wherever the delinquent is deemed to be a representative of the master on this ground, the liability of the master may, it is obvious, be referred either to the theory that the duty of instruction is nondelegable, or to the theory that the function of instruction is one of those which are official in the sense explained in the note to *O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. pp. 584 et seq. Thus, in a state where the doctrine of departmental control is applied, that one has power to employ and discharge laborers, and is the foreman in his department, has the duty of the master devolved on him to instruct employees as to the danger of the employment. *St. Smith Oil Co. v. Slover* (1893) 58 Ark. 168, 24 S. W. 106.

Similarly, in courts where vice principalship is inferred from the mere exercise of control, the master is deemed answerable for the failure of controlling employees to instruct the subordinates. *Norton v. Volks* (1895) 153 Ill. 402, 41 N. E. 1085; *Alton Paving, Bldg. & Fire Brick Co. v. Hudson* (1897) 74 Ill. App. 612, Affirmed in (1898) 176 Ill. 270, 52 N. E. 256; *Consolidated Coal Co. v. Wombacher* (1890) 134 Ill. 57, 24 N. E. 627.

In another state, where the effect of vesting a superior servant with the power of employing and discharging his subordinates is to make him the master's *alter ego* as to them, it has been held that the superior servant is none the less a vice principal in respect to the duty of instruction because the employing and discharging are subject to the consent and approval of the superintendent. *International & G. N. R. Co. v. Hinzle* (1891) 82 Tex. 623, 18 S. W. 631, where the plaintiff was ordered to paint cars without being instructed as to a rule requiring men working on side tracks to set out signal flags.

Indeed, a third basis of liability is predicable in such cases, since an order to do work for which the subordinate is unfitted by reason of his ignorance is itself a negligent act of a manifestly official character, and it is therefore not

necessary to rely upon a specific duty of instruction. See, for example, *Missouri P. R. Co. v. Perego* (1887) 36 Kan. 424, 14 Pac. 7, where the court, while advertent to the duty to instruct an inexperienced boy, seems also to consider the defendant liable on the ground that the foreman was negligent in directing the boy to obey an unskilled mechanic in the performance of work which demanded expert knowledge.

Under the general rule stated above, the superior employee will necessarily be treated as the representative of the master as to the duty of instruction, even though he may be, for other purposes, a mere servant in the jurisdiction where the cause of action arises.

The master having subjected the servant to the command of another without information or caution with respect to all such obligations as the master owes, the other stands in the master's place; and this is so notwithstanding the two servants are, as regards the common employment, fellow servants. *Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798. See also *Olsen v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866 (foreman of gang shoveling snow,—vice principal in regard to the duty of notifying his subordinates of rules); *Bjbljan v. Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265 (man in charge of machine like that which plaintiff was handling, vice principal when deputed by the foreman to instruct the plaintiff); *Wallace v. Standard Oil Co.* (1895) 66 Fed. 260; *Klochinski v. Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934; *Camp v. Hall* (1897) 39 Fla. 535, 22 So. 792; *Neillon v. Marinette & M. Paper Co.* (1890) 75 Wis. 579, 44 N. W. 772 (foreman); *Strauss v. Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425 (foreman); *O'Connor v. Barker* (1898) 25 App. Div. 121, 49 N. Y. Supp. 211 (floor foreman in factory).

The doctrine which exempts the master from liability arising out of the negligence of fellow servants is based upon the assumption by the servant of the ordinary risks of his employment, but has no application to risks which are not contemplated by him in entering upon the service. *Burke v. Anderson* (1895) 16 C. C. A. 442, 34 U. S. App. 182, 69 Fed. 814 (where the explosion of a stick of dynamite under a blow from the pick of a common laborer who had been set to work after a blast without any warning as to the possibility of peril from unexploded shots was held to be an extraordinary risk).

The failure of an agent to instruct a fellow servant as to his duties naturally results in putting an incompetent employee in a position in which his want of skill will be dangerous to his collaborators. Under such circumstances it is clear that the liability of the master may be referred to his breach of either one of two non-delegable obligations. Such was the situation in *Sullivan v. Metropolitan Street R. Co.* (1900) 58 App. Div. 89, 65 N. Y. Supp. 842.

As there is no duty to instruct a servant as to the special dangers of work which is outside the scope of his original employment and to which his superior has no authority to assign him, the negligence of the superior in ordering him to perform such work is that of a fellow servant merely. In such a case the immunity of the master is obviously the result of a consideration which renders it wholly unnecessary to advert to, and impossible to rely upon, the nondelegable quality of the duty of instruction. *Crown v. Orr* (1893) 140 N. Y. 450, 35 N. E. 648. Contrast with this case *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, where the authority of the foreman in the premises seems to have been conceded.

One conjunction of circumstances in which this principle operates in the master's favor 64 L. R. A.

arises where an uninstructed servant undertakes a duty which he was not authorized to undertake.

Plaintiff, a street-car driver, in crossing an excavation, was obliged to unhitch his team, and leave the car, under the control of the conductor, to come down the grade of its own weight, past the excavation. In getting the team around the excavation, plaintiff stumbled and fell across the track, and the conductor, who had just been hired, and had received no instructions as to the use of the brake, turned it the wrong way, whereby the car ran over plaintiff and injured him. It was shown on the trial that the contractor making the excavation provided men to push the cars going up grade past the excavation. Held, that this fact did not tend to show that it was not the duty of the conductor to take charge of the car while coming down grade. *Sullivan v. Metropolitan Street R. Co.* (1900) 53 App. Div. 89, 65 N. Y. Supp. 842.

o. Duty to impart information as to permanent dangers superadded to the environment after the work has begun.

Some courts have deferred to the force of the consideration that there is apparently no logical ground upon which it is possible to ascribe a nondelegable quality to the duty discussed in the preceding section and at the same time to refuse to predicate such a quality of the duty to imparting to a servant such information as is proper under the circumstances with regard to new dangers which are of such a nature that his safety will be continuously imperiled until the normal conditions of his environment have been restored. A master, it is held, cannot delegate to another, even though he be a fellow servant, the duty of notifying his servant of increased danger so as to absolve himself from liability for failure to communicate it. *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285 (negligence of persons who, under a license from the master, put in new burners in a brick kiln for the purpose of testing their advantages).

The rule applies where the increase of danger arises from some extrinsic alteration in the character of the environment itself. See the case last cited, and also *Cerillos Coal R. Co. v. Deserant* (1897) 9 N. M. 49, 49 Pac. 807 (a fire boss in a mine is a vice principal as to the performance of the duty of informing miners where they may work without being endangered by accumulations of gas); *Elledge v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720 (foreman supervising work of excavation held to be a vice principal in regard to warning laborers as to any special danger of a subsidence).

A master is liable for the negligence of his "walking boss" in failing to notify one of a gang of men who were directed to help in putting out a fire that the stump of a tree had been so burned at the bottom that it was likely to fall. *Maltby v. Belden* (1899) 45 App. Div. 384, 60 N. Y. Supp. 824. See also *Boelter v. Ross Lumber Co.* (1899) 103 Wis. 324, 79 N. W. 243.

The testimony of the foreman of a factory that a trapdoor in a passageway was used on an average about three times a week, and from five to ten minutes at a time, justifies an inference that it was expected to be used, and that the act of a servant in opening it was not unauthorized in such a sense as to prevent recovery from the employer by a fellow servant injured by falling through the trapdoor, upon the ground of the employer's negligence in maintaining the door in the passageway and failing to notify him thereof. *Johnson v. Field-Thurber Co.* (1898) 171 Mass. 481, 51 N. E. 18.

In *Smith v. Oxford Iron Co.* (1880) 42 N. J.

L. 467, 36 Am. Rep. 535, it appeared that one Scranton, the president of the defendant company, to whose care was committed the superintendence of the business of the corporation, introduced the use of giant powder. It was clearly shown that it was a highly dangerous explosive, and that the proper manner of using it was not made known to the plaintiff, although printed instructions were in the possession of the company. The court said: "Before allowing this new compound to be introduced, it was a duty which the company owed to the plaintiff to ascertain and make known its properties and the mode of using it, either to the plaintiff himself or those under whose direction he worked. The obligation to do so rested upon Scranton, as the head officer of the company, and his neglect in that respect was the neglect of the company itself. It was gross negligence in the company to furnish such an article for a laborer's use without giving him the requisite information. Whether the company was aware of its dangerous quality, or furnished it for use without having taken steps to obtain such knowledge, it is equally liable. It was a duty which the company, through Scranton, was bound to perform, to see that such reasonable care as the exigency of the case demanded, was taken, and to impart to the subordinates full information as to the manner of applying the new compound, before placing it in the hands of an ignorant laborer. This obligation resting on the company itself, the president could not shift its liability by referring the matter to one of his subordinates."

It would seem that, if there was any object in doing so, all the cases in which the master has been held liable for the failure of a servant to discover defects in an instrumentality which he has to supervise might be brought under this principle.

The rule against delegation of power is equally applicable where the servant has been transferred to a new place of work where he will be exposed to some abnormal risk of the kind now under discussion.

In *McMahon v. Ida Min. Co.* (1897) 95 Wis. 308, 70 N. W. 478, it was held that a master is "not to set a man at work among latent and extraordinary dangers, of which the employee knows nothing and which he cannot ascertain by experience or observation;" and that "in taking the plaintiff from one part of the mine in which he had been at work and setting him at work in a different place," and not warning him as to certain unexploded blasts, the shift boss was plainly and palpably acting in the capacity of the master.

This phase of the master's obligation to warn was recently considered at great length in *Carlson v. Northwestern Teleph. Exchange Co.* (1896) 63 Minn. 428, 65 N. W. 914, where the court reasoned thus: "If the nature and magnitude of the master's work, whether it be that of construction or otherwise, and the number of men engaged in its execution, are such that the exercise of ordinary care for the safety and protection of the workmen from unusual and unnecessary dangers requires that they be given reasonable orders, and that they be not ordered from one part of the work to another, without warning, into places of unusual danger and risks, which are not obvious to the senses and known to them, but which might be ascertained by the master by a proper inspection, the absolute duty rests upon the master to give such reasonable orders. Considerations of justice and a sound public policy impose this duty upon the master as such, which he cannot delegate so as to relieve himself from the consequences of a negligent discharge of it. Where a large number of men are employed upon the

same work, it is essential that reasonable orders, regulating their conduct, and assigning to them proper places in which to work, should be given. It is the duty and the right of the master to give orders and direct the places where his servants shall work. Their duty is instant and absolute obedience, unless it be obvious to them that such obedience will expose them to unusual dangers. Despatch, discipline, and the safety of person and property in the execution of work imperatively require that the master should order and the servant obey. It would be practically impossible to carry on a work of any magnitude on any other base. A workman, when ordered from one part of the work to another, cannot be allowed to stop, examine, and experiment for himself, in order to ascertain if the place assigned to him is a safe one; and therefore in obeying the order, while he assumes obvious and ordinary risks, he has a right to rely upon a faithful discharge of the master's duty to use ordinary care to warn and protect him against unusual dangers. Any rule or doctrine which deprives the workman of this right and protection when the master delegates the power and duty of giving such orders to a subordinate, no matter how high or low his rank or grade, is unsupported by reason, violates all considerations of justice, and is not supported by the weight of authority." The standpoint of the court will be made somewhat clearer by quoting the following passage from the concurring opinion of Mitchell, J.: "The principle which this court has always announced as the test is that it is not the mere rank or grade of the superior employee, but the nature of the duty or service which he was performing, which determines the question; that, whenever a master delegates to another the performance of a duty which he owes absolutely to his servants, or which would fall within the line of his duty, as master, if personally present, then, in the performance of such acts such other person would be, as to other servants, a vice principal, and not a fellow servant. Whether we have always correctly applied this test to the facts is another question. For example, in hiring and discharging workmen the foreman in the present case would represent the master, and his negligence in the premises would be chargeable to the master. So, also, in the matter of selecting or inspecting implements and other instrumentalities for the performance of the work, assuming that this duty had been delegated to him. And where, as in this case, he had been given entire control of the work, and of all the workmen engaged in it, with absolute and supreme authority to give them orders how to do the work and where to work, I think that, on exactly the same principle, in giving these orders, which the workmen were bound to obey, he represented the master, and was performing a duty which would have devolved on the master if personally present."

In *Burke v. Anderson* (1895) 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814, where a superintendent of the work of excavating for a railway was held to be a vice principal as regards his negligence in failing to notify a laborer that a portion of the explosives has not been exploded, the court said: "The master provides the place for his servant to work, and if his acts create a special danger he is not alone chargeable with the positive duty to exercise the utmost care and every available precaution against possible injury to those who are to work there, but, if danger impends, notwithstanding the precautions taken, he is further obligated to give due information and timely warning to those in his service who are ignorant of its extent before calling upon them to

incur the risk. In respect of the employment of the plaintiff and the directions for his work, it is unquestionable and conceded that the superintendent represented the master as vice principal. In the same relation he is chargeable with knowledge of the danger in using the explosives, and with the duty to protect employees and notify them of risk. If the plaintiff was not informed of the peril which compliance with the order involved, or if it was not clearly apparent, the risk thus created cannot be held to have been contemplated in the service in which he engaged, and therefore it was not one assumed by him in his employment. The instructions requested on behalf of the principal defendant, and the theory of the whole defense as well, rest upon the claim that the operation of blasting was common labor, and not the work of a superintendent or vice principal, that its performance by this superintendent was in the character of a fellow servant, and the master was not liable for any neglect therein beyond the exercise of ordinary care in selecting his servants. In the same connection it is argued that the use and care of the explosives was not a personal duty of the master. Whether these claims could be maintained by the master in any case in which he brings into his work the dangerous means which produce injury, and whether the rule of strict care does not impose a positive obligation which he cannot evade by delegating the performance, are questions of interest, but they do not require consideration here. It is sufficient that the risk was created by the master or for his purposes; that there is legitimate finding by the jury of negligence on the part of those engaged in the performance, causing the injury; and finally that the plaintiff was ignorant of the risk and had not assumed it. The doctrine which exempts the master from liability arising out of the negligence of fellow servants is based upon the assumption by the servant of the ordinary risks of his employment, in which the negligence of fellow servants is included, but it has no application to risks which are not contemplated by him in entering upon the service (*Northern P. R. Co. v. Hamby* [1894] 154 U. S. 349, 357, 38 L. ed. 1009, 1012, 14 Sup. Ct. Rep. 983), and certainly cannot govern for this extraordinary risk interposed by the master without warning." See also *McMahon v. Ida Min. Co.* (1897) 95 Wis. 308, 70 N. W. 478 (without warning miner sent to work in a place where there were a number of unexploded blasts).

In some instances it is difficult to say whether, from a purely logical standpoint, the liability of the master should be referred to this rule, or to that which requires him to answer for the negligence of persons deputed to carry out regulations. See III. 1, *supra*. The intimate association between the two conceptions is especially manifest in cases turning upon the master's obligation to control the movements of trains. *Moon v. Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401 (section foreman failed to signal train to stop at a place where track had become dangerous).

The same state of facts appeared also in *Torian v. Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339, where we find the court laying down the law thus: "It was the duty of the defendant company . . . to use all reasonable precautions, including necessary signals to moving trains, essential to the protection of the lives and limbs, not only of employees, but to the protection of all persons lawfully on its road. The defendant company, by and through the negligence of its agent, Herndon, in failing to signal the approaching train, and warn it of the danger in its path, was guilty of culpable negligence which caused the accident that re-

sulted in the death of the plaintiff's intestate, and for that negligence and that result the company is liable in damages. That negligence was the proximate cause of the death of plaintiff's intestate, who was not the coemployee of Herndon, by whose negligence the accident was caused in the sense which relieves the employer from liability for injuries to one servant by and through the negligent act or omission of his fellow servant."

In *Turner v. Norfolk & W. R. Co.* (1895) 49 W. Va. 675, 23 S. E. 83, it was held that though in some respects the engineer and fireman of a special engine are fellow servants of a section hand, yet, in giving him warning of the use of the track by a special train they discharge a nonassignable personal or positive duty of the railroad company in its corporate capacity. The court said: "It has been well said that it would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions or loss of life. *Lewis v. Seifert* (1887) 116 Pa. 647, 11 Atl. 514. Having prepared and promulgated its schedule, it must adhere to it, and if it makes a change or violates such schedule, it is its positive duty to notify all who may be affected thereby of such change. When, in contravention of its schedule, it sends a 'wild engine' over its track unexpectedly, it is in duty bound to warn all its employees who are rightfully on and using the track about its business, whether in charge of engine, train or hand car, of the change in the schedule, and if it intrusts this duty to others, by bell, whistle, or otherwise, it makes such others its vice principals to that extent, and if they fail to discharge this duty the company must answer for their negligence unless it be shown that the injured person contributed thereto. For instance, if the company had failed to notify Foreman Alley, by bell, whistle, or otherwise, of the presence of a special train or obstruction on the track, and he had been injured thereby, he could recover unless the defendant showed that he was under express instructions to be on the lookout for such special trains, and, as a matter of precaution, to flag around curves and through cuts. In such case he would fail, not because of being a fellow servant with the engineer, but from contributing to his negligence. The company must protect its employees from all dangers created by itself or its authorized agents or agencies which such employees cannot themselves foresee, or, by the use of ordinary prudence, avoid. For it must furnish them a safe place to work. To send 'wild engines' and trains without any manner of warning or precaution over tracks already rightfully occupied by other employees is negligence in the highest degree criminal, in utter disregard of human life or limb, and worthy of the severest penalties the law can possibly inflict; and it is made less criminal by the degree of precaution taken to give the necessary warning, and only becomes excusable when the measures adopted are sufficient to protect such employees from threatened danger, provided they are free from fault themselves."

The advantage which the servant receives from the rule is, however, greatly curtailed by the construction which has been put upon the doctrine as to details of work (see, especially, *V. f. infra*). Some of the cases cited in this subdivision would undoubtedly have been decided differently in some jurisdictions.

p. Duty to warn as to dangers of the transitory class occasionally supervening during the progress of the work.

In some instances the master's liability for the failure of one employee to warn another as

to a peril of the merely transitory class may be predicated on the ground that the dereliction of duty was an official act of an agent who was a vice principal by virtue of his rank as a general or departmental manager. The general principle applicable to such a case has been stated thus: "It is a wrong on the part of the agent having the right to order a servant to do certain specific work to increase the peril of the service by his own negligence. The employee acting under the specific order has a right to assume, in the absence of warning or notice, that his superior who gave the order would not, by his own negligence, make the work unsafe." *Taylor v. Evansville & T. H. R. Co.* (1899) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876. See also the *note* to *O'Neil v. Great Northern R. Co.* (1900: Minn.) 51 L. R. A. 592, 593.

But wherever there is no such superiority of rank that the plaintiff must rely solely on the character of the negligent act itself as a ground of recovery, it seems clear that, in the absence of some special consideration bringing the facts within the domain of some duty conceded to be nondelegable, the master cannot be compelled to indemnify a servant for injuries caused by this kind of negligence, without breaking in upon the principle that the master is, at all events, not liable for any dangers which are due to the manner in which the servants themselves deal with instrumentalities which are intrinsically safe and suitable. Such a case is presented where the real gravamen of the action is the failure to conduct the work upon a safe system. *Grace & H. Co. v. Kennedy* (1900) 40 C. C. A. 60, 99 Fed. 679, Affirming (1899) 92 Fed. 116, where a person employing men to work on tall timbers above a sidewalk, which are required to be supported by guys across the street, was held liable for his failure to furnish watchmen to warn drivers in charge of vehicles upon the street to avoid the guys, so as to be liable for the fall of a workman caused by a vehicle striking a guy, although fellow workmen in moving the guys as the work progresses are also negligent in placing it where it will be struck by passing wagons. In the lower court the *rationale* of the decision was that the "place was made unsafe by the lack of warning with which the work in which the plaintiff was engaged had nothing to do," and it was observed that the duty of providing for the safety of the place of work rests as a nondelegable obligation upon the master "except as it may be changed by the progress of the work itself." In the court of appeals the liability was predicated rather upon the lack of a proper system, and it was laid down that the master cannot escape liability under the rule that the duty of the master to provide safe places does not apply where the place, originally furnished is safe, and becomes unsafe in the progress of the work, or because of the manner in which the work is done, since it cannot be said that the place (the street) originally furnished was safe unless it was protected by danger signals or watchmen.

Under the theory that the master's duty to enforce rules is nondelegable, it is also possible to justify the decision of the Indiana court of appeals which has also held that a railroad company is liable to a car repairer for personal injuries received by him while making repairs, where a brakeman to whom the company has entrusted the duty of notifying the workmen that a switch engine is about to enter upon the tracks fails to give such notice, if a rule of the company requires the notice to be given, and does not require the repairer to take any steps for his own protection. *Evansville & T. H. R. Co. v. Holcomb* (1894) 9 Ind. App. 198, 36 N. E. 39.

So far as the writer knows, there is only one 54 L. R. A.

case in which the master has been held liable on the broad ground that he must answer for the negligence of a servant charged with the function of warning other employees that the instrumentalities are about to be used in a way which will render their environment unsafe for a brief period of uncertain duration. In holding that the failure of a quarry foreman to give warning of a blast, as it was his duty to do, in time to permit the workmen to get out of danger, is imputable to the employer, and is not one of the risks assumed by the employee, the result being the same whether the negligence arose from a defective system with reference to warnings, or from the foreman's failure to properly observe such system, the court rejected the theory of the defendant that the giving of the warning was only incidental to the foreman's work in preparing the blast and lighting the fuse, saying: "When we consider the general duty owed by an employer to his employees to exercise reasonable care that the place where he sets them to work shall be kept safe (*Van Steenburgh v. Thornton* (1895) 58 N. J. L. 160, 33 Atl. 380), the propriety of including therein the duty of giving warning in such circumstances as those now before us becomes at once apparent. The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen, and the proper warning given, the quarry became an unsafe place for the workmen, but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place was kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast." *Belleville Stone Co. v. Mooney* (1897) 61 N. J. L. 263, 39 L. R. A. 834, 39 Atl. 764, Affirming 60 N. J. L. 323, 38 Atl. 836.

Considering the consistent rigor with which the doctrine of common employment has usually been construed in New Jersey to the servant's disadvantage, the attitude of the court in this particular instance is somewhat surprising.

q. Duty to inspect instrumentalities; generally.

Since neither the duty of seeing that the instrumentalities of work, as originally supplied, satisfy the legal standard of safety, nor the duty of seeing that they continue while in use to satisfy that standard, can be adequately performed without a proper examination of the subject-matter, it would seem that in any case in which an absolute quality is ascribed to these duties, a like quality ought, as a necessary logical consequence, to be ascribed to the duty of examination both as respects the time when the instrumentalities are first furnished, and as regards the period during which they remain in use.

But a comparison of the decisions cited in the following subdivision, with those noted in III. d, *supra*, and in VII. a, b, *infra*, shows that the courts have not always deferred to the logical force of this consideration.

r. Duty to inspect instrumentalities at the time they are first brought into use.

So far as regards the original condition of such instrumentalities as are furnished in a completed condition an entirely symmetrical doctrine prevails. If a master undertakes to manufacture and supply instrumentalities to his servant, he must, at his peril, see that they are properly inspected before being brought into

use. See *note* to *Walkowski v. Penokee & G. Consol. Mines* (1898; Mich.) 41 L. R. A. 70.

Inspection to discover whether an appliance is defective is as much a part of the work of furnishing safe appliances as reparation after the defect is discovered. *Eaton v. New York C. & H. R. R. Co.* (1900) 163 N. Y. 391, 57 N. E. 609.

So, also, if articles which are liable to deteriorate with the lapse of time are stored after being purchased, and then brought into use as the necessities of the work may demand, the person who has them under his charge is regarded as the master's representative in respect to the duty of seeing that none which have become unfit for use are turned over to the servants. *Nord Deutscher Lloyd S. S. Co. v. Ingebragsten* (1894) 57 N. J. L. 402, 31 Atl. 619 (storekeeper delivered a rusty cable to a stevedore).

It has been held that a railway company is liable for an injury to a brakeman caused by his being thrown off the car and under the wheels by the negligent loading of smokestacks on such car by a station agent intrusted with such loading, where the brakeman was not guilty of negligence contributing to the injury. *Atchison, T. & S. F. R. Co. v. Seeley* (1893) 54 Kan. 21, 37 Pac. 104. The court said: "An authority is cited to the effect that, where the company has employed a competent inspector to see that the cars are properly loaded and in good condition, it cannot be held liable for the negligence of the inspector in failing to observe that the car was improperly loaded. *Dewey v. Detroit, G. H. & M. R. Co.* (1893) 97 Mich. 343, 22 L. R. A. 292, 16 L. R. A. 342, 52 N. W. 942, 56 N. W. 756. This authority is not satisfactory to us nor in line with the decisions that have been cited. We are unable to see any reason for a distinction between the preparation and inspection of the car itself as a fit instrumentality to be placed in a train and the preparation and inspection of a loaded car to be placed in the train for transportation. Each is an instrumentality to be used in connection with the services necessary to be performed by the trainmen in its transportation, and no distinction between them is seen, so far as the obligation of the company or the safety of the employees engaged in handling it are concerned. The inspection in either case is made with reference to the same end and the person to whom this duty is delegated stands in the place of the company, and the latter is responsible for his acts." Contrast IV. o. 3, *infra*.

The doctrine that the master is liable for a defect in one of the constituent parts of a machine which is substituted for a discarded one obviously involves, in the present connection, the corollary that he is liable for the careless performance of the duty of inspecting the new materials thus introduced into the machine. *Tov v. United States Cartridge Co.* (1893) 159 Mass. 313, 34 N. E. 461. See extract in III. f, *supra*.

On the other hand, the effect of the decisions cited in the *note* to *Walkowski v. Penokee & G. Consol. Mines* (1898; Mich.) 41 L. R. A. pp. 71 *et seq.* is that, to the extent there shown, the master is not required to answer for the inadequacy of an inspection where the person who made, or ought to have made, it was a manufacturer or dealer on whose skill and judgment he was entitled to rely. Compare also II. h, 1, *supra*.

a. Duty to inspect instrumentalities during the time they are kept in use.

Except in so far as the servant's rights of recovery may be limited by the application of the doctrine as to details of work, the duty of inspection is by most courts treated as nondelegable. The effect of this doctrine will be explained in subtitle VII. *infra*. At present it will be sufficient to say that, as a general rule, the duty of inspection is absolute in so far as it has relation to intrinsic defects, and delegable in so far as it has relation to defects which arise in the daily use of the instrumentalities, and are of such a nature that the necessary remedy can without difficulty be applied by the servants themselves. A differentiation based upon a theory so extremely vague as this is naturally anything but satisfactory, and a comparison of the cases cited in the following paragraphs with those tabulated in VII. b, *infra*, shows that between the two zones of facts with respect to which the theory yields definite and logical results there lies an extensive debatable ground which forms the subject of decisions reflecting little more than the tendency of the various courts to favor either the master or the servant in the choice of the particular principle to which the rights of the parties shall be referred.

The following cases were decided on the broad ground that in the language of the court in *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918, "proper inspection to discover defects is a part of the master's duty." *Texas & P. R. Co. v. Barrett* (1895) 14 C. C. A. 373, 30 U. S. App. 190, 67 Fed. 214. Affirmed in (1897) 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707 (weakness of boiler which exploded might have been discovered by a proper test); *Atchison, T. & S. F. R. Co. v. Mulligan* (1895) 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569 (engineer, charged with duty of inspecting his engine, not a fellow servant of a hostler injured by a defective footboard); *Texas & P. R. Co. v. Thompson* (1895) 17 C. C. A. 524, 30 U. S. App. 549, 70 Fed. 944, reiterating the doctrine of *Texas & P. R. Co. v. Barrett* (1895) 14 C. C. A. 373, 30 U. S. App. 190, 67 Fed. 214 (boiler exploded. *Speer, D. J.*, dissented, but only on the ground that the theory of the defendant as to the cause of the accident had not been brought to the attention of the jury by proper instructions); *Gowen v. Bush* (1896) 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349 (employees charged with the duty of going through a mine inspecting it and seeing whether it is free from explosive gas are discharging a personal duty of the master, and are not fellow servants of a miner in that respect); *Western Coal & Min. Co. v. Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219 (owner of a mine cannot escape responsibility for neglect to make timely inspection of the timbers, walls, and roofs by the devolution of the duty on a competent mining boss or foreman); *McCauley v. Southern R. Co.* (1897) 10 App. D. C. 560; *Baltimore & P. R. Co. v. Elliott* (1896) 9 App. D. C. 341 (error to direct a verdict for the defendants, where there is evidence of negligence in inspection); *Wells v. Coe* (1886) 9 Colo. 159, 11 Pac. 50; *Chicago & E. I. R. Co. v. Kneirim* (1894) 152 Ill. 458, 39 N. E. 324; *Cleveland, C. C. & St. L. R. Co. v. Ward* (1897) 147 Ind. 256, 45 N. E. 325, 46 N. E. 462 (defective locomotive); *Blazenic v. Iowa & W. Coal Co.* (1897) 102 Iowa, 706, 72 N. W. 292 (employee appointed to inspect the roofs of tunnels in a mine); *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 592, 15 Pac. 484; *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585; *Cole v. Warren Mfg. Co.* (1899) 63 N. J. L. 626, 44 Atl. 647 (employment of an expert mill architect and builder in the reconstruction of a mill, not a sufficient discharge of the master's duty); *Cerrillos Coal R. Co. v. Deserant* (1897) 9 N. M. 49, 49 Pac. 807 (fire boss in a mine whose duty it is to inspect the working places and inform miners who work by contract as to their

duty it is to inspect the working places and inform miners who work by contract as to their

safety); *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556, 42 N. Y. Supp. 188 (boiler exploded); *McKnight v. Brooklyn Heights R. Co.* (1898) 23 Misc. 527, 51 N. Y. Supp. 738 (inspectors of harness used by street-car company not fellow servants of drivers); *McKnight v. Brooklyn Heights R. Co.* (1898) 23 Misc. 527, 51 N. Y. Supp. 738; *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, 25 S. E. 925 (carpenters employed to inspect and make any needed repairs in a platform upon which servants are required to work are vice principals); *Fisher v. Oregon Short Line & U. N. R. Co.* (1892) 22 Or. 538, 16 L. R. A. 519, 30 Pac. 423 (section foreman held to represent the master in not discovering a dangerous defect on a railway track); *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2, *Reversing* (1872) 9 Phila. 16; *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907 (derrick, not being properly fastened, swung round so as to obstruct railway track); *Houston & T. C. R. Co. v. Marcelles* (1883) 59 Tex. 334; *Sabine & E. T. R. Co. v. Ewing* (1892) 1 Tex. Civ. App. 531, 21 S. W. 700 (defective locomotive); *Fordyce v. Culver* (1893) 2 Tex. Civ. App. 569, 22 S. W. 237; *Missouri, K. & T. R. Co. v. Ferch* (1898) 18 Tex. Civ. App. 46, 44 S. W. 317; *Houston v. Brush* (1894) 66 Vt. 331, 29 Atl. 880, (defective tackle block pin not properly fastened); *Baltimore & O. R. Co. v. McKensie* (1885) 81 Va. 71 (section master and night watchman failed to discover a rock which had fallen on a railway track).

In the following cases car inspectors were held not to be fellow servants of trainmen or other employees exposed to danger from defective cars; *Union P. R. Co. v. Daniels* (1894) 152 U. S. 684, *sub nom.* *Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, *Affirming* (1890) 6 Utah, 357, 23 Pac. 762; *Macy v. St. Paul & D. R. Co.* (1886) 35 Minn. 200, 23 N. W. 249; *Ohio & M. R. Co. v. Pearcy* (1891) 128 Ind. 197, 27 N. E. 479; *Little Rock & M. R. Co. v. Moseley* (1893) 6 C. C. A. 225, 12 U. S. App. 514, 56 Fed. 1009; *Cincinnati, H. & D. R. Co. v. McMullen* (1889) 117 Ind. 439, 20 N. E. 287; *Missouri P. R. Co. v. Dwyer* (1886) 36 Kan. 58, 12 Pac. 352; *Carpenter v. Mexican Nat. R. Co.* (1889) 39 Fed. 315; *Cooper v. Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37; *Illinois C. R. Co. v. Hilliard* (1896) 99 Ky. 684, 37 S. W. 75; *Long v. Pacific R. Co.* (1877) 65 Mo. 225; *Condon v. Missouri P. R. Co.* (1883) 78 Mo. 567; *Illinois C. R. Co. v. Reardon* (1894) 56 Ill. App. 542; *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; *St. Louis, A. & T. R. Co. v. Putnam* (1892) 1 Tex. Civ. App. 142, 20 S. W. 1002; *G. H. Hammond Co. v. Mason* (1895) 12 Ind. App. 469, 40 N. E. 642; *Atchison, T. & S. F. R. Co. v. Seeley* (1894) 54 Kan. 21, 37 Pac. 104 (here the duty was predicated on the manner in which the car was loaded); *Kentucky C. R. Co. v. Carr* (1897) 19 Ky. L. Rep. 1172, 43 S. W. 103; *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, 46 N. W. 111; *McDonald v. Michigan C. R. Co.* (1895) 108 Mich. 7, 65 N. W. 597; *Coontz v. Missouri P. R. Co.* (1894) 121 Mo. 652, 28 S. W. 661 (duty here delegated to engineer); *Chicago, B. & Q. R. Co. v. Kellogg* (1898) 54 Neb. 127, 74 N. W. 454; *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 24 N. E. 918 (defective brake); *Jennings v. New York, N. H. & H. R. Co.* (1895) 12 Misc. 408, 33 N. Y. Supp. 585; *Cameron v. Great Northern R. Co.* (1898) 8 N. D. 124, 77 N. W. 1016 (steps had been removed from a car); *Columbus & X. R. Co. v. Webb* (1881) 12 Ohio St. 475; *International & G. N. R. Co. v. Keenan* (1890) 78 Tex. 294, 9 L. R. A. 703, 14 S. W. 668; *Smith v. Chicago, M. & St. P. R. Co.* (1877) 42 Wis. 54 L. R. A.

520; *Norfolk & W. R. Co. v. Ampley* (1896) 93 Va. 108, 25 S. E. 226 (here the duty was delegated to the conductor).

In *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229, it was held that where, by a regulation governing the employees in the transfer yard of a railway company, car inspectors were required to inspect incoming cars immediately upon their arrival, and, if out of repair, to mark them "in bad order," indicating that they were to be sent to the "repair track," negligence on the part of the inspectors in failing to properly discharge this duty, by reason of which plaintiff was injured while attempting to couple a damaged car without notice, of its condition, and without fault on his part, may be imputed to the company. The court said: "In respect to patent defects in the coupling apparatus, brakes, wheels, etc., we may assume that the defendants had undertaken the duty of inspection, and intrusted it to the proper agents. As a rule, also, there is a distinction between the special duties of such persons and the service of other employees who are engaged in handling cars and operating trains. It is not the same in kind as that of the switchman, brakeman, or other operative. *Wedgwood v. Chicago & N. W. R. Co.* (1878) 44 Wis. 44; *Schultz v. Chicago, M. & St. P. R. Co.* (1879) 43 Wis. 375, 4 N. W. 899. The service of the former class relates wholly to the matter of the care and repair of machinery, the use of which is attended with constant danger to other employees unless maintained in a safe condition; and they represent the master, not in the capacity of superior officers placed over other employees, but because performing the master's duty in respect to safe instrumentalities." See also III. t. *infra*, as to inspection of foreign cars.

In an action by an employee to recover for injuries caused by the giving way of a grab iron of a ladder on the side of the car, an instruction which deals with the method of inspection adopted by the company is properly refused, where the issue is, not whether the system of inspection was the proper one, but whether the inspectors properly executed the system. *Thompson v. Great Northern R. Co.* (1900) 79 Minn. 291, 82 N. W. 637.

A similar conclusion, it may be remarked, is reached under the theory that inspectors are in a different department from the servants who use the instrumentalities inspected. Thus, in one case it was laid down that the negligence of the servants of a railroad company, having charge of the inspection and repair of cars, is, as regards a brakeman, the negligence of a superior in another department. *Chicago & N. W. R. Co. v. Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661. In another, the conductor of a freight train was denied being a fellow servant of a car inspector by whose negligence in failing to inspect the ladder of one of the cars the former was injured. *Illinois C. R. Co. v. Hilliard* (1896) 99 Ky. 684, 37 S. W. 75 (servants said to be "acting in different spheres").

The nature of the liability imputed to the master for negligence in regard to inspection is sometimes defined by saying that the employment of a competent inspector of its appliances does not relieve the master from liability for injuries resulting from defects in the appliances, which would have been discovered by a reasonably careful inspection, but which were not in fact discovered. *Cleveland, C. C. & St. L. R. Co. v. Ward* (1896) 147 Ind. 236, 45 N. E. 323, *Rehearing denied* in 147 Ind. 265, 46 N. E. 462; *Following Durkin v. Sharp* (1882) 88 N. Y. 225, where it was held that the inspection of a railroad track was a duty of the master, and if carelessly and negligently performed, even by

a competent inspector, the master would still be liable. To excuse him from liability the track must have been carefully inspected by a competent inspector.

The sufficiency of the number of inspectors of railroad cars, and their competency, furnish no defense to an action for injuries caused by a defect which could have been detected by a proper inspection. *Union P. R. Co. v. Daniels* (1894) 152 U. S. 684, *sub nom.* *Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756.

Where a servant of a railroad company is injured or killed in consequence of the giving way of a defective bridge, the company cannot escape liability from the fact that the bridge was constructed properly in the first place, and it employed skillful and competent subordinates to inspect and repair its bridges. *Toledo, P. & W. R. Co. v. Conroy* (1878) 68 Ill. 569. For other examples of the same form of statement, see *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556, 42 N. Y. Supp. 188; *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 874, 14 N. E. 407; *Elmer v. Locke* (1883) 135 Mass. 575; *Ohio & M. R. Co. v. Pearcy* (1891) 128 Ind. 197, 27 N. E. 479; *Texas & P. R. Co. v. O'Fiel* (1890) 78 Tex. 486, 15 S. W. 33; *Indiana Iron Co. v. Cray* (1897) 19 Ind. App. 565, 48 N. E. 803 (facts indicated that a proper inspection would have disclosed the danger).

The master will not be allowed to escape on the theory that the person who actually made the negligent inspection was not the employee appointed by him to discharge the duty of inspection (*Sabine & E. T. R. Co. v. Ewing* [1892] 1 Tex. Civ. App. 531, 21 S. W. 700); and if he chooses to devolve the duty of inspecting an instrumentality upon the employee whose function it is to use it for the purpose of his work, and provides no other method of inspection, he must respond in damages for the negligence of the employee in continuing to use the instrumentality after he has learned that it is dangerously defective, and has had an opportunity of discarding it or reporting its condition to the agent of the master whose duty it is to make the needful repairs.

In *McDonald v. Michigan C. R. Co.* (1895) 108 Mich. 7, 65 N. W. 597, a railway company was held liable to one of its brakemen for an injury received through the failure of the engine to respond promptly to the airbrake, which defect was known to the engineer, who continued to use the engine after knowing of the defect. The court said: "The record shows that there was no provision for inspection other than inspection by the engineer operating the train. He was expected to inspect his engine at all practicable times, and to report defects. This was no more than common prudence dictates should be required of all operatives of railway trains, and it is to be considered as a part of their duties in and about the operation of their trains; and this is as true when the railroad company makes no other provision for inspection as when it has another regular inspector. Such inspection, in the ordinary operation of the road, is the act of a fellow servant, as between the engineer and brakeman, and, as between them, does not constitute the engineer a representative of the master. To say that an engineer who should err in attempting to make the next station after his engine became broken acted as the representative of his master, thus holding the latter liable to the fireman, who was injured, would be carrying the rule too far. An unreported injury of the brakes, known to the brakeman, would be another illustration. The duty that the master owes to his patrons requires vigilance and care upon the part of the crew, and the master should be permitted to require it 54 L. R. A.

without subjecting himself to all the consequences following negligence by an inspector proper. . . . But if the company makes no other provision for inspection, and chooses to rely upon the reports of its men, deferring repairs until breaks occur, or until the operators in due course of business report defects, we must either say that it has neglected the duty of inspection altogether, or that it has imposed one of its duties upon its operatives, and that it does not fall within the limits of fellow service, or that it may avoid the duty which the law imposes by invoking the rule of fellow servant. So long as operatives do report, and the master repairs promptly, the jury may properly say that there is no negligence on the part of the master; but, if defects are not seasonably repaired, the master neglects a duty, and we should not split hairs to determine whether it was his personal carelessness, or that of the agent whom he appoints to apprise him of the impending duty to repair, although such agent be a fellow operative of one who is injured by reason of a want of seasonable repair." The reasoning in this case seems to be sounder and more in conformity with general principles than that of the following passage in *Theleman v. Moeller* (1887) 73 Iowa, 108, 34 N. W. 765. The court said: "It is the rule of this court that an employee cannot, in an action against his employer, recover for the negligence of a co-employee engaged in the prosecution of a common business. But this rule does not extend to an employee who is charged with no other duty than to inspect the machinery, in the operation of which the injury occurs. *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5. But the engineer, it will be seen from the statement of the evidence just made, was not confined by his duty to the mere inspection of the machinery. He had it in charge, was required to see that it was in good condition, and to repair it when broken or defective. These duties were not separated from the operation of the machinery. The engineer and plaintiff together operated it. The engine furnished the motive power propelling the saw, which did the work of sawing,—the very purpose for which both engine and saw were used. The saw could not be operated without the engine. The engineer was engaged in operating the saw. He was therefore a co-employee of plaintiff in the common business of both."

There is no reason why the engineer should not be regarded as occupying the dual position of a vice principal and of a mere servant. See II. k. *supra*.

The antithesis between inspection which concerns matters of detail and inspection which has relation to intrinsic defects is the basis of the decisions cited below. *Mayer v. Liebmann* (1897) 16 App. Div. 54, 44 N. Y. Supp. 1067 (owners of a brewery held liable for an injury to an employee caused by the fall of a beer keg through a run in which the kegs were lowered into a cellar, resulting from the rivet holes in the rods and brackets of the run becoming enlarged by use and rust, where the defect could have been discovered by proper examination).

In *Fox v. Le Comte* (1896) 2 App. Div. 61, 37 N. Y. Supp. 316, the court remarked: "As to the defendant's negligence, it is undisputed that if the plunger moved without pressure on the treadle, the press was defective. It was alleged that though this was the case the defendant had no knowledge of the fact. It was not necessary that the defendant should personally have such knowledge. The repair of the press was not a mere detail of the work, as in *Webber v. Piper* (1888) 109 N. Y. 496, 17 N. E. 216, but a part of the master's duty to use reasonable

care to provide safe appliances for his servants. This duty was committed to the machinist, but, being the master's duty, the machinist in the discharge of it was not a coservant, but represented the master. For his neglect the master was liable."

The improper adjustment of a brake rod constitutes a "defective appliance," and not a mere "neglect or failure in the detail of the work" within the rule relating to the liability of the master for defects in appliances, where, according to the regular course of the business, it was the duty of inspectors to make the adjustment, and not the duty of the train employees. *Woods v. Long Island R. Co.* (1896) 11 App. Div. 16, 42 N. Y. Supp. 140.

In *Bushby v. New York, L. E. & W. R. Co.* (1885) 37 Hun, 104, it was argued by the defendant's counsel that, as car stakes are uniformly furnished by the shipper the defendant was under no obligation in respect to them, except to inspect them, and that that duty was performed in the present case; but the court held that the defendant could not vest itself of the duty it owed to its employees by leaving that duty to be performed by the shipper, or by making an arrangement with him whereby he undertook to perform it. This view was adopted by the court of appeals in (1887) 107 N. Y. 374, 14 N. E. 407, Danforth, J., remarking, the defect complained of was not in the loading, but in the preparation of the car to receive the load,—that is, in the car as a "lumber car."

Compare also *McIntyre v. Boston & M. R. Co.* (1895) 163 Mass. 189, 39 N. E. 1012, where the defendant was held liable for defective side stakes, the court saying: "The case is not one where an implement designed for repeated use has been weakened and made unfit for further service by such use; it is rather the case of the furnishing of an implement never fit for use, and evidently unfit. Such a stake could not, without negligence, have been placed where stakes were kept to be used for the purpose to which this was put. We need not inquire whether, if it had been taken from a number of sound and suitable stakes provided for that purpose by a workman whose duty it was to equip the car, the careless taking of this stake would have been negligence of a fellow workman the risk of which the plaintiff must stand, or whether negligence in equipping the car with stakes is something for which the defendant is responsible, whether it intrusts the work to one person or another."

A master cannot escape liability to servants for the nonperformance of his duty to use reasonable care that overhead shafting shall be supported and maintained so as not to endanger their safety, by delegating its performance to an engineer placed in charge of the machinery in the factory. *Hustis v. James A. Banister Co.* (1899) 63 N. J. L. 465, 43 Atl. 651. The court disposed as follows of the contention that the case fell within the distinction drawn in certain cases cited, *viz.*, that inspection or repair incidental to use by a servant of machinery or implements, is the servant's not the master's, duty: "Of negligence in the performance of such incidental duty, other servants, as in case of any negligence of their fellows, take the risk. To illustrate, an engineer while running his locomotive must not only watch its steam-gauge and the working of its mechanism, but may also need to have resort to his repair-kit. For neglect of such duties his master is not liable to other servants in common employment with him. Simple or complex, the use of any instrumentality of human action involves some inspection, and may involve repair because of that very use. It is with such inspection and such repair only that the law charges the servant to the 54 L. R. A.

relief of the master, and it is plain that the use must be direct. The engineer runs, and therefore must inspect, his engine, but not the shafting or machinery to which he transmits power. The turner runs, and therefore must inspect, his lathe, but not the shaft that brings him power. Inspection while in use and inspection incidental to use are not convertible expressions. There may be inspection of moving mechanism devolving on no servant, but on the master. If so, negligence in that inspection or failure to properly repair defects discovered will be chargeable on the master, although he may select as the agent to perform his duty a fellow servant of those to whom he owes such duty. The test is always whether or not the duty left unperformed was the master's duty. In the case in hand it was properly left to the jury to say whether reasonable care for the safety of the workmen in the defendant's factory required inspection and repair of the line of shafting that fell and injured the plaintiff. If so, that duty could not be discharged by delegation except at the master's peril, although the agent chosen was a fellow servant of the plaintiff. Properly this case should not be considered as one involving the operation of machinery, but as one involving a place of working. That the support of a suspended piece of iron was rendered precarious by its motion in connection with machinery is an immaterial circumstance. The question for the jury was whether or not the defendant used reasonable care that what it set up over the heads of its servants should not fall down upon them.

In other cases the consideration upon which stress is laid is the analogous one that the defective appliance was permanent, and not one merely for temporary use. *Dougherty v. Milliken* (1898) 26 App. Div. 386, 49 N. Y. Supp. 905 (duty of an employer to see that an eyebolt to which a guy holding a permanent derrick in position is fastened is a reasonably safe and proper appliance, cannot be delegated to a servant).

When a spur track is constructed for permanent use, it is an instrument for the use of those who conduct and manage the trains, and the liability of the master is referred to the principle that he cannot escape responsibility where it is his duty to supply suitable structures, instrumentalities, or appliances by proving that he delegated to a proper agent their construction, superintendence, or repairs, and not to the rule under which it is held, in regard to temporary stagings erected for the repair or completion of buildings, that if suitable workmen and materials are provided his obligation is discharged. *Elmer v. Locke* (1883) 135 Mass. 575.

t. *Duty to inspect instrumentalities belonging to another person, but temporarily used by the master.*

As regards instrumentalities not belonging to the master, but temporarily placed under his control for the purpose of facilitating the transaction of business in which both he and the owner have a common interest, the only rational and logical doctrine seems to be, that a servant has nothing to do with the arrangements which the master may make with a third party for their mutual convenience, and should therefore be entitled to hold the master responsible for the negligent inspection of the thing so transferred in all cases in which he would have been able to recover if that thing had been owned by, or permanently in the possession of, the master. And this is the view adopted in several jurisdictions.

That a car-inspector is a vice principal, wheth-

er the cars whose condition is in question are foreign or domestic, has been declared in *Terre Haute & I. R. Co. v. Mansberger* (1893) 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 198, rehearing denied in (1895) 14 C. C. A. 308, 24 U. S. App. 687, 67 Fed. 67; *s. p. Atchison, T. & S. F. R. Co. v. Myers* (1894) 11 C. C. A. 439, 24 U. S. App. 293, 63 Fed. 793, Disapproving the Massachusetts doctrine; *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231, 15 N. W. 241; *Jones v. New York, N. H. & H. R. Co.* (1897) 20 R. I. 212, 37 Atl. 1033; *Felton v. Bullard* (1899) 37 C. C. A. 1, 94 Fed. 781 (declining to follow Massachusetts decisions); *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 364, 45 N. E. 108; *Chicago & N. W. R. Co. v. Gillison* (1897) 72 Ill. App. 207; *Galveston, H. & S. A. R. Co. v. Templeton* (1894) 87 Tex. 42, 26 S. W. 1066; *St. Louis, A. & T. R. Co. v. Putnam* (1892) 1 Tex. Civ. App. 142, 20 S. W. 1002; *Galveston, H. & S. A. R. Co. v. Nass* (1900; Tex. Civ. App.) 57 S. W. 910. See also *Baltimore & P. R. Co. v. Mackey* (1895) 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; *Texas & P. R. Co. v. Archibald* (1898) 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, where, although the precise point decided is merely that a railway company owes employees a duty to have foreign cars as well as its own inspected, the facts involved and the language used by the court show that the duty was regarded as one of the nondelegable class.

The Indiana case cited above overrules the suggestion to the opposite effect in *Cincinnati, H. & D. R. Co. v. McMullen* (1889) 117 Ind. 439, 20 N. E. 287, and explains *Neuts v. Jackson Hill Coal & Coke Co.* (1894) 139 Ind. 411, 38 N. E. 324, 30 N. E. 147 (see VII. b, *infra*) as a case in which the rule as to the liability of railway companies for the defective condition of foreign cars was not applicable, as the defective car was merely delivered to a coal company to be loaded with coal.

The duty extends, of course, to defects inherent in the original construction of the appliance, as well as to defects which may have supervened while it was in use. Thus, a railway company is absolutely bound to use ordinary and reasonable care to see that a foreign car is constructed safely,—as, for example, that it is furnished with such appurtenances as handles, ladders, or other safeguards in common use. *Dooner v. Delaware & H. Canal Co.* (1894) 104 Pa. 17, 30 Atl. 269.

In Massachusetts, while mere ownership is probably not regarded as being of itself a differentiating factor, the doctrine which will be explained at length in VII. b, *infra*, that a master is not liable for negligence in the inspection of instrumentalities in their ordinary use from day to day, involves the consequence that the employees deputed to examine foreign cars are merely fellow servants of the trainmen.

In *Mackin v. Boston & A. R. Co.* (1833) 135 Mass. 201, the court reasoned thus: "Although, perhaps, the mere ownership is not material, a car so received, while in transit to its destination, and until ready for such inspection as would be suitable and necessary in preparation for its return, would not come within the rule applicable to machinery and appliances furnished by the defendant. According to the course of business, well known to the plaintiff, and notorious, the defendant was in the habit of receiving many such cars daily, and drawing them over its road as a part of its freight trains. Even in the absence of any statute, or special contract, regulating the terms of receiving and drawing such cars, the defendant was bound, as a common carrier, to receive and draw them. *Vermont & M. R. Co. v. Fitchburg R. Co.* (1867) 14 Allen, 462, 92 Am. Dec. 785. 54 L. R. A.

The obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but, as to cars so received, the duty of the defendant is not that of furnishing proper instrumentalities for service, but of inspection; and this duty is performed by the employment of sufficient, competent, and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakemen as to such cars, while in transit, and until ready to be inspected for a new service." To the same effect, see *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28; *Little Miami R. Co. v. Fitzpatrick* (1884) 42 Ohio St. 318; *St. Louis, I. M. & S. R. Co. v. Gaines* (1885) 46 Ark. 555.

Under this theory it is conceded that the receiving company may be held responsible, where it has omitted to provide for a proper system of inspection, and for its negligence in the selection of an inspector. *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28.

This represents the full extent of its liability. *Thyng v. Fitchburg R. Co.* (1892) 156 Mass. 13, 30 N. E. 769.

IV. *Nonliability of the master for negligence of servants in respect to the details of the work.*

a. *Generally.*

By dint of numerous decisions during the last thirty years with respect to the same or similar groups of facts the boundary line between the respective domain of the doctrine of common employment and the doctrine of nondelegable duties may now be traced with reasonable precision along a large part of its extraordinarily devious course. But its actual position is still so largely a matter of controversy in any jurisdiction in which the facts to be passed upon are not covered by a precedent so close as to be decisive, that the volume of litigation relating to this department of the law of employer's liability seems to be steadily growing. Nor, when we consider the extreme vagueness of the tests propounded for the purpose of distinguishing acts which are from acts which are not done by a servant as the master's representative, is there any ground for expecting that the further classification of principles will be other than a slow and tedious process.

The boundary line between the act of a master and the act of an employee is sometimes quite vague and shadowy. *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 421, 25 L. R. A. 396, 37 N. E. 466; *Vitto v. Keogan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1.

In *Fraser v. Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785, the court, after referring to the rule that the question whether a servant is a vice principal must be determined by the nature of the duties which he is performing, proceeded thus: "While we have no disposition to impinge upon the just and salutary rule that makes it the primary duty of the master to furnish to his servants safe instrumentalities and places for work, yet we are satisfied that in many cases the courts, by indulging in too much refined and artificial reasoning, have carried the rule altogether too far, and have often held the master liable in cases where the untutored minds of laymen, in the exercise merely of common sense, would unhesitatingly say that the master had not been derelict in the performance of any duty towards his servants. When it is considered that, where numerous employees are all engaged in prosecuting the same general object, there is hardly one of them

whose duties do not, in part at least, in some way relate to or affect the safety of the instrumentalities with which, or of the places in which, the others work, it is easy to see that the rule referred to may be, as it often has been, carried so far as to practically abrogate the whole doctrine of 'common employment.'"

The following passage from the dissenting opinion of Mitchell, J., in *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 811, 53 Am. Rep. 35, 23 N. W. 229, is worthy of notice as indicating some of the difficulties of precisely fixing, with reference to such a principle, with precision the division line between nondelegable duties and the duties of fellow servants: "This rule [i. e. as to nondelegable duties] has been sometimes understood as meaning that the master is responsible to his servants for the negligence of every employee, however subordinate his station, who is engaged in performing the most common executive duties in the matters of repairing, examining, or watching the instrumentalities intended for the use of other servants. I think this is a misapprehension of the rule, which has sometimes arisen from losing sight of the distinction between one who is clothed with the powers of the master in the control and supervision of some department of the business, and who is *pro hac vice* the representative or *alter ego* of the master, and one who simply performs what may be termed mere executive details. . . . The management of an extensive business, like that of operating a railroad, includes so many departments and so many grades of service that it may not always be an easy matter to draw the line between those who are to be deemed 'vice principals,' or representatives of the master, and those who are to be deemed 'fellow servants,' as to other employees; but the fact of such a distinction is everywhere recognized. To hold that the master is responsible to his servants for the negligence of every employee of the most subordinate rank who is engaged in the department of repairing, examining, watching, or guarding the instrumentalities used by other employees, would virtually abrogate the whole doctrine of 'common employment.' There is hardly an employee in the service of any railroad whose duties do not, in part at least, relate to the matter of maintaining in safe condition the track or rolling stock. If the rule be that all these *pro hac vice* represent the master, and are performing his duty, the same rule must be applied to all masters alike. Such a rule, if applied to farmers, manufacturers, and others, would, I think, effect a radical change in what has been supposed to be the law. And yet this is, I think, the logical result to which the opinion in this case would seem to lead; for I can see no distinction in principle between these 'car-inspectors' and switch-tenders, station agents, guards, watchmen, and the like, in so far as their duties relate to maintaining in safe condition the machinery and other instrumentalities of the master, designed to be used by his employees."

It is sufficiently evident that, for the determination of the question, what work may "ordinarily be intrusted to them [servants] without liability to their fellow servants for their negligence" (*O'Connor v. Rich* [1895] 164 Mass. 560, 42 N. E. 111), the essence of the problem is to discover some rational basis upon which the theory that the master is under an absolute obligation to use due care in providing and maintaining a safe environment for his servants shall be adjusted to the practical situation which results from the fact that any delinquency of a servant which actually eventuates in injury to a fellow servant must, in the very nature of the case, operate so as to render the environment of

the sufferer unsafe. In a very recent case we find the New York court of appeals commenting upon the fact that "under the guise of an application of the rule requiring a master to furnish a reasonably safe place for his servants to work in, other attempts before this have been made to deprive a defendant of the benefit of another equally well-settled and just rule of the law of negligence, that a party shall not be held responsible to a servant for an injury occasioned by the neglect of a competent coemployee." *Perry v. Rogers* (1898) 157 N. Y. 261, 51 N. E. 1021.

It is clear that the problem is not susceptible of the simple solution, sometimes explicitly offered by counsel, and still more frequently repudiated by judges in their opinions, that a delinquency may constitute a breach of the master's duty to furnish a safe place of work merely because the place of work is thereby made unsafe for the time being.

In *Hermann v. Port Blakely Mill Co.* (1896) 71 Fed. 853, the court said with regard to such a contention: "The word 'place,' in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants, by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damage to someone makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do. It would create a liability which the master could not avoid by the exercise of any degree of foresight or care."

In *Stourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128, the court, in discussing the contention of the plaintiff that the case fell within the principle that a master is bound to furnish a reasonably safe place for his servants to work, said: "If this rule is applicable to the present case, then it would follow that for the negligence of any servants to whom the master had committed the duty of providing a safe place the master himself would be liable. I think, however, that this is not the case of a 'place' within the meaning of the rule. As stated in *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017, doubtless in one sense of the term the employee must always be in some place, and doubtless also the place in a certain sense is not safe if an accident occurs there. But the rule that the master must provide a safe place for work only applies where the work and the place are not connected; where the work is not in the construction of the place."

The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for other employees. Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place. *Howard v. Denver & R. G. R. Co.* (1886) 26 Fed. 837.

That it was the duty of appellant to use ordinary care in furnishing appellee a suitable track and other appliances upon and with which to do his work, there can be no question; but, if his fellow servants negligently encroached upon this track while he was at work, it must be regarded as their negligence, and not the negligence of the master. Were the rule different, every servant, properly engaged in operating

cars upon the track, who receives injury through the negligence of another servant in improperly running thereon, would be entitled to recover against the master. In other words, in every case of the collision of two trains, those employees receiving injury who were not in fault would be entitled to recover against the master, by reason of the negligence of those who were in fault, upon the theory that the duty of the master in reference to the track applies as well to the acts of fellow servants as to strangers. We incline to think, as an original proposition, that this would have been the proper rule for our courts to have adopted, but the adverse decisions are now too numerous to undertake to overturn them. *Texas & P. R. Co. v. Campbell* (1894; *Tex. Civ. App.*) 39 S. W. 1104. Compare the language used in *Jarman v. Chicago & G. T. R. Co.* (1898) 98 Mich. 135, 57 N. W. 32; *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Richmond Locomotive & Mach. Works v. Ford* (1897) 94 Va. 627, 27 S. E. 509; *Jenkins v. Richmond & D. R. Co.* (1898) 89 S. C. 507, 18 S. E. 162; and also the cases as the adjustment of railway switches cited in *V. o. 5, 4/ra*.

All the authorities are agreed as to the general proposition that a master who has furnished a reasonably safe place to work in, and reasonably safe appliances to work with, cannot be held liable to a servant whose coservant has, by his negligence, rendered that place or those appliances unsafe, without the master's fault or knowledge.

When it appears that the working place originally, and when the employee was sent to do work there, was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated, by exigencies created in carrying out the details of the work, or by the neglect of a fellow servant, a different rule is applicable. *Baird v. Reilly* (1899) 85 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884.

If a master provides a safe place for work it is the duty of a servant, by attention to details of arrangement and execution, to guard it against insecurity; and if a servant be injured by neglect of such details, no matter by whom, the negligence is that of a fellow servant. *Geoghegan v. Atlas S. S. Co.* (1893) 3 Misc. 224, 22 N. Y. Supp. 749.

But there are too many latent ambiguities in such a statement to admit of its being used as a serviceable differentiating test of liability or nonliability. Nor is the situation rendered any clearer by laying down the rule that, if the negligent act or omission of a servant was in the discharge of the servant's duty, the master is not liable to coservants in the same employment for such negligent act or omission. *Sofield v. Guggenheim Smelting Co.* (1900) 64 N. J. L. 605, 50 L. R. A. 417, 46 Atl. 711.

Equally indefinite is the doctrine that the negligence of a coservant which relieves a master from liability is the omission of such coservant to perform some act which it is his duty to perform. *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907.

In practical litigation, therefore, the courts have been accustomed to rely, rather, upon certain subsidiary conceptions which, when analyzed from various points of view, involve the general principle underlying these and similar formularies. The varieties of phraseology in which the results of this analysis find expression are quite numerous, but may all, it would seem, be grouped under one of the heads indicated in the following subdivisions.

b. Supervision of details not a master's duty.

The most general form in which the limits of
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a master's obligations are susceptible of being stated is that he is not bound to supervise the merely executive details of the work to be done by his servants.

It would be extending the liability of the master beyond any established rule, to require him to oversee and supervise the executive details of mechanical work carried on under his employment, and there is no rule of law which authorizes it. *Hassey v. Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556.

The master is under no duty to make regulations as to matters of executive detail. *Besel v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 171 (not culpable to omit to prescribe how many men should be sent with a train of cars on their way to the repair shop).

The master does not insure his employees against each other, nor is he bound to supervise and direct every detail of their labor. They must exercise their own senses in the selection of material out of the mass provided for them; they must use their own judgments as to the manner of handling it. No employer could bear the burden of legal responsibility for every blunder or neglect on the part of each and all of his employees. The fact that one employee is more skillful than another, or has had greater experience, and is so deferred to by others, does not change his relation to his employer or to his fellows. Nor does a difference in rank or grade of service change the rule. When the character of the business requires it, the master is as much bound to provide his workmen with a reasonably competent foreman as to provide them with tools, but in either case his liability ceases when he has made a suitable selection. What remains to be done is that each workman, whatever his rank or skill or experience, shall, with reasonable diligence and intelligence, discharge his duty towards his employer and his fellows. We are not disposed to discuss the question, on which some courts have differed, how far down in the chain of delegated appointments the master is to be held as bound to personal supervision. The starting point, that he is only liable for his own neglect, is one from which we have no right to depart. And it is plain enough that, when he is held to any personal supervision which from the nature of his business is impracticable, the rule is violated, and there is no tangible distinction left between liability to strangers. We think some of the decisions have led very far towards destroying all means of discernment. *Michigan C. R. Co. v. Dolan* (1875) 32 Mich. 510.

It would be absurd to say that the owners owed a duty to the seamen, that too long a hawser should never be used, or that signals in a fog should be properly given by their own vessel. *The Queen* (1889) 40 Fed. 694.

A railway company is under "no positive duty to supervise the details of the operation of switching cars" in its yard. *Central R. Co. v. Keegan* (1895) 160 U. S. 259, 40 L. ed. 413, 16 Sup. Ct. Rep. 269.

A railway company cannot be held liable for the negligence of the foreman of a gang of track repairers in failing to set a lookout, as prescribed by a rule of the company, upon the theory that someone else should have looked after him and seen that he did his duty. *Duthie v. Caledonian R. Co.* (1898) 25 Sc. Sess. Cas. 4th series, 934.

In *Ryan v. Cumberland Valley R. Co.* (1854) 23 Pa. 384, in discussing an allegation of the plaintiff, (a laborer on a construction train who was injured by the carelessness of the engineer), that the neglect of the engineer in failing to see that all the cars were safely coupled before starting his train was chargeable to the company, observed: "This alleged duty did not

grow out of any contract between the plaintiff and the defendants, else the contract would have been charged as an essential and relevant bond of their relation, which has not been done. If it was a duty which the engineer owed to the plaintiff in any way, then the action ought to be against him for the breach of it. If he owed it to the defendants, then they alone can complain of its nonperformance. The duty must therefore be alleged as that of the defendants to the plaintiff. In what form shall we put it, or how shall we define it? Is it that, when persons are employed to work for others, the employers are bound to see that the instruments of their work are and shall continue in a condition to be used with safety? Then the coachman, the wagoner, and the carter, who ought to know more about the vehicles which they use than their employers do, have a practical warranty that they are in good order, though practically we know that many of them are nearly worn out; the wood-chopper and the grubber are insured that their axe or mattock shall not injure them by flying off the handle; the engineer, the miller, the cotton-spinner, and the wool-carder have a guarantee for the accidents that may befall them in the use of the machinery which they profess to understand, and which they ought so to understand as to be able to inform their employers when it is out of order. If this be so, then the care and skill required of workmen is reduced very much below what is ordinarily expected of them. If there be any distinction between any of the cases put and the one in hand, it is too narrow to be made the foundation of a new rule, or to cancel the force of the analogy which they afford. Certainly such a duty has never been considered as belonging to these relations, and therefore it cannot be law."

Other illustrations of the same phraseology may be found in *Denenfeld v. Baumann* (1898) 40 App. Div. 502, 58 N. Y. Supp. 110; *Hart v. New York Floating Dry Dock Co.* (1883) 16 Jones & S. 460; *Fraser v. Stott* (1899) 120 Mich. 624, 79 N. W. 896.

A detail of the work in this sense has been defined as anything so "connected with work being done as to be an essential part of its performance," and "necessary to insure its safe completion." *Golden v. Sieghardt* (1898) 38 App. Div. 161, 53 N. Y. Supp. 460.

But this definition is not of much assistance, except in so far as it is explained by the mere categorical affirmations of principle in the following subdivisions.

It may be remarked that, by predicating the nonexistence of a duty on the part of an employee alleged to be a vice principal to supervise his subordinates in the performance of their work, the necessity of inquiring into the correctness of that allegation is sometimes dispensed with. A conductor, for instance, is bound to give orders as to the movement of the several parts of a freight train at a station, but he is not in duty required to follow up each brakeman, and see how each movement is executed. *Belyea v. Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480, where it was held not to be negligence for the conductor to leave to the brakeman the work of seeing that the brakes were properly set on each of the cars which were left standing on a grade.

In nearly all the cases in which this rule as to details of work constitutes a protection to the master, the evidence shows actual negligence on the part of the fellow servants of the plaintiff. But it is a mistake to lay down, without qualification, that "the negligence in such a case is said to resolve itself into the negligence of a fellow servant." *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398, Citing 54 L. R. A.

Bowen v. Chicago, B. & K. C. R. Co. (1888) 95 Mo. 268, 277, 8 S. W. 230. Compare also the following passage from the opinion in *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860: Assuming that his attention was so called to the matter, as testified to by this witness, was the foreman guilty of negligence attributable to the master, in permitting the workmen to go on with the work upon the platform that they had erected to suit themselves? If his judgment was wrong with respect to the sufficiency of the platform, so was that of the workmen. They knew as much with respect to the safety of the place where they stood as he did. None of the masons suggested to anyone that the scaffold was unsafe. Whatever was said on that subject was by one of the plumbers when he saw the men using their scaffold. If, under these circumstances, the foreman had refused or declined to interfere with what had been done by the workmen, and he trusted to their judgment, it was not such negligence as to charge the defendants with the result of the accident. It was, at most, but an error of judgment on the part of the foreman with respect to a detail of the work in which the masons were engaged. He concluded, as the workmen themselves did, that the place was safe, and in determining that question they were all co-servants."

Sometimes the circumstances seem to be such that the master's immunity may be referred indifferently to any one of three conceptions, viz., that the servant was himself a participant in the acts of negligence, that his fellow servants were negligent, or that the negligent act was an incidental detail of the work as to which no duty on the master's part can be predicated.

In *Hogan v. Field* (1887) 44 Hun, 72, the action was held to be barred on the first of these grounds, but upon the evidence the other two would apparently have been available as valid defenses.

c. Merely transitory perils; master not bound to protect the servant against.

See V. 2, *infra*.

A form of expression which is often met with in recent cases, particularly in Massachusetts, is that there can be no recovery where "the danger to which the plaintiff was exposed was merely a transitory one existing only on the single occasion when the injury was sustained, and due to no fault of plan or construction, or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used." *Meehan v. Speirs Mfg. Co.* (1899) 172 Mass. 875, 52 N. E. 518.

Or, as the rule has also been enunciated, "the absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes." *Whittaker v. Bent* (1897) 167 Mass. 588, 46 N. E. 121, per Holmes, J.

A "temporary contrivance" was opposed to a "permanent attachment," in *Kiffin v. Wendt* (1899) 39 App. Div. 229, 57 N. Y. Supp. 109.

d. Dangers caused by the progress of the work; master not bound to protect servant against.

One special application of the general conception underlying the rule stated in the preceding subdivision is that, where the work is of such a character that, as it progresses, the environment of the servant must necessarily undergo frequent changes, the master is not bound to protect the servants engaged in it against the dangers resulting from those changes.

Where the place, as it stands when the work

begins is perfectly safe, and the danger can only arise as the work progresses, and be caused by the work done, it is not the duty of the employer to stand by during the progress of the work, to see when a danger arises. It is sufficient if he provides against such dangers as may possibly or probably arise and to give the workmen the means of protecting themselves. *Durst v. Carnegie Steel Co.* (1896) 173 Pa. 102, 33 Atl. 1102.

The duty of a master to provide his servants a safe place in which to work does not attach where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done. *Cleveland, C. C. & St. L. R. Co. v. Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970.

The employer's obligation towards his employee does not oblige him to keep the working place in a safe condition at every moment of the work, so far as its safety depends upon the due performance of the work by fellow servants of the employee. *Baird v. Reilly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884.

It makes a vast difference in the question of the liability of the master, whether, when a servant meets with an accident from a defect in the previous work, occurring through the negligence of a servant engaged in its construction, the negligence is to be deemed as arising from a failure to provide a safe place, or as negligence in the general enterprise in the prosecution of which all the workmen are engaged. If the first, the master is liable, even though the negligence is that of a servant, because the duty is that of the master; if the second, it is the negligence of a co-servant, and the master is not liable for it. *Stourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128.

The rule that a master is bound to furnish his servant a safe place in which to do his work does not apply "where the prosecution of the work itself makes the place and creates its dangers." *O'Connell v. Clark* (1897) 22 App. Div. 466, 48 N. Y. Supp. 74.

The rule that the duty of furnishing and maintaining a safe place and safe appliances is nondelegable "cannot apply to a condition of danger brought about by the negligent acts of a servant or a fellow servant, for whose acts he is responsible, nor to the hazards and dangers arising from the employment, and belonging to the peculiar occupation in which the servant is engaged, and which he assumed when he entered the master's service." *Anderson v. Daly Min. Co.* (1897) 16 Utah, 28, 50 Pac. 815.

In *Petaja v. Aurora Iron Min. Co.* (1896) 106 Mich. 403, 32 L. R. A. 435, 64 N. W. 335, 66 N. W. 951, the court commented upon the failure of counsel to cite any cases supporting the theory of the plaintiff "that a master is obliged to make safe the place which the servant makes and occupies as a means of doing his work, or which results as an incident of the work, although it necessitates his presence in a place, to a greater or less degree unsafe," and asked: "In such cases, must the master stay with, or follow up, the servants, to be certain that they make the place safe, so that they or some of them be not injured?" Permanent conditions and temporary changes are also contrasted in *New Pittsburgh Coal & Coke Co. v. Peterson* (1894) 136 Ind. 398, 35 N. E. 7.

One *in-licium* of a "detail" is that the appliance was not permanent, but temporary and movable, to be altered as the work progressed, by the workmen themselves, as their needs required. *Maher v. McGrath* (1895) 58 N. J. L. 469, 33 Atl. 945.

In another case the same court alludes to conditions in the place of work created by the workmen themselves, as the work progresses, 54 L. R. A.

and to conditions continually changing in the course of the work. *Foley v. Brooklyn Gaslight Co.* (1896) 9 App. Div. 91, 41 N. Y. Supp. 66. The cases in which this principle is most usually applied are those involving the various kinds of construction work.

The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building which they are employed in erecting, in a safe condition at every moment of their work so far as its safety depends upon the due performance of that work by them and their fellow servants. *Armour v. Hahn* (1884) 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433.

The duty of a master to furnish a safe place for the performance of work does not require him to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates. *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525. See also *Durst v. Carnegie Steel Co.* (1896) 173 Pa. 102, 33 Atl. 1102; *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 111, 37 Atl. 874, and the cases cited in VI. b, 3, *infra*.

It should be observed that in some cases of this class the element of a fellow servant's negligence is not involved at all, and recovery is denied on the broad ground that there is no breach of duty on the master's part.

Thus, it has been held that the danger to workmen walking on the keelson of a barge which they were engaged in unloading, owing to the rounding top thereof, is not one for which the master is responsible, as it is a condition which the workmen create as the work progresses and the keelson is exposed. *Foley v. Brooklyn Gaslight Co.* (1896) 9 App. Div. 91, 41 N. Y. Supp. 66.

So, a master is not liable as for a failure to furnish a safe place of work, where he ordered the injured servant to push a draft of bales which, while it was being hoisted, had caught in the coamings of a hatch, and one of the bales fell on the servant. *O'Connell v. Clark* (1896) 6 App. Div. 33, 39 N. Y. Supp. 454 (1897) 22 App. Div. 466, 48 N. Y. Supp. 74.

e. Preparation or care of instrumentalities; master not responsible for, where these functions are a part of the work to be done.

The cases determined by the conception adverted to in the preceding subdivision often involve facts which may also be discussed with relation to the principle that the master is not liable, as for negligence in failing to provide or maintain safe instrumentalities, in any case where the preparation or care of these instrumentalities constitutes a part of the work which the injured servant or his coemployees undertook to do.

In *Robinson v. George F. Blake Mfg. Co.* (1887) 148 Mass. 528, 10 N. E. 814, the court thus criticised an instruction: "It is not a universal rule of law that an implied duty rests upon an employer to furnish suitable means, machines, implements, and instrumentalities for doing his work. This may depend on the nature of the employment and the circumstances of the case. The natural inference from these might be that the servant or person employed was to furnish his own tools and appliances. Or the nature of the work to be done might be such that it would be natural and reasonable to infer that both parties understood that the servant should procure whatever might prove to be needed, according to his own judgment, as a part of his employment. If a person is employed to do a piece of work himself, with the understanding that he shall procure such means, materials, or

implements as he finds to be needed and if he enters upon the execution of the work and procures insufficient or defective means, materials, or implements, it might be found that the master did not assume any responsibility to such servant for their sufficiency or quality, even though he was to pay for them. Nor is the case necessarily different, if the person so employed is authorized to engage others to help him do the work, as well as to procure means and appliances. If, for example, the work to be done should include the moving or raising of a heavy article, which could be done with the use of a simple fulcrum and lever, and the employer's foreman, in charge of the work, should be left to provide them at the place where the work was to be done, and he should take a common stone for the fulcrum and a piece of scantling or a rail from a neighboring fence for the lever, and the stone should roll, or the lever break, and one of the men engaged in the work should be hurt thereby, a jury would naturally find that such selection of materials and appliances was a part of the work to be done, and not within the implied duty and undertaking of the employer."

The rule that the master must provide a safe place for work only applies where the work and the place are not connected, where the work is not in the construction of the place. *Stourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128.

A distinction has, however, been made, so that where it appears that as a part of or an incident to the work which the employee is to do, such employee is required to erect a scaffold or other appliance necessary to do the work, neglect in the erection of such scaffold is not a neglect to perform a duty that the employer owes to his employee. *Richards v. Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234.

The rule that a master must furnish suitable tools and appliances and a safe place to work is qualified by another that, where the master furnishes suitable appliances, and the duty to adjust them properly to work of a temporary character is neglected by a fellow workman whose business it is to attend to that detail, the master is not liable to a fellow workman injured by that neglect. *Divver v. Hall* (1897) 21 Misc. 452, 47 N. Y. Supp. 630.

We shall not attempt to do what no court has yet been able to do, *viz.*, formulate a statement of the rule that will furnish a test by which to determine every case; but we may suggest that, in our opinion, an important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it are themselves part of the work which they are employed to perform. If it be the latter, then, as is well settled by our decisions, the master is not liable. *Fraser v. Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785.

The rule as to common employment does not apply to a case "where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employees are to adjust the appliances by which the work is to be done." *Burns v. Sennett* (1893) 99 Cal. 363, 33 Pac. 916.

To the same effect, see the following cases: *Beesley v. F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 658; *Petaja v. Aurora Iron Min. Co.* (1896) 106 Mich. 469, 32 L. R. A. 438, 66 N. W. 961, Affirming on rehearing 106 Mich. 463, 32 L. R. A. 435, 64 N. W. 335; *Sims v. American Steel Barge Co.* (1894) 56 Minn. 68, 57 N. W. 322; *Marsh v. Herman* (1891) 47 Minn. 587, 50 N. W. 611; *Callan v. 54 L. R. A.*

Bull (1896) 113 Cal. 593, 45 Pac. 1017; and the cases cited in subtitle VI. *infra*.

Both these aspects of the master's nonliability are sometimes associated closely together, as where a court speaks of a place in which conditions are constantly changing and of which the furnishing and preparation was in itself part of the work the employees were required to perform. *Consolidated Coal & Min. Co. v. Clay* (1894) 51 Ohio St. 542, *sub nom.* *Consolidated Coal & Min. Co. v. Floyd*, 25 L. R. A. 848, 38 N. E. 610.

The consideration of this principle from a slightly different standpoint yields the rule that it is always a condition precedent to the exemption of the master from liability that the operations which were the immediate cause of the injury were a part of the regular duties of the servants themselves. *McGinty v. Athol Reservoir Co.* (1892) 155 Mass. 183, 29 N. E. 510.

1. Negligent use of safe appliances by fellow servant; master not responsible for.

Another ground of distinction relied upon by the courts is based upon the theory that the master, while responsible for intrinsic defects in the instrumentalities which would not have existed if the servants intrusted with the functions of supplying or maintaining them had exercised proper care, cannot be held liable for injuries caused by the manner in which the servants use those instrumentalities for the performance of their work.

The duty of the master "does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient." *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720.

For the management of his machinery and the conduct of his servants a master is not responsible to their fellow servants. *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210.

The master has done his whole duty when he supplies the proper appliances, the care and use of which must be necessarily intrusted to his servants. *Jones v. Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661.

A master is not liable for acts incidental to the management and use of the appliances furnished. *McKinnon v. Norcross* (1889) 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183.

One line of distinction between vice principals and coemployees is in the duty, in one instance, to supply or maintain instrumentalities of the service, and, in the other, of using the instrumentalities supplied. *Neuts v. Jackson Hill Coal & Coke Co.* (1894) 139 Ind. 411, 38 N. E. 324, 39 N. E. 147.

A master is not liable for the "negligence of those engaged with the plaintiff in making use of a place admittedly safe." *Baron v. Detroit & C. Steam Nav. Co.* (1892) 91 Mich. 585, 52 N. W. 22.

It is no part of the duty of the master to direct workmen in the use of the tools with which they perform their work. *Hussey v. Coger* (1899) 112 N. Y. 614, 3 L. R. A. 569, 20 N. E. 556.

The line of demarkation here between the absolute duty of the master and duty of the servants is the line that separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair, the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to

perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance. *St. Louis, I. M. & S. R. Co. v. Needham* (1894) 25 L. R. A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107.

After rejecting the theory that the negligent use of materials can be, in the majority of cases, a breach of the master's duty, the court said: "The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employee of the machinery shall create danger." *Howard v. Denver & R. G. R. Co.* (1886) 26 Fed. 887.

In *Hard v. Vermont & C. R. Co.* (1860) 32 Vt. 473, the court adverts to the difference between the master's obligation as to equipping and as to operating a railway.

See also *Smith v. Empire Transp. Co.* (1895) 89 Hun. 568, 35 N. Y. Supp. 534.

That is to say, the master performs his whole duty if he supplies an instrumentality which is safe if carefully used by the fellow servants of the complainant (*Fowler v. Chicago & N. W. R. Co.* [1884] 61 Wis. 159, 21 N. W. 40; *Hogan v. Smith* [1891] 125 N. Y. 774, 26 N. E. 742); or, in other words, where an appliance is reasonably safe to operate, and its operation necessarily rests upon the care, intelligence, and fidelity of the fellow servants of the person injured, the master will not be held responsible for an accident, the nature of which indicates that it must have been due to the manner in which the appliance was operated by one of those workmen. *Dana v. Crown Point Iron Co.* (1893) 51 N. Y. S. R. 238, 22 N. Y. Supp. 455.

The cases decided on this theory sometimes involve facts which show the master to be free from culpability for the reason that the instrumentality in question was applied to the purpose of the work without his authority. See III. c. *supra*.

Negligence as regards the use of instrumentalities may, it is clear, be committed in one of the following ways. It is often difficult to say precisely under which of the categories the delinquency in question should be classed, but in practical litigation this is not a matter of any importance, since the result is the same whatever may be the strictly logical designation of the negligent act.

The delinquent coservant may have so handled or placed a safe instrumentality so carelessly as to convert it for the time being into an injurious agency. See the cases cited above, and also the following: *Cleveland, C. C. & St. L. R. Co. v. Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; *Pelrice v. Kille* (1897) 26 C. C. A. 201, 58 U. S. App. 291, 80 Fed. 865; *The Queen* (1889) 40 Fed. 694; *McDermott v. Boston* (1882) 133 Mass. 349; *Trcka v. Burlington, C. R. & N. R. Co.* (1896) 100 Iowa, 205, 69 N. W. 422; *Worheide v. Missouri Car & Foundry Co.* (1888) 32 Mo. App. 367; *McLaughlin v. Camdea Iron Works* (1897) 60 N. J. L. 557, 38 Atl. 677.

Any machine may be made dangerous if wrongfully or negligently used. *Callaway v. Allen* (1894) 12 C. C. A. 114, 24 U. S. App. 388, 64 Fed. 297.

The delinquent may have created the abnormal danger by his negligence in selecting the defective instrumentality from the stock of materials supplied. See especially the cases cited in V. h. *infra*, and the following: *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Daley* 64 L. R. A.

v. Boston & A. R. Co. (1888) 147 Mass. 101, 16 N. E. 690; *Young v. Boston & M. R. Co.* (1897) 105 Mass. 210, 46 N. E. 624; *Kennedy v. Spring* (1893) 160 Mass. 203, 35 N. E. 779; *McKinnon v. Norcross* (1889) 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183; *Fraser v. Red River Lumber Co.* (1891) 43 Minn. 235, 47 N. W. 785; *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697; *Moore v. McNell* (1898) 35 App. Div. 323, 54 N. Y. Supp. 956; *Guggenheim Smelting Co. v. Flanigan* (1898) 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145; *Willis v. Oregon R. & Nav. Co.* (1884) 11 Or. 257, 4 Pac. 121; *Ross v. Walker* (1891) 139 Pa. 42, 21 Atl. 157, 159.

In *Simpson v. Central Vermont R. Co.* (1896) 5 App. Div. 614, 39 N. Y. Supp. 464, the court said: "To provide these supplies (i. e., new wicks) for use was the master's duty: to take them as they were needed for use was the servant's duty."

The delinquent coservant may have failed to use the instrumentalities furnished, and so have created the abnormal danger which caused the injury. See, for example, *Griffiths v. Gildow* (1858) 3 Illust. & N. 648, 27 L. J. Exch. N. S. 404; *Cleveland, C. C. & St. L. R. Co. v. Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; *Kaare v. Troy Steel & Iron Co.* (1893) 139 N. Y. 869, 34 N. E. 901; *Hudson v. Ocean S. S. Co.* (1888) 110 N. Y. 625, 17 N. E. 342; *Dwyer v. Hall* (1897) 21 Misc. 452, 47 N. Y. Supp. 630, Reversing 20 Misc. 677, 46 N. Y. Supp. 533; *McAndrews v. Burns* (1876) 39 N. J. L. 117 (omission to deliver here); *Laporte v. Cook* (1899) 21 R. I. 158, 42 Atl. 519; and the cases cited in V. i-k, *infra*.

The duty of a foreman in using the means and appliances provided for safely and properly carrying on the work is that of a servant engaged in the same business with the plaintiff, even if he acted as the representative of the master in furnishing such means and appliances. *Floyd v. Sugden* (1883) 184 Mass. 563.

The delinquent may have been in control of the injured servant and caused the injury by giving his fellow servants some direction as to the use of the appliances, or by sending the injured servant to work in a specially dangerous place without due warning, or a positive assurance that he would not be put in peril by complying with the order. See *Hodgkins v. Eastern R. Co.* (1876) 119 Mass. 419; *Martin v. Chicago & A. R. Co.* (1895) 65 Fed. 384; *McBride v. Indianapolis Frog & Switch Co.* (1892) 5 Ind. App. 482, 32 N. E. 579; *Tully v. New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29; *Craig v. Chicago & A. R. Co.* (1893) 54 Mo. App. 523; and the cases cited in V. a-e, *infra*.

g. *Rationale of doctrine exempting master from liability for negligence in carrying out the details of the work.*

Viewed from the standpoint of the extent of a master's obligations to his servant, the doctrine that there can be no recovery for the negligence of a coservant in respect to the details of the work has been regarded as one deduced *ex necessitate rei*. Some of the details must necessarily rest upon the intelligence and care of the servants. *Sullivan v. New York, N. H. & H. R. Co.* (1892) 62 Conn. 209, 25 Atl. 711.

In *Hodges v. Standard Wheel Co.* (1899) 152 Ind. 680, 686, 52 N. E. 391, 54 N. E. 383, the court said: "That appellee did not owe to appellant, as its employee, under the circumstances, the legal duty to support the rims in question by the hands of some one of its agents or representatives in the manner as Huey was doing just previous to the accident, is certainly evident. If it could be said to be charged with that duty, then every corporation engaged in

the same line of business as it was would, in legal contemplation, be required to be present at all times and places at its factory when lumber, timber, or iron, or other heavy material of like character, was being handled or moved by some of its employees, and by the hands of such agent or representatives prevent such iron, timber, or lumber, or other material connected therewith, from slipping and falling upon said employees, and thereby injuring them."

When proper tools and appliances are provided upon the premises for the use of employees, no authority can be found for imposing upon the employer the further duty of seeing that the servant does not select from among a number of appliances the one not adapted to the work in which for the time he may be occupied. If such a responsibility is cast upon the master, it would be necessary in his protection to have an *alter ego* to attend constantly upon every workman in his service to see that he did not use an implement unfitted for his work. Guggenheim Smelting Co. v. Flanigan (1898) 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145.

In a Delaware case the court speaks of a "duty ministerial in its character and of executive detail in the operation on the road which must of necessity be vested in [and trusted to] the faithfulness of the employee." Wheatley v. Philadelphia, W. & B. R. Co. (1894) 1 Marv. (Del.) 305, 30 Atl. 600. See also, to the same effect, Kudik v. Lehigh Valley R. Co. (1894) 78 Hun, 492, 20 N. Y. Supp. 533.

It seems difficult, however, to concede that such a consideration has any real weight except in so far as it may be a step towards the conclusion that the servant assumes the consequent risks. Taken by itself, it may be said to be equally potent as a reason for insisting that the master should be chargeable with the negligence which, under the arrangements which he has chosen to make for carrying on his business, he knows to be occasionally inevitable. *Qui sentit commodum idem sentire debet et onus*. In whatever cloak of verbiage it may be wrapt up, a doctrine having no more solid foundation than the hypothesis that one of these inferences, rather than the other, should be drawn from the existence of the conditions adverted to is merely one formulated *ex cathedra*. A much more satisfactory reason for absolving the master from liability for negligence of this description is, he is chargeable with an assumption of such risks because he knows them to be incident to the performance of the duties voluntarily undertaken by him. This is equivalent to saying that in cases in which the servant's right to recover is denied on account of the nature of the injurious act, this conclusion is, in the last analysis, referable to precisely the same elementary conception as that which underlies the doctrine of common employment itself.

The master is not responsible for the negligent performance of some detail of the work intrusted to the servant, whatever may have been the grade of the servant who executes such detail. If it is the work of the servant, and he volunteers to perform it, and the master is not in fault in furnishing proper materials, there is no breach of duty on the part of the latter. The scaffolding having been constructed by the workmen themselves, or under direction, if appliances which they made use of for that purpose were in any respect defective or insufficient they had, so far as appears, the same means of knowing that fact as the defendants. Kimmer v. Weber (1897) 151 N. Y. 417, 45 N. E. 860.

In another case the same court speaks of "a detail of the working or management of the business, the risks attending which have been assumed by the party taking employment."

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Cullen v. Norton (1891) 126 N. Y. 1, 26 N. E. 905.

In Hatton v. Hilton Bridge Constr. Co. (1899) 42 App. Div. 403, 59 N. Y. Supp. 272, the court, after citing several cases as to details of work, said: "Those authorities refer to accidents occurring during the progress of the work, where the servant is necessarily aware of the danger; where he knows, or ought to know, as much in regard to the safety of the place where he is called to work as the master; to cases where the master has performed his duty of furnishing and maintaining a safe place for the servant to perform his work in, and safe and proper instrumentalities therefor. After that duty has been performed, they determine that if a servant is injured because of the manner of the performance of the work the master is not liable."

In Hogan v. Field (1887) 44 Hun, 72, the plaintiff was held not entitled to recover for the reason that while the construction of the defective scaffold was no part of the business of the gang of workmen to which he belonged, they, without objection, undertook the erection of it, and had the control and management of the work.

In McCone v. Gallagher (1897) 16 App. Div. 272, 44 N. Y. Supp. 697, the fact was emphasized that the servant's knowledge of the details and requirements of the temporary appliance which they were left to construct as a part of the work was as complete as that of the master.

In Maher v. McGrath (1896) 58 N. J. L. 469, 33 Atl. 945, the error in the construction of a scaffold was said to be one "committed by workmen with whom he [the plaintiff] was working in a common employment, subject to a common danger which all equally knew must result from a negligent construction."

In Brothers v. Cartter (1873) 52 Mo. 372, 375, 14 Am. Rep. 724, the court said: "If a workman or servant is to work in conjunction with others, he must know that the carelessness of one of his fellow servants may be productive of injury to himself, and he must know that neither care nor diligence by the master can prevent the want of due care and caution on the part of his fellow servants. The servant on entering upon the employment is supposed to know and assume this risk." This statement was adopted in Brown v. Winona & St. P. R. Co. (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484.

As between themselves, no one more than another, in the ordinary work of navigation, represents the owner, or performs an owner's duty, and therefore each takes the risk of the other's negligence. The Queen (1889) 40 Fed. 694. See also Armour v. Hahn (1884) 111 U. S. 313, 26 L. ed. 440, 4 Sup. Ct. Rep. 433, the effect of which is stated in VI. b, 4, *infra*; Minneapolis v. Lundin (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525; Oregon Short Line & U. N. R. Co. v. Frost (1896) 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965; Soutar v. Minneapolis International Electric Co. (1897) 68 Minn. 18, 70 N. W. 796; Slater v. Jewett (1881) 85 N. Y. 61, 29 Am. Rep. 627; Tully v. New York & T. S. S. Co. (1896) 10 App. Div. 463, 42 N. Y. Supp. 29; Donnelly v. Brown (1887) 43 Hun, 470.

In this point of view it will obviously be material, in doubtful cases, to inquire whether the operation which was the cause of the injury was ordinarily intrusted to the employees themselves. This is the conception present to the mind of the court in a recent New York case when it used the phrase, "one of the details of the business that is generally left to the workmen themselves." Kimmer v. Weber (1897) 151 N. Y. 417, 45 N. E. 860.

So, a Federal court speaks of acts which "may be all performed, and for the most part usually are directed and performed, by others than the master. The Queen (1880) 40 Fed. 604.

b. Pleading.

1. Declaration.

A declaration alleging facts which show that, if there was any negligence, it consisted in the omission of some duty characteristic of a mere servant, acting as such, is demurrable. *Dwyer v. American Exp. Co.* (1892) 82 Wis. 807, 52 N. W. 304; *Baxter v. Abernethy* (1893) 21 Sc. Sess. Cas. 4th series, 159; *Carolan v. Southern P. Co.* (1897) 84 Fed. 84; *Davis v. Muscogee Mfg. Co.* (1898) 106 Ga. 126, 32 S. E. 30; *Kerr v. Crown Cotton Mills* (1898) 105 Ga. 510, 31 S. E. 166; *Kudik v. Lehigh Valley R. Co.* (1894) 78 Hun, 492, 29 N. Y. Supp. 533; *Frawley v. Sheldon* (1897) 20 R. I. 258, 38 Atl. 370.

The operation of this rule cannot be prevented by the device of an averment ascribing the injury to the negligence of the master himself. *Sherman v. Rochester & S. R. Co.* (1853) 15 Barb. 574.

But in an action to recover damages for negligently causing the death of a servant, when the complaint positively alleges that the acts and omissions complained of were by the defendant, it cannot be presumed that they were those of a fellow employee of the deceased. *Brown v. Central P. R. Co.* (1885) 68 Cal. 171, 8 Pac. 828.

2. Plea.

Where a complaint is demurrable because it shows that the plaintiff was injured by the negligence of a fellow servant, such fact need not be pleaded in the answer. *Mann v. O'Sullivan* (1899) 126 Cal. 61, 58 Pac. 375.

Upon a plea traversing negligence by the defendant, the defense that the injury complained of was caused by the negligence of a fellow servant is open. *McCarthy v. Bristol Shipowners' Co.* (1888) Ir. L. R. 10 C. L. 384; *s. f.*, *Byrne v. Fennell* (1882) Ir. L. R. 10 C. L. 397.

1. Instructions.

See also VI. e, *infra*.

Where, upon the evidence, the injury may possibly have been due to an act of the kind for which the master is not responsible, it is error to refuse instructions embodying the rule appropriate to such a case. *Reichel v. New York C. & H. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 763.

It is also ground for reversal if such instructions are omitted, where the state of the evidence is such that the jury may have been misled by such omissions.

In *St. Louis, I. M. & S. R. Co. v. Needham* (1894) 23 L. R. A. 838, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107, it was argued that, if the court erred in its charge, that error did not prejudice the company because there was uncontradicted testimony that there was no target on the switch which was left open, and the jury were charged that if the switch was not in proper order because it had no target upon it, and for that reason the injury and death were caused, the company was liable. But the court said: "This position cannot be successfully maintained. The testimony was such that the jury might well have found that the injury was neither caused nor contributed to by the absence of the target, and that it resulted solely from the negligence of the conductor who left the switch open. The defendants in error

charged two acts of negligence upon this company,—the failure to provide the target; and the failure of the conductor to close the switch. Issues were raised and submitted to the jury to determine whether either of these acts caused or contributed to the injury. The verdict was general, and its generality prevents us from discovering upon which of these acts of negligence charged it was founded. A general verdict cannot be upheld where there are several issues tried, and upon any one of them error is committed, in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. What *Cheer Coal Co. v. Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810; *Maryland use of Markley v. Baldwin* (1884) 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278.

j. Functions of court and jury in passing upon evidence.

It is primarily for the jury to say whether the injury resulted from negligence in furnishing the materials, or in using them. *Thomas v. Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 40; *Brady v. Norcross* (1899) 174 Mass. 442, 54 N. E. 874; *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874; *Arkerson v. Dennison* (1875) 117 Mass. 407; *Manning v. Hogan* (1879) 78 N. Y. 615; *Fitzsimmons v. Taunton* (1893) 160 Mass. 223, 35 N. E. 549; *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

The question whether a cross piece in a ladder broke under the weight of plaintiff servant because a nail that fastened its left end to the side piece was near such a knot in the side piece as was shown to have existed, is for the jury. *Flanigan v. Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762.

Where, at the close of the plaintiff's case, it is apparent that the evidence thus far introduced is consistent with the theory that the injury was caused by the negligence of a fellow servant, it is error to rule that the doctrine of common employment is not applicable, and so exclude the defendant from offering any evidence to sustain a defense based on that doctrine. *Cooper v. Hamilton Mfg. Co.* (1867) 14 Allen, 193.

It is error to leave it entirely to the jury to determine what acts and duties the defendant was required to perform and discharge as principal. The proper course is to lay it down, as a matter of law, that the duty of the defendant "is to supply the servant with suitable and safe machinery and appliances, with competent and skilful coworkers, and to make and promulgate sufficient rules and regulations for the conduct of the business in its ordinary run and for any extraordinary occasions that may be reasonably anticipated" (*Slater v. Jewett* [1881] 85 N. Y. 61, 73, 29 Am. Rep. 627); and then ask the jury to find whether the defendant had failed in the performance of its duty in any of these respects. *Hart v. New York Floating Dry Dock Co.* (1882) 16 Jones & S. 480. See also VI. e, *infra*.

But where the evidence offered by the plaintiff is such as to be susceptible of no other construction than that the injury was caused solely by an act belonging to the category of those deemed to be characteristic of mere servants, the case should be taken from the jury.

The complaint may be dismissed. *Dana v. Crown Point Iron Co.* (1893) 51 N. Y. S. R. 238, 22 N. Y. Supp. 455; *Denenfeld v. Baumann* (1899) 40 App. Div. 502, 58 N. Y. Supp. 110;

Byrne v. Eastmans Co. (1898) 27 App. Div. 270, 50 N. Y. Supp. 457; *Wilson v. Hudson River Water Power & Paper Co.* (1893) 71 Hun. 292, 24 N. Y. Supp. 1072; *Sweeney v. Page* (1892) 64 Hun. 172, 18 N. Y. Supp. 890; *Collins v. St. Paul & S. C. R. Co.* (1882) 30 Minn. 31, 14 N. W. 60.

Upon appeal, where the complaint has been dismissed, the plaintiff is entitled to the most favorable inferences to be drawn from the evidence. *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

Or a nonsuit may be ordered. *McCarthy v. Bristol Shipowners' Co.* (1883) Ir. L. R. 10 C. L. 384; *Byrne v. Fennell* (1882) Ir. L. R. 10 C. L. 397; *Donovan v. Ferris* (1900) 128 Cal. 48, 60 Pac. 519; *Ryan v. McCully* (1894) 123 Mo. 636, 27 S. W. 533; *Judson v. Olean* (1889) 26 N. Y. S. R. 706, 22 N. E. 555; *Cole v. Rome, W. & O. R. Co.* (1893) 72 Hun. 467, 25 N. Y. Supp. 276; *Dwyer v. Hall* (1897) 21 Misc. 452, 47 N. Y. Supp. 630, *Reversed* in 20 Misc. 677, 46 N. Y. Supp. 533; *Leary v. Lehigh Valley R. Co.* (1894) 76 Hun. 575, 28 N. Y. Supp. 187; *Mahoney v. Vacuum Oil Co.* (1894) 76 Hun. 579, 28 N. Y. Supp. 196; *Hoover v. Beech Creek R. Co.* (1893) 154 Pa. 362, 26 Atl. 815; *Fowler v. Chicago & N. W. R. Co.* (1884) 61 Wis. 159, 21 N. W. 40; *Cooper v. Milwaukee & P. du Ch. R. Co.* (1869) 23 Wis. 668; *Stuts v. Armour* (1893) 84 Wis. 623, 54 N. W. 1000.

Or a verdict may be directed for the defendant. *Wigmore v. Jay* (1860) 5 Exch. 354, 19 L. J. Exch. N. S. 296, 14 Jur. 837; *Donovan v. Ferris* (1900) 128 Cal. 48, 60 Pac. 519; *Carroll v. Western U. Teleg. Co.* (1893) 160 Mass. 152, 35 N. E. 456; *Kelley v. Boston Lead Co.* (1880) 128 Mass. 456; *Kennedy v. Spring* (1898) 160 Mass. 203, 35 N. E. 779; *Young v. Boston & M. R. Co.* (1897) 168 Mass. 219, 46 N. E. 624; *Howard v. Hood* (1892) 155 Mass. 891, 29 N. E. 630; *Smith v. Lowell Mfg. Co.* (1878) 124 Mass. 114; *Conger v. Flint & P. M. R. Co.* (1891) 86 Mich. 76, 48 N. W. 695; *Ling v. St. Paul, M. & M. R. Co.* (1892) 50 Minn. 160, 52 N. W. 378; *Rawley v. Colliau* (1892) 90 Mich. 31, 51 N. W. 350; *Baron v. Detroit & C. Steam Nav. Co.* (1892) 91 Mich. 585, 52 N. W. 22; *Kehoe v. Allen* (1892) 92 Mich. 464, 52 N. W. 740; *Marsh v. Herman* (1891) 47 Minn. 537, 50 N. W. 611; *Corcoran v. Delaware, L. & W. R. Co.* (1891) 126 N. Y. 678, 27 N. E. 1022; *Herrington v. Lake Shore & M. S. R. Co.* (1894) 83 Hun. 365, 31 N. Y. Supp. 910; *Hart v. New York Floating Dry Dock Co.* (1882) 16 Jones & S. 460; *Allegheeny Heating Co. v. Rohan* (1888) 118 Pa. 223, 11 Atl. 789; *Crawford v. Stewart* (1887; Pa.) 6 Cent. Rep. 140, 8 Atl. 5; *Van den Heuvel v. National Furnace Co.* (1893) 84 Wis. 636, 54 N. W. 1016; *Adams v. Snow* (1900) 106 Wis. 132, 81 N. W. 983.

In an action by an employee against a manufacturing corporation for personal injuries received while endeavoring to escape from its mill, which was on fire, it appeared that the fire was caused by the heating of a bearing on one of the machines used in the mill, and that it might have been readily extinguished when first discovered; that the defendant had a cistern with pipes leading to each story of the mill, to which were attached lines of hose, but at the time of the fire the water did not run when attempt was made to use it. It was held, in the absence of evidence of any reason why the water did not run, that it must be attributed to the negligence of the fellow servants of the plaintiff in failing to keep the apparatus in order, or in failing to put it in operation; and that the defendant was not liable. *Jones v. Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661. The court remarked that it was not called on to decide whether an employer was bound to

provide precaution for the prevention of fire, or means for facilitating the escape of employees from a fire which had started, and proceeded thus: "Even if we assume that such obligations rest upon the employer, no evidence was offered tending to show that the defendant failed to take proper precautions to prevent fire, or that the hose, tanks, and other appliances for extinguishing it were not all that under any circumstances would be required. The evidence offered was simply that the water did not run, when the fellow servants of the plaintiff attempted to use it. This was not sufficient proof of negligence to charge the defendant. The defendant, in any aspect of the case, had done its whole duty when it supplied the proper appliances, the care and use of which must be necessarily intrusted to its servants. The failure of the water to run must therefore be attributed to the negligence of fellow servants, either in failing to keep the apparatus in proper order, or in negligently putting it in operation."

Where the evidence merely shows that whenever the hatchway through which the plaintiff fell was rightfully opened, it was by the order of the defendant or of a particular agent, and that in the latter case such agent always stood by it when it was open to guard against accidents, and that on the occasion in question it was opened without the knowledge or permission of such particular agent or of the defendant, and by the unauthorized act of a fellow servant of the deceased, the conclusion of law is, that the plaintiff was injured, not by the neglect or default of his employer, but of his fellow servant. *Karl v. Maillard* (1868) 3 Bosw. 501.

And if a verdict is rendered for the plaintiff on such evidence it should be set aside. *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Langlois v. Maine C. R. Co.* (1892) 84 Me. 161, 24 Atl. 804; *Jarman v. Chicago & G. T. R. Co.* (1893) 98 Mich. 135, 57 N. W. 32; *Reichel v. New York C. & H. R. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 763; *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813; *McDonald v. New York C. & H. R. R. Co.* (1892) 63 Hun. 587, 18 N. Y. Supp. 609; *McCampbell v. Cunard S. S. Co.* (1895) 144 N. Y. 532, 30 N. E. 637; *Peschel v. Chicago, M. & St. P. R. Co.* (1885) 62 Wis. 338, 21 N. W. 269.

Where, by agreement of the parties, the facts are left to a trial judge, in order that he, acting as a jury, may find what they were, it is not for a court of appeals to consider whether they would have found as he did, but whether his finding is so far wrong that they ought to set it aside. *Charles v. Taylor* (1878) L. R. 3 C. P. Div. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32, per Brett, L. J.

Where the nonliability is thus clear, as a matter of law, it is error to instruct the jury that it is for them to say whether any negligence is to be imputed to the master. *Hall v. United States Radiator Co.* (1900) 52 App. Div. 90, 64 N. Y. Supp. 1002.

k. Explanation of classification of the cases cited in the ensuing sections.

The decisions regarding acts of negligence which are not regarded as constituting breaches of the nondelegable duties seem to be, broadly speaking, susceptible of classification under the categories indicated by the headings of the next three subtitles. But in many instances it is obviously impossible to say positively that a case belongs to one category rather than another. The arrangement adopted, therefore, is merely to be regarded as a convenient method of showing the effect of the enormous mass of materials with which we have to deal.

V. Negligence of coeservant involving merely the use of the instrumentalities; master not responsible for.

a. Orders respecting the use of the instrumentalities.

1. Generally.

The effect of the cases cited in the note to *Stevens v. Chamberlin* (1900; C. C. App. 1st C.) 51 L. R. A. 517-539, and 590-592, is that an order is not deemed to be given in a representative capacity, unless the employee giving it is a vice principal by virtue of his rank.

Other cases illustrating more directly the principle that a master is not liable merely for the reason that the negligence was committed on the giving of an order are cited in the following four subdivisions.

2. Order accompanied by an assurance of safety.

In an early English case it was laid down broadly that a workman is entitled to rely on the representations of a fellow workman whose province it is to inform him whether he can or cannot safely work in a certain place. *Pater-son v. Wallace* (1854) 1 Macq. H. L. Cas. 748. As the negligent servant in this case was an underground manager, and it was denied that such an employee was a vice principal in the more recent decision of *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, it would seem that such a ruling is equivalent to a declaration that, as to the function in question, he is the master's agent. The precise grounds upon which the earlier decision proceeds are, however, quite obscure, and it is extremely doubtful whether it can be reconciled with the principles laid down in *Wilson v. Merry*.

Some American cases also seem to treat the assurances of any employee who is in the exercise of control as being binding on the master, although for other purposes he may be a mere servant. *Pool v. Chicago, M. & St. P. R. Co.* (1892) 56 Wis. 227, 14 N. W. 46 (railway company bound by assurance of a servant in charge of a hand car, to a detective in the company's employ, that he might safely ride sitting upon the rear end of the car with his feet hanging over); *Bradley v. New York C. R. Co.* (1874) 3 Thomp. & C. 288 (trackmaster, as incident to his right to employ laborers, held to be authorized to give them an assurance that he will warn them as to the approach of trains); *Floetti v. Third Ave. R. Co.* (1896) 10 App. Div. 308, 41 N. Y. Supp. 792 (workman went under track in reliance on foreman's statement that no car would pass until a time much later than that at which the accident occurred); *Mullane v. Houston, W. Street & P. Ferry Co.* (1897) 21 Misc. 10, 46 N. Y. Supp. 957 (assurance by trackmaster of a street railway company to a workman under his control, to induce the latter to enter a hole which was dangerous while the cable was in operation, that he would order the engineer not to start the cable, held to be a matter pertaining to the duty of a master to provide a safe place of work, and not a mere detail of work within the functions of a fellow servant).

The first of the decisions cited involves, it will be observed, the element of a difference of department, and may be justified on that ground alone. The second is contrary in principle to those collected in *V. f. infra*, and on the facts cannot be reconciled with the rulings of the Supreme and circuit courts of the United States cited below. As to the third and fourth it is difficult to conceive of circumstances in which

the injurious negligence could be more plainly that of a fellow servant than the acts of omission here in evidence. The places of work were perfectly safe except in so far as they were rendered insecure by the running of the car and the starting of the cable. If the foreman himself had operated the car or started the cable, the defendant would certainly not have been liable (see *Crispin v. Babbitt* [1880] 81 N. Y. 516, 37 Am. Rep. 521), and it seems impossible to argue that the failure to prevent another servant from doing these acts can be negligence of an essentially different quality.

The opposite theory of the quality of an order accompanied by an assurance is adopted in the cases cited below.

The orders of a section foreman to a laborer who is with him on a hand car, that he shall not look back to watch for a train, and assurance that the foreman himself will watch and give warning of any danger, do not make the master liable for an injury to the laborer resulting from the negligence of the foreman in failing to watch for the train. *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603.

One of two foremen of construction work acts as a mere coeservant of a subordinate in directing him to work at the base of an overhanging bank, and assuring him that he can work there in safety. *Balch v. Haas* (1896) 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974.

In *Missouri* it was held, at a time prior to the adoption of the superior servant doctrine (see note to *O'Neill v. Great Northern R. Co.* [1900; Minn.] 51 L. R. A. pp. 539 *et seq.*), that a railway was not any more bound by the assurances of a conductor that a rope was safe than by those of a fellow laborer of the plaintiff. *McGowan v. St. Louis & I. M. R. Co.* (1876) 61 Mo. 528.

The last two of the New York decisions cited above have been lately distinguished, not very successfully, in a case where it was held that the fact that, on plaintiff objecting to descending into a trench, defendant's foreman assured him it was safe, and that he would stand and watch, did not render defendant liable, since the foreman's assurance was merely as to the details of the work, given in his individual capacity, and not for the principal. *Schott v. Onondaga County Sav. Bank* (1900) 49 App. Div. 503, 63 N. Y. Supp. 631.

On the whole, therefore, the better opinion is believed to be that an assurance of safety is not an act which constitutes the employee giving it a representative of the master *ad hoc* *viocem*, but merely an act which is official in the sense that an employee who is a vice principal by virtue of his rank is regarded as giving it in the capacity of an agent of the master, and not of a mere servant. See, generally, note to *O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. pp. 586 *et seq.*

In the following cases the assurance emanated from one who was a vice principal in the jurisdictions mentioned, but the question whether it was an official act was not discussed. *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437, 47 Pac. 248 (local manager); *Monahan v. Kansas City Clay & Coal Co.* (1894) 58 Mo. App. 68 (foreman of mine); *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 592, 15 Pac. 484 (superintendent); *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398 (second mate of ship); *Nelson v. St. Paul Plow Works* (1894) 57 Minn. 43, 58 N. W. 863 (superintendent); *Heifensstein v. Medart* (1896) 136 Mo. 595, 36 S. W. 963, 37 S. W. 829, 38 S. W. 294 (superintendent); *Sopherstein v. Bertels* (1896) 178 Pa. 401, 35 Atl. 1000 (superintendent).

b. Choice of particular methods of work.

See also V. c, d, h, o, 7, *infra*.

The general rule is that the master is not responsible for the errors which a servant of superior grade may commit in regard to the choice of methods for carrying out the work intrusted to his management.

The conductor of a freight train is a mere fellow servant with a brakeman on the train in determining not to apply for more brakemen, or set off cars from his train before proceeding down a steep grade, under a rule of the company committing to his judgment the question whether he shall make such application, where there is nothing unusual about the train. *Wooden v. Western N. Y. & P. R. Co.* (1895) 147 N. Y. 508, 42 N. E. 199, *Reversing* (1891) 43 N. Y. S. R. 218, 16 N. Y. Supp. 840 (1892) 46 N. Y. S. R. 77, 18 N. Y. Supp. 768. The court said: "The duty of the company, as of any other master, to its servants, was performed if it furnished adequate machinery and suitable appliances for the work, and employed competent fellow servants, under proper rules, duly promulgated and adapted to the end of meeting possible emergencies of an ordinary or extraordinary character, which might be foreseen to arise in the conduct of its operations. It is only when the duty to be performed is one which the master is supposed to do in person for his servant's safety in his place of work, that it cannot be delegated to another so as to free the master from responsibility for the consequences of some neglect. The duty here was not of that character. It related to the performance of a part of the servant's ordinary work, and was regulated by the rule and published notice."

A railway company is not liable for the decision of bridge carpenters to raise a heavy bridge pier by tackle, rather than in some other way, and to fasten that tackle in a certain way, and to omit to brace it while it was being raised. *Ulrich v. New York C. & H. R. R. Co.* (1898) 25 App. Div. 465, 51 N. Y. Supp. 5.

The failure of a directing machinist, who was holding a torch, to suggest the danger of striking a driving-spring which was being placed in a locomotive, is not an omission of duty in the capacity of a vice principal. *Kerner v. Baltimore & O. S. W. R. Co.* (1897) 149 Ind. 21, 48 N. E. 364.

The mere fact that an employee held a stick of frozen duallin over a fire to thaw it will not support an action by a fellow employee against the master for injuries resulting from an explosion, upon the theory that the act itself showed that the employee was an unsuitable person for the master to have in his employment, where he was employed merely as a common laborer, and was acting at the time in pursuance of a direction for which the master was not responsible. *McManus v. Staples* (1898) 171 Mass. 150, 50 N. E. 537.

Directing a workman in a gang which is taking down a building to chop a post at a particular conjuncture is a mere detail of work. *Cleveland, C. C. & St. L. R. Co. v. Brown* (1896) 20 C. C. A. 147, 84 U. S. App. 759, 73 Fed. 970.

The act of one who is superintending the putting up of an elevator in a building in process of construction, in determining when the measurements shall be taken in the upper floors, and how far the construction of the building shall progress before they are taken, is the act of a fellow servant with a workman in the employ of such company who is injured while taking a measurement under the direction of such superintendent. *Whallon v. Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174.

Where a servant was injured by the falling
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of a staging which had been properly constructed and was adequate for the purposes for which it was intended and had been used, but fell by reason of the negligence of a fellow servant in taking it down, the master is not liable. *Lefarge v. Berlin Mills Co.* (1895) 68 N. H. 373, 44 Atl. 533.

A servant cannot recover where he was injured through the act of a fellow servant in taking down a trestle as a whole, instead of separating it and taking it down in sections. *Cogan v. Burnham* (1900) 175 Mass. 391, 56 N. E. 585.

No recovery can be had against an employer for an injury to an employee caused by the sudden fall of a frozen crust of ground on the employee while undermining the same, where the negligence, if any, in causing the crust to fall without warning was not that of the superintendent, but that of certain fellow servants who were driving wedges into the bank above. *Gorman v. Woodbury* (1899) 173 Mass. 180, 53 N. E. 373.

An employer is not liable for the negligence of a foreman in prematurely directing his subordinates to let go a telephone pole which was being taken down. *Morgridge v. Providence Teleph. Co.* (1898) 20 R. I. 386, 39 Atl. 328.

A laborer ordered to hold a bent fish plate in a certain position while the foreman endeavored to straighten it with a hammer cannot recover if he is injured through his compliance with the order. *Lagrone v. Mobile & O. R. Co.* (1890) 67 Miss. 502, 7 So. 551.

A direction to put powder into a hole without waiting a sufficient time for the hole to cool after giant powder had been exploded there is not deemed to have been given by a vice principal. *Mast v. Kern* (1898) 34 Or. 247, 54 Pac. 950.

c. Disposition of the force of employees available for the work in hand.

One special application of the general principle embodied in the cases cited in the last subdivision is observable in the rule that wherever the master has employed an adequate force of servants of a sufficient degree of skill and capacity, and furnished them with all the means which are essential for a proper discharge of their several duties, and the circumstances are such that the same number of men and the same degree of care are not always required, he is justified in leaving to them the exercise of their own discretion and judgment in the disposition and distribution of the force available.

No negligence can be imputed to a railway company for an omission to make regulations as to the number of brakemen to be sent on a train of detached cars when on its way to the repair track, and in what positions they should be placed. Hence, an accident due to the fact that there were too few brakemen on a particular train, and none at the rear end, will be held to be attributable, not to the negligence of the company, but to that of one or other of the employees engaged in distributing the cars. *Basel v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 171 (car repairer injured).

A railway company is not liable for the negligence of the foreman of a drill crew in sending a detached car along a track where other cars are being coupled, without stationing a brakeman upon it to control its movements. *Central R. Co. v. Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269.

In *Hussey v. Cogger* (1899) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556, where the plaintiff was injured through the negligence of some of his fellow servants, the court reasoned thus: "It was no part of the duty of the master to remove hatches, or direct the particular mode of

doing so, any more than to direct workmen in the use of the tools with which they performed their work. There were customary and established modes of performing such services, and each employee was expected to do his work in the manner and style to which he was accustomed, without special directions in respect thereto. It was entirely immaterial whether the superintendent undertook to perform the work of removing hatches, or ordered it to be done by others; he was, in either case, engaged in performing the duty of a workman. The master had furnished abundant help to do the work, and had done all that was required of him, and it was the fault of the servants that a sufficient number did not co-operate to perform it safely, or do it in the manner prescribed by custom."

d. Assigning servants to work for which they are unfitted.

It has been held that there can be no recovery for negligence of this description in cases where the unfitness was the cause of injury to the unfit person himself.

Where the act alleged to have directly resulted in injury was that of a fellow servant in requiring the plaintiff to lift beyond his strength, no breach of the master's duty to supply a safe place of work or safe instrumentalities is involved. The issue presented is merely one of the manner in which a servant employed a proper instrument of work. *Robertson v. Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655.

Nor can there be recovery where the negligence with which it is sought to charge the master consisted in allowing the unfit person whose acts were the direct cause of the injury to undertake duties which he was incapable of performing properly.

A railway company is not liable for an injury to a brakeman caused by the negligence of the engineer in placing his unskilled fireman temporarily in the performance of his duties in handling the engine. *South Florida R. Co. v. Price* (1893) 32 Fla. 46, 13 So. 638; *Parriah v. Pensacola & A. R. Co.* (1891) 28 Fla. 251, 9 So. 696; *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 110.

It is clear, however, that nonliability cannot, in cases of the latter class, be predicated except where the change of functions was allowed without any authority, express or implied, from the master. The decisions cited in III. b, *supra*, with regard to such negligence, show that, if the change was made by an official who had the power to make it, the circumstances are controlled by the doctrine that the duty to employ competent servants is nondelegable.

e. Negligence in sending servants into abnormally dangerous places without warning.

See, however, III. c, *supra*.

Several decisions embody the principle that an employee who, in the exercise of superintendence, sends a subordinate to perform his duties in a place where he will be exposed to a specific peril due to conditions which have arisen in carrying out the executive details of the work, acts as a mere fellow servant of such subordinate in giving the order without warning him of the existence of the peril. The leading case on this point is *Cullen v. Norton* (1891) 126 N. Y. 1, 26 N. E. 905. There the plaintiff's decedent was employed by defendant as a laborer in his cement quarry, and was engaged in drilling rock for blasting purposes under the defendant's foreman. Prior to the accident, eleven holes had been drilled in a piece of rock, and charged and fired, but only ten of

them exploded. The foreman examined the unexploded hole and found the fuse unconsumed, but failed to remove it. The next morning he directed two of the workmen to drill holes in the rock, within 2 feet of the undischarged hole, and at the same time ordered the deceased to drill 20 or 30 feet below. The exposed fuse shortly after in some way ignited the charge, which exploded and threw a mass of rock on the deceased. Upon these facts the trial judge dismissed the complaint. This judgment was reversed by the supreme court ([1889] 52 Hun, 9, 4 N. Y. Supp. 774) on the ground that the foreman was the representative of the employer in regard to furnishing the plaintiff with a safe place to work. At the second trial the plaintiff had a verdict, and the judgment therein was affirmed by the supreme court ([1890] 29 N. Y. S. R. 700, 9 N. Y. Supp. 174) on a theory of the evidence thus explained by Landon, J.: "The rule requiring the master to protect his servant from the known and inherent dangers of the situation includes those reasonably to be apprehended. Because the carelessness of fellow servants in such a situation is not to be reasonably apprehended, the master may escape the consequences arising from that peril. But if it was reasonable to apprehend a premature explosion from some other cause, then the master's care and prudence should have protected the intestate from it; the foreman was his only representative to act for him, and the jury have found that he not only failed to exercise that care, but actually did with respect to the intestate what ordinary care should have restrained him from doing. *Leonard v. Collins* (1877) 70 N. Y. 90. It may be conceded that the distinction between the dangerous nature of the employment and the dangerous nature of the place of employment is not always clearly perceived. We . . . hazard the illustration: Suppose the place is a rock in a mine, and the work is the picking out of explosive powder from the hole of an undischarged blast in the rock. The place, aside from the nature of this particular work, is safe, but the work is unsafe and dangerous in the extreme. If an explosion results from the work, and injures the servant, the injury is plainly attributable to the work, and not to the place. But suppose, while engaged in this dangerous work, an overhanging rock, gradually becoming loosened, now falls upon the servant and kills him, his death is attributable to the place, and the inquiry would be pertinent whether his master was negligent in assigning him to such a place. Again, suppose the workman is extracting the powder from the blast, as in the first supposition, and the danger is incident only to the nature of his work, and the master, with knowledge of the situation, directs a second workman to drill a new hole in the same rock near to the one upon which the first workman is employed. Clearly, with respect to the second workman, the place is a dangerous one, wholly irrespective of his own employment. As is repeated in *Hussey v. Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556, the master owes the duty to his servants to furnish a safe and proper place in which to prosecute his work, and to exercise care and prudence in the protection of his servants from the known and inherent dangers of the situation." In the court of appeals ([1891] 126 N. Y. 1, 26 N. E. 905) the judgment was reversed, on the ground that the "master furnished the mine as a place for labor, and it was solely on account of the manner in which the foreman, a fellow servant, performed the work, or directed it, that the accident happened, and happened in the course of the performance of the very kind and character of work which the plaintiff's intestate took the risk of by accepting

employment." The following extract from the opinion shows that the different conclusions arrived at by the two courts were due to the fact that the effect of the evidence was viewed by each of them from essentially different standpoints: "If Doran acted as master, the defendant is liable, while, if he acted in his capacity as an employee, and not as a representative of the master, his negligence does not rest upon the master. The quarry was the place where the work was to go on, and the master was bound to make it a reasonably safe place for such work, considering its character and the necessarily dangerous nature of the work itself. For the manner in which the persons employed in the quarry should themselves perform their work the master was not liable. It is not claimed that the master did not furnish a proper place to work in the first instance; that is, when the deceased was employed, the quarry was as safe as any quarry is where frequent blasts are being fired off. But the manner of the performance of each of the various details of the work by which, as a whole, it was to be conducted, rested necessarily upon the intelligence and care and fidelity of the servants to whom these duties were intrusted. It can't be that every time a blast was exploded, and the men came back, the manner of their distribution for work was a duty of the master, and that the order of a foreman, mistakenly or negligently given, must be regarded as the order of the master in filling a duty to furnish a safe place to work in. It is, as it seems to me, a detail of the working or management of the business, the risks attending which have been assumed by the party taking employment."

The circuit court of appeals has also rendered a similar decision, holding that a foreman of a gang of men engaged in constructing a sewer under the supervision of general superintendents is not a special vice principal, so as to render the city liable to one of such men injured in consequence of the negligence of such foreman in directing such man to reload holes drilled for blasting, without telling him that the person who loaded them, and was about to clean them out, had said that the dynamite in one of them had not exploded. *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525. The court reasoned thus: "The duty of the master to furnish a safe place for the performance of work does not require it to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress. It was the duty of each workman to use reasonable care to so render his service that the place in which he and his fellow servants were required to labor should continue to be reasonably safe. It was the duty of the foreman to so direct the work of excavating, of laying the pipe, and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master. The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. If the safe place originally furnished by the city became unsafe in the progress of the work, it

was rendered so, not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts and this negligence the city was not responsible."

A master who provided a skilful foreman and competent fellow workman, with necessary and proper appliances and tools for the removal of fragments of stone after a blast, is not liable for injuries sustained by an employee because the foreman omitted to give him notice to pry off the piece of rock that fell and hit him, instead of going to work directly under it. *Perry v. Rogers* (1898) 157 N. Y. 251, 51 N. E. 1021, Reversing (1895) 91 Hun, 248, 36 N. Y. Supp. 208.

The fact that a master personally directed a servant to go to work with a gang who cleared up at night the *débris* caused by blasting in the daytime will not enable the servant to recover for injuries occasioned by the fall of a rock loosened by such blasting, where competent workmen, a skilled foreman, and safe appliances were furnished. *Capasso v. Woolfolk* (1900) 163 N. Y. 472, 57 N. E. 780, Reversing (1898) 25 App. Div. 234, 49 N. Y. Supp. 409; (*Perry v. Rogers* [1898] 157 N. Y. 251, 51 N. E. 1021, *supra*, was followed).

In like manner, the negligence of a foreman in directing a common laborer employed to drill holes for blasting to draw an unexploded charge, without warning him as to the kind of explosive used, or instructing him in the way of handling it, is that of a fellow servant merely. *Vitto v. Farley* (1895) 15 Misc. 153, 36 N. Y. Supp. 1105. The decision was based on the ground that the direction related to a mere "detail of the work intrusted to the judgment and discretion of the foreman," and that the "method to be employed was left entirely to the foreman."

It is often quite difficult to decide whether cases of this type should be referred to the principle illustrated by the above decisions, or to the principle that the duty of instruction is nondelegable. A very slight change in the standpoint from which the evidence is considered will suffice to throw the facts on one side or the other of the line. In a very close case it was held by a divided court that an employee owning a coal dock, the structures and machinery upon which are undergoing repairs and rebuilding, made necessary by a storm, is not guilty of negligence in failing to warn a new and inexperienced employee, at work upon a chute, of the presence in such chute of the slack of a cable attached to the machinery of the dock, and of the danger of its suddenly lifting by the starting of the machinery, where the machinery is not in regular operation, and such lifting of the cable is not one of the incidents of such operation, regularly or occasionally occurring, but arises from the engineer's adjusting the cable upon the drums and leaving it for a time lying in the chute, and plaintiff's position is safe until the starting of the engine, and the employer has no notice of the presence of the cable in the chute, and cannot reasonably anticipate it.—especially where such employee is not ordered to take a position over the chute. *Porter v. Silver Creek & M. Coal Co.* (1893) 84 Wis. 418, 54 N. W. 1019. The majority of the court reasoned thus: "In the course of the engineer's work the cable was for a time lying in the chute. He started the engine and drew it up, and thus made the plaintiff's position over the chute dangerous, while a moment before it was entirely safe. The cable was never in the coal chute in the ordinary course of the business, but was always far above the chute. No official or superintending officer

of the company knew of the fact that the cable was in the chute, or was liable to be there, or ordered it put there. It was out of the usual course of business, and could not reasonably be anticipated. Nor was the plaintiff directed to take the position which he did over the chute. Certainly, the defendant could not be held to be obliged to warn the plaintiff of a danger which no one could reasonably anticipate." Two judges dissented on the ground that the master was bound to know that the machinery might start at any moment, and imperil the plaintiff. Compare the reasoning of the supreme court in *Cullen v. Norton* (1891) 126 N. Y. 1, 26 N. E. 905, as quoted *supra*.

On the whole this seems to be the correct theory of the evidence. The rule as to details of work being based essentially on the hypothesis of an assumption of the risks involved in the given operations, it is manifestly a prerequisite to its application, that those risks should have been understood by the injured servant. If it is a permissible inference from the evidence that, for some special reason, either *quoad personam* or *quoad res*, he did not understand those risks, and his want of comprehension was excusable, it is difficult to admit that the case is not one in which the jury should at least be called upon to say whether, under the circumstances, a duty of instruction should be predicated. The objection to the view of the majority of the judges is that the consideration mainly relied upon, *vis.*, that the event which caused the injury was not one which the master had reason to anticipate was scarcely one which a court of review was, under the circumstances, shown by the record warranted in making the basis of a peremptory inference of fact. If there was no evidence, or insufficient evidence, on this point, the proper course, it is submitted, would have been to send back the case to the trial court for further investigation.

f. Failing to warn servants as to dangers arising from the execution of the details of the work.

The general principle that the master's duty to provide a safe place of work is not deemed to have been violated, where the unsafety is caused solely by the acts of co-servants in carrying out the details of the work, clearly involves the corollary that the master is not chargeable with the failure of those servants to warn each other as to the existence of dangerous conditions which have already supervened.

A railroad company is not liable for injuries to a brakeman, caused by the neglect of a flagman in not giving due notice of rails torn up for repairs. *Cooper v. Milwaukee & P. du Ch. R. Co.* (1869) 23 Wis. 668.

The roadmaster of a railroad, directing the work of tearing down a bridge, is not the vice principal of the employer to the extent that his omission to give a particular warning of a detail thereof which portends danger would render the master liable for his omissions in that respect. *O'Neill v. Great Northern R. Co.* (1900) 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086 (plaintiff caught by a bolt which had not been drawn from a stringer of a trestle which he was helping to remove).

An employer is not liable for the death of an employee, caused by the blowing off of a door of a blast stove while he was engaged in tightening a nut on it, where there was no danger in working at the door unless the blast was on, and of that fact he was ignorant, solely through the neglect of his coemployee, under whose direction he was working. *Dahlke v. Illinois Steel Co.* (1898) 100 Wis. 431, 76 N. W. 362.

Similarly, all the authorities, with the exception of the single New Jersey case cited in 54 L. R. A.

III. p. *supra*, seem to be agreed that a master is not liable for the negligence of a servant in failing to notify a coemployee of the approach of a transitory peril which, as the work progresses, will render the environment unsafe for a brief period, but which may easily be avoided if due warning is given. In some of the cases illustrating this principle the breach of duty was committed by failing to notify the injured servant himself that his safety was imperiled by the particular peril in question.

The negligence of a section foreman in failing to note an approaching train, and to give the proper warning, so that a hand car may be taken from the track, is not the omission of a duty which the railroad company owes, as master, to one of the gang. *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 608. "We do not perceive," said the court, "that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slightest application to the facts of this case. There is no intimation in the evidence, nor is any claim made, that the hand car upon which the plaintiff was riding was not properly equipped and in good repair, and in every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit in and of itself from the station at Albuquerque to the point where the plaintiff was going to work."

If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south."

A trainmaster, who orders cars to be taken out of a train without notice to a brakeman engaged in making a coupling acts as a fellow servant of such brakeman. *Martin v. Chicago & A. R. Co.* (1895) 65 Fed. 384.

The duty of warning servants that a blast is about to be fired in a quarry does not belong to the nondelegable class. *Donovan v. Ferris* (1900) 128 Cal. 48, 60 Pac. 519; *Gallagher v. McMullin* (1898) 25 App. Div. 571, 49 N. Y. Supp. 734 (warning not given in time).

There can be no recovery, where an engineer, without warning, moved cars again after they had come to a stop against another car to which a brakeman was about to couple them. *Long v. Coronado R. Co.* (1892) 96 Cal. 209, 31 Pac. 170.

The negligence of an employee intrusted with the duty of warning other employees of the starting of machinery is not imputed to the employer. *Portance v. Lehigh Valley Coal Co.* (1899) 101 Wis. 574, 77 N. W. 875; *New Pittsburgh Coal & Coke Co. v. Peterson* (1896) 14 Ind. App. 634, 43 N. E. 270; *Cole Bros. v. Wood* (1894) 11 Ind. App. 60, 36 N. E. 1074.

One under whose direction a carpenter is working upon a ladder in front of a car stable, who promises to remain at the foot of the ladder to give the workman notice whenever it is necessary to remove the ladder in order to permit the cars or a cart to pass in or out of the stable, does not represent the master. *Byrnes v. Brooklyn Heights R. Co.* (1899) 36 App. Div. 355, 55 N. Y. Supp. 269.

Where a servant undertakes the work of putting damaged cars on a certain track in a yard, the receipt of insufficient notice as to the precise defect in some particular car which he has to handle is to be treated as the neglect of a fellow servant, and the risk must fall within the ordinary rule inasmuch as it is an incident of the service which was entered upon, that broken cars might be put in the wrong place in the yard, and insufficient notice of the defects in

them might be given. Such an omission of notice relates to matters of detail, and is one which cannot be given in advance. It is therefore not like an omission to give instructions to an inexperienced hand as to the general danger to which his work will expose him. *Yeaton v. Boston & L. R. Corp.* (1883) 135 Mass. 418.

Trainmen engaged in switching cars act as fellow servants in failing to give notice to a car repairer at work on one of the tracks of their approach. *Texas & P. R. Co. v. Campbell* (1894; Tex. Civ. App.) 39 S. W. 1104.

A railroad company which has provided watchmen to guard a car repairer from danger while at work is not liable to him for an injury resulting from their failure to warn him of an approaching train. *Luebke v. Chicago, M. & St. P. R. Co.* (1885) 63 Wis. 91, 53 Am. Rep. 266, 23 N. W. 136 (on the first appeal—[1883; 59 Wis. 127, 17 N. W. 870]),—the judgment of the lower court had been reversed on the ground that it had not been shown that the company had performed its duty of furnishing a watchman; *Rex v. Pullman's Palace Car Co.* (1897) 2 Marv. (Del.) 337, 43 Atl. 246. In the latter case, the court said, in the course of an oral charge: "The giving of notice of the approach of danger where it does not enter into the creation of, or the maintenance of, a safe place, is not necessarily a primary duty of the master, but a secondary duty, so to speak, which may be delegated to competent fellow servants under proper rules. Notice is sometimes an incident to the safety of the place; a matter of executive detail, which ordinarily must, of necessity, in operating large establishments, be intrusted to some independent human will other than that of the master; upon the faithfulness of which will, in the performance of duty it is reasonable to rely."

The negligence of a motorman in disobeying a rule of the company requiring those in charge of its cars to give timely warning of their approach to a track crew is not chargeable to the company as a violation of its duty to use reasonable care to provide a safe place for the trackman to do his work. *Lundquist v. Duluth Street R. Co.* (1896) 65 Minn. 387, 67 N. W. 1006.

The failure of a hatchtender to discharge his duty of giving warning to the servants in the hold below, that a bale is about to be thrown down, is not negligence which is imputable to the shipowner. *Ocean S. S. Co. v. Cheaney* (1890) 86 Ga. 278, 12 S. E. 351.

The failure of an employee to perform his duty of giving due warning that a piece of timber has been placed in the chute which conveys it to a ship is the negligence of a mere fellow servant of the workmen on board. *Hermann v. Port Blakely Mill Co.* (1896) 71 Fed. 853.

A contractor engaged in the business of altering and repairing vessels is not liable for the failure of his superintendent to warn the men working in the hold that a hatch is about to be removed. *Hussey v. Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556 (hatch escaped from the hands of the workmen).

The negligence of the superintendent in charge of work under a construction contract in replying in the affirmative to the question of an employee who was throwing down blocks from a height to the workmen below, whether it was clear below, resulting in an injury to a workman employed below, is not chargeable to the master. *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559.

In the absence of an express agreement, one employed to repair an elevator is not entitled to warning from the master when the elevator is about to start, where he relies upon a fellow servant, whom he has requested to give such

warning. *Mann v. O'Sullivan* (1899) 126 Cal. 61, 58 Pac. 375.

In other cases the delinquency consisted essentially in an omission to convey to the co-servant whose act was the immediate cause of the injury such information as would have enabled him to avoid inflicting the injury.

The omission of a foreman of track repairers to set a lookout is not negligence which can be imputed to the company. *Duthie v. Caledonian R. Co.* (1898) 25 Sc. Sess. 4th series, 934.

A railway company is not liable for the failure of a yard foreman to place a signal flag in front of the cars upon the repair track, so as to prevent any other train from coupling on to such car while said signal was displayed, the result being that a car repairer was injured by the coupling of a train. *Peterson v. Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 260.

That the failure to warn servants as to transitory dangers is regarded as official negligence in an employee who is a vice principal by virtue of his rank, see *note to O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 592, 593.

g. Absence from the post of duty.

A master who employs a sufficient number of servants is not liable for an injury to an employee caused by the temporary absence of a co-employee from a post of duty without any fault on the part of the employer. *Reichel v. New York C. & H. R. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 768.

The absence of a brakeman from cars shunted without an engine is the negligence of a co-servant, and not of the railroad company, where the latter has employed sufficient and competent brakemen to do such work, and they are present in the yard at the time of the accident. *Potter v. New York C. & H. R. R. Co.* (1892) 136 N. Y. 77, 32 N. E. 603. The court distinguished *Filke v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545, where the missing brakeman did not present himself for duty at all, and intimated a doubt as to the correctness of *Murphy v. New York C. & H. R. R. Co.* (1890) 118 N. Y. 527, 23 N. E. 812.

h. Selecting an imperfect appliance from the stock available.

Compare cases cited in *V. b. supra*.

It is well settled that, where the master has provided an adequate and readily accessible stock of suitable appliances in good condition from which to make a selection, and the imperfection of an instrumentality selected therefrom is, or ought to be, apparent to the servant who selects it, the master cannot be held responsible for injuries which are sustained by the use of that instrumentality, whether the sufferer be the servant himself who makes the selection, or a coemployee.

There can be no recovery where the field superintendent of a natural gas company, whose duty it was to shut in and test wells, was injured by an explosion due to his selection of a valve too weak to bear the pressure. *Toohy v. Equitable Gas Co.* (1897) 179 Pa. 437, 36 Atl. 314.

An employer is not liable for an injury to an employee caused by the breaking of a plank while putting a tank in position, where such plank was selected by the employee and his foreman while employed in the same service with him. *Mahoney v. Vacuum Oil Co.* (1894) 78 Hun, 579, 28 N. Y. Supp. 196.

A molder working by the day in a foundry, frequently called upon to assist in pouring heat-

ed metal into molds, is a fellow servant of an employee who made the molds, and cannot recover for injuries sustained by him by the escape of heated metal, due to the use of an imperfect flask in making the mold, where numerous flasks were provided, and the employee was not required to use an imperfect one. *Kehoe v. Allen* (1892) 92 Mich. 464, 52 N. W. 740.

In *Cregan v. Marston* (1891) 126 N. Y. 568, 27 N. E. 952, where the controversy was as to whose duty it was to observe and examine the condition of a rope, and change it when so worn that it became unsafe, the court explained its position as follows: "It is conceded that the defendants kept on hand and ready for use at any moment an adequate supply of these falls, and of the best and most approved character.

... If one was wanted, word was sent to the office, and the new fall at once supplied, for use at the dock. Usually the engineer or his assistant made the application, but anybody engaged in the work could give the notice and get the new fall. It does not appear that any such application coming from any of the workmen, therefore, were left in a position of perfect safety as to the sufficiency of the falls against everything save their own negligence or error of judgment. The rope was swinging before their eyes, and would disclose its approaching weakness on the surface before it became rotten or pulpy within, and they were able to know how long it had been used, and so whether prudence required it to be changed. They were at liberty, and knew they were at liberty, to supplant one which exhibited marks of weakness with another both new and sufficient, from the supply kept on hand. They were in the daily habit of observing its condition, and it was specially the custom of the engineer to do so. He had examined it a day or two before the accident, and deemed it safe." On this state of facts it was held out that the negligence of the engineer, if it existed, was not that of the master.

In *Ling v. St. Paul, M. & M. R. Co.* (1892) 50 Minn. 160, 52 N. W. 378, the court thus explained its reasons for holding that a master is not responsible to a servant for the act of a fellow servant in negligently selecting from a number of those available an iron hook which was broken and unfit for use, to which to attach a pulley to raise a heavy weight in a boiler shop: "It is very apparent from the case that when, for this or like purposes, it became desirable or necessary for the boiler makers and their assistants to resort to the mechanical aid of a pulley, it was a part of their duty to consider where, under the circumstances relating to its use, they would fasten or anchor the pulley, and the means by which they would do it. To illustrate, it was not the legal duty of the defendant towards these mechanics, as their master, to direct them whether to make their pulley fast to the crown sheet over the fire box, or to use a timber for that purpose, or as to whether they should use a hook, of one form or another, an eye bolt, or some other means of making it fast. It was not a part of the absolute duty of the master to provide the particular simple instrument or thing which should be used for such a purpose. That was a part of the very duty which the mechanics were to themselves perform. The defendant provided the means which might be necessary to enable the mechanics to do what was thus required of them. If there was not at hand such a thing as might be necessary to fasten the pulley in position for use, they could have it made by the blacksmith. But the evidence shows conclusively that there were enough hooks lying about the shop fit for this purpose, which might have

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been selected and used. The accident occurred from the fact that whoever procured this hook neglected to observe, as he might have done, that it was broken and unfit for use. It does not appear who did this. There is no reason to presume, even as a matter of fact, that the foreman did it, rather than the boiler maker Brennan, or one of his helpers. But, while much attention is given to this matter in the argument of the appellant, we deem it to be of no consequence whether the boiler maker or the foreman was the person who negligently selected this particular hook and put it in position for use. In either case this was a part, a mere detail, of the work which these mechanics were employed to perform, and, whether done by the foreman, boiler maker, or a helper, whatever negligence there may have been in selecting the broken hook was the negligence of a fellow servant, and the plaintiff cannot recover from this defendant."

Recovery has been also denied where a fellow servant selected the following articles: A rope (*Prescott v. Ball Engine Co.* [1896] 176 Pa. 459, 35 Atl. 224); a buggy for conveying iron (*Bemis v. Roberts* [1891] 143 Pa. 1, 21 Atl. 998); a coupling pin that was too short (*Thyng v. Fitchburg R. Co.* [1892] 156 Mass. 13, 30 N. E. 169); a defective link for coupling cars (*Young v. Boston & M. R. Co.* [1897] 168 Mass. 219, 46 N. E. 624); a defective hammer by a fellow servant (*Rawley v. Colliau* [1892] 90 Mich. 31, 51 N. W. 350); appliances for supporting and steadying a heavy iron structure which was being hoisted (*Ludlow v. Groton Bridge & Mfg. Co.* [1896] 11 App. Div. 452, 42 N. Y. Supp. 343, previous proceedings reported in [1895] 71 N. Y. S. R. 510, 38 N. Y. Supp. 452, new trial denied in [1896] 16 Misc. 222, 37 N. Y. Supp. 595); an imperfect plank upon which to walk from a car to a shed into which it is being unloaded (*Van den Heuvel v. National Furnace Co.* [1893] 84 Wis. 636, 54 N. W. 1016); portions of a derrick employed in stone-setting. *Harms v. Sullivan* (1878) 1 Ill. App. 251.

One common variety of negligent selection consists in the use of an instrumentality which is safe and adequate for the purpose which was contemplated by the master when he supplied it, but which is dangerous or inadequate when used for the work to which it was actually applied. *Carroll v. Western U. Teleg. Co.* (1893) 160 Mass. 152, 35 N. E. 456; *Meehan v. Speirs Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518; *Durgin v. Munson* (1864) 9 Allen, 396, 85 Am. Dec. 770; *The Persian Monarch* (1893) 5 C. C. A. 117, 14 U. S. App. 158, 55 Fed. 333, *Reversing* (1892) 49 Fed. 669; *Maber v. Thropp* (1896) 59 N. J. L. 186, 35 Atl. 1057.

An employer who furnishes safe and suitable appliances to the employee with which to do the work on which he is engaged is not responsible for injuries caused by defects in appliances substituted by a fellow servant for those furnished by the employer. *Campbell v. New Jersey Dry Dock & Transp. Co.* (1898) 61 N. J. L. 382, 39 Atl. 658.

The selection of an article from a supply of suitable material to be taken away and used at a distance has been held to be distinguishable from the selection of such an article from materials on hand at the place of work, and to be done in the performance of the nondelegable duty of furnishing appliances. *Thomas v. Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 40.

1. *Failing to use the instrumentalities furnished by the master.*

Another kind of dereliction of duty which is regarded as characteristic of a servant, and not of the master, is that which consists in the

failure of a fellow servant to make use of suitable appliances furnished by the master for the work in hand.

A master who provides a proper apparatus to prevent a tub from falling back into a pit from which it is to be hoisted when full of earth is not liable for an injury caused by the failure of a fellow servant to use that apparatus. *Griffiths v. Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404.

A brewer cannot be held culpable on the ground that he did not furnish proper appliances, where he sent his men to a customer's cellar with the usual apparatus for elevating barrels, and the men, finding the apparatus could not be used on account of the narrowness of the cellar, proceeded on their own responsibility to lift the barrels without it. *Ramsay v. Robin* (1889) 16 Sc. Sess. Cas. 4th series, 690.

A bridge builder is not liable where a foreman of a bridge gang injures a subordinate by his failure to use the braces furnished for enabling the workmen to move a heavy piece of the structure with greater safety. *Ludlow v. Grotton Bridge & Mfg. Co.* (1896) 11 App. Div. 452, 42 N. Y. Supp. 343.

A servant cannot recover for personal injuries where the defect complained of is the want of a gang plank at the side door of a car into which he was helping to load a machine, when it is not shown that a suitable gang plank was not furnished. *Trimble v. Whitin Mach. Works* (1898) 172 Mass. 150, 51 N. E. 463.

An employer is not liable for an injury caused by the breaking of a derrick from the lack of guy ropes to prevent swinging of the article hoisted, where there was rope on the premises which might have been used as guy ropes, but which the fellow servants of the injured employee neglected to use. *Clark v. Riter-Conley Co.* (1899) 89 App. Div. 598, 57 N. Y. Supp. 758.

Under the Pennsylvania statutes of 1877 and 1883, which merely require mine owners to furnish a sufficient number of props for the tunnels, a miner cannot recover if the evidence shows that a roof which fell and injured him would not have fallen if a single prop had been put in by the "boss." *Reese v. Biddle* (1886) 112 Pa. 72, 8 Atl. 813. Compare *Hall v. Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411, where a miner was held not to be entitled to recover for an injury due to the negligence of an underlooker in omitting to see that the roof of the mine was propped safely, though here the point of view was not quite the same, as the essence of the decision was that the delinquent was not a vice principal by virtue of his rank.

An employer is not liable for an injury to a servant caused by the giving way of a belt fastener, due to the use of an insufficient number of fasteners in splicing the belt, where it keeps on hand a large quantity of such fasteners, and the failure to use a sufficient number is due to the negligence of his coemployees. *Harley v. Buffalo Car Mfg. Co.* (1894) 142 N. Y. 81, 36 N. E. 813.

An employer who acts as his own superintendent in the work of excavating a tunnel, and furnishes proper appliances for securing the safety of laborers who are to be lowered into it by a shaft leading into it, is not liable for an injury caused by the negligent omission of one of his subordinates to deliver those appliances at the mouth of the shaft. *McAndrews v. Burns* (1876) 39 N. J. L. 117. See, however, *VI. 1, 1, 3, infra*.

A ship owner which supplies, and has on hand, fenders and a gang plank, the use of which will render safe the unloading of the ship, 54 L. R. A.

is not liable for an injury to an employee caused by the failure of the stevedore, who superintends the unloading, to use the same. *Flynn v. Maine S. S. Co.* (1895) 14 Misc. 446, 85 N. Y. Supp. 1031.

A railroad employee cannot recover against the company for injuries caused by the neglect of the engineer or fireman in failing to have sand in the dome of the engine, on the ground of the company's failure to provide safe ways and appliances. *Illinois C. R. Co. v. Jones* (1894; Miss.) 16 So. 300.

The failure to provide a headlight renders a railway company liable to an employee who suffers injury through such failure; but it is not liable to the person injured for the failure of the men on the engine to light the one provided. *Collins v. St. Paul & S. C. R. Co.* (1882) 30 Minn. 31, 14 N. W. 60.

Negligence cannot be imputed to an employer on account of the absence of lights from the place of work where torches are furnished which may be used by the employees if they so desire. *Kaare v. Troy Steel & I. Co.* (1893) 139 N. Y. 369, 34 N. E. 901.

j. Negligence in failing to discard a defective for a suitable instrumentality.

In some cases of the class reviewed in the two preceding subdivisions the evidence indicates a breach of the duty to discard a defective appliance and replace it by a sound one, as well as a breach of the duty to use the appliances furnished.

The effect of considering the master's responsibility from this standpoint is discussed in VII. d, *infra*.

k. Using instrumentalities in a manner not contemplated nor authorized by the master.

A master who has furnished sufficient and suitable instrumentalities is not liable for the injuries which one servant may receive from the negligence of another in selecting for the performance of the work a particular instrumentality, which, though sufficient in itself, was not adapted to the purpose for which it was used.

In *Carroll v. Western U. Teleg. Co.* (1893) 160 Mass. 152, 35 N. E. 456, holding a telegraph company not to be liable for the fall of a pole upon an employee engaged in raising it, due to the slipping of the pole upon a shovel with pointed end, directed by the foreman to be used instead of a crutch, which had broken, the court said: "We assume that the shovel was not a proper tool for the purpose, but it was not furnished for the purpose by the defendant. The plaintiff, as we understand, contends that his party was reduced to using it by the breaking of the deadman and the absence of other tools, coupled with the fact that the pole was to be raised at that time, and thus that the defendant was responsible for the situation. The short answer is that there is no evidence that the defendant did not furnish a sufficiency of proper tools at the depot from which those which were used were taken, or within convenient reach, and that, when proper appliances of this sort are furnished by the employer within convenient reach in a case like the present, he has done his whole duty, and is not bound to see that every gang of workmen take as many tools as the event may show to have been desirable."

A steamship is not liable for injuries to an experienced stevedore by the giving way of the guy rope of a derrick improperly used by such stevedore and his coemployees in hauling a vessel alongside, where the derrick was not intended for that purpose. *The Persian Monarch*

(1893) 5 C. C. A. 117, 14 U. S. App. 158, 55 Fed. 333, Reversing (1892) 49 Fed. 669.

An employer is not liable for injuries to a painter in his employ by the breaking of a defective plank which his foreman has placed in position and directed such painter to pass over for the purpose of removing a scaffold, where the plank was not furnished by the employer for such use. *Butterworth v. Clarkson* (1893) 3 Misc. 338, 22 N. Y. Supp. 714.

To this head may be referred those cases in which it has been held that a servant who is responsible for a fellow workman's use of a temporary makeshift contrivance during the progress of the work does not represent the master as regards the furnishing of that contrivance.

An experienced carpenter, who, without making any examination, stands on a box handed to him by his vice principal, who to his knowledge had made no examination thereof, assumes the risk of the box not being strong enough to bear his weight. *Soutar v. Minneapolis International Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796 (the second ground of the decision was the plaintiff's full comprehension of the risk).

A foreman knowing of the existence of a ladder placed upon a roof as a temporary contrivance for a special purpose is a fellow servant with an employee whom he directs to assist in going upon the roof to adjust a collar to a recently erected smokestack. *Kiffin v. Wendt* (1899) 39 App. Div. 229, 57 N. Y. Supp. 100.

An employer who furnishes a supply of ladders from which employees are to select ladders to be used in painting is not liable for injury to an employee caused by the breaking of the lower of two ladders spliced together by the employees in such a manner that the foot of the ladder had to be placed some distance from the building,—especially where it does not appear that the ladder which broke would have been insufficient if used alone. *McKay v. Hand* (1897) 168 Mass. 270, 47 N. E. 104.

The result is not changed by the fact that the injured servant had reason to believe that the defective appliance was one of those furnished by the master. *Guggenheim Smelting Co. v. Flanagan* (1898) 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145.

It will be observed that the evidence in these cases brings us very close to that which is the subject of consideration in VI. *infra*. The facts in this class of cases are also susceptible of being sometimes viewed from the standpoint of the plaintiff's contributory negligence, and the master's exemption from liability is sometimes predicated on this ground. *Moran v. Brown* (1887) 27 Mo. App. 487. See also the extract from the opinion in *Durgin v. Munson* (1864) 9 Allen, 396, 85 Am. Dec. 770, as quoted in V. m, 1, *infra*.

I. Giving of signals.

Frequent attempts have been made to bring the negligence of servants deputed to give signals within the scope of the principle that the duty to maintain a safe place of work is non-delegable. But this contention has always been rejected.

An employer is not liable where trainmen cause injury to one of their number by failing to give proper signals to a following train (*Hoover v. Beech Creek R. Co.* [1893] 154 Pa. 362, 26 Atl. 815; *Jenkins v. Richmond & D. R. Co.* [1893] 39 S. C. 507, 18 S. E. 182 [first train had broken in two]; *Wheatley v. Philadelphia, W. & B. R. Co.* [1894] 1 Marv. [Del.] 305, 30 Atl. 660); nor where a fireman omitted to sound a bell or whistle for the purpose of notifying the injured employee of the approach of a moving engine (*Greenwald v. Marquette, H. & O. R.* 54 L. R. A.

[1882] 49 Mich. 197, 13 N. W. 513); nor where one brakeman causes injury to another by giving a signal which causes a sudden reversal of the engine (*Cole v. Rome, W. & O. R. Co.* [1893] 72 Hun, 467, 26 N. Y. Supp. 270); nor where the result of the manner in which a signal was given to a yard hand by his foreman was that he did not understand that the car he was ordered to couple was to be sent to the repair track, and accordingly acted less cautiously than he would have done if he had realized the danger (*Fraker v. St. Paul, M. & M. R. Co.* [1884] 32 Minn. 54, 19 N. W. 349); nor where a conductor or other official in control of a train injures a brakeman by his negligence in signaling to back up cars. *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258; *McCosker v. Long Island R. Co.* (1881) 84 N. Y. 77, Reversing (1880) 21 Hun, 500. In the latter case the court said: "The yardmaster, through whose negligence the injury occurred, must be deemed to have been a fellow servant of the deceased, as to all acts done within the range of the common employment, except such as were done in the performance of some duty which the master owed to his servants. The act, in the present case, was very plainly not of that character. The yardmaster was charged with the duty of making up the trains and distributing the cars in and about the yard, and the repair shops of the defendant, and the deceased was employed by him to assist in that service. As a necessary consequence, broken and disabled cars had to be handled and moved to the repair shops, and whatever of risk was inseparable from their damaged condition, and the inconvenience, and even danger, of getting them to the shops, was an open and palpable risk of his employment, which the deceased assumed. It is, of course, no ground of liability of the company that the bumpers of this car were broken, and it could not be coupled in the ordinary way. The deceased was employed to handle and move to the repair shops damaged and disabled cars, and took the risk of his employment in that respect. While engaged in attaching the broken car to the one in front with the aid of a chain, and by direction of the yardmaster, the latter negligently, and at the wrong moment, signaled to the engineer to back his train, and as a consequence the deceased was crushed between the cars. The negligence which caused the injury was in no sense that of the master. In moving this train the yardmaster was acting, not as the agent of the master in the performance of the master's duties, for it was not the latter's duty to effect the coupling of these cars and their movement to the repair shop. What the yardmaster was doing was the work of a servant, in the department of labor and duty assigned to him as such. No duty which the master owed to his servants was being done by the yard master from the negligent performance of which the injury resulted."

And an employer is not liable where a servant detailed to give warning to the men on board as to the movement of articles which are being hoisted on board a ship omits to perform that duty (*Hermann v. Port Blakely Mill Co.* [1896] 71 Fed. 358); nor where the plaintiff was injured while assisting in laying iron pipe in a trench, by the pipe swinging against him as it was lowered, in consequence of the negligence of one of plaintiff's fellow servants in giving the signal to lower the pipe (*Kennedy v. Allentown Foundry & Mach. Works* [1900] 49 App. Div. 78, 63 N. Y. Supp. 195); nor where the proper signals are omitted in navigating ships (*The City of Norwalk* [1893] 55 Fed. 98; *The Queen* [1889] 40 Fed. 694).

Where brake-chains are so defective that a brakeman is frequently compelled to go under the car, and while he is there the conductor signals for the train to start, and so injures him, the conductor's negligence, not the broken chains, is regarded as the proximate cause of the injury. *Pease v. Chicago & N. W. R. Co.* (1884) 61 Wis. 163, 20 N. W. 908.

A conductor of a train, signaling to the engineer to go forward, is a fellow servant of the engineer, and also of the fireman, who was injured by the negligent act of the conductor in making the signal, and of the engineer in obeying it. *Grattis v. Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108.

m. Negligence in carrying out the express orders or regulations of the master.

In any case in which the master has issued directions for the guidance of his servants respecting the manner in which the work is to be done, whether those directions take the shape of general rules or of specific orders *ad hanc vicem*, any delinquencies of which employees may be guilty in regard to the mere details of the work to which those orders or rules relate are deemed to be committed by them as mere servants. In many instances it is easy to deduce the result from the conception that a fellow servant's disobedience to orders is not one of those events which a master is bound to anticipate as likely to make the place of work unsafe. *Healey v. New York, N. H. & H. R. Co.* (1897) 20 R. I. 138, 37 Atl. 676.

Evidence that the master's directions were not followed will, under such circumstances, be viewed as simply negating the existence of negligence on his part. But a comparison of the cases cited below with those reviewed in the preceding subdivisions shows that all the various groups of facts as to which nonliability has been predicated on this ground have been of such a character that the servant would have been unable to recover, quite irrespective of the circumstance that the negligence committed constituted an infraction of the master's orders. Indeed, it is clear, both upon principle and authority, that, so far as the availability of the defense of common employment is concerned, the extent of the master's liability is measured by the same standard, whether the act which caused the injury was or was not forbidden by him. See III. 1, *m. supra*.

1. Cases of the nonobservance or inadequate observance of general rules.

Where the evidence is equally consistent with the theory that the injury was caused by negligence in supervising the operation of trains, and with the theory that it was caused by the fault of a co-servant, the plaintiff cannot recover. *Rose v. Boston & A. R. Co.* (1874) 58 N. Y. 217. The court said: "In the case before us it appeared in proof that the train on which the plaintiff's intestate was a brakeman went out within three or four minutes after another train, and was itself followed by a third train, at about the same distance of time. The injury which resulted in the death of the plaintiff's intestate was the consequence, as the jury have found, and as they might rightfully find from the evidence, of those trains being sent out so near together. By what direction they started so nearly at the same time does not appear. All the proof that relates to the point is contained in the single phrase of one of the witnesses, who, speaking, not of the time of the accident, but of the time of his testifying, says: 'The head conductor who has charge of sending out trains is Mr. Rockefeller.' What

charge Rockefeller has is not shown, nor whether he, in fact, despatched the trains in question. It does not appear whether he was intrusted with any discretion upon the subject of starting trains, or whether any regulations on the subject, either by a prescribed time-table or otherwise, had been made by the company. But it is obvious that the company may have prescribed proper and safe rules in respect to the starting of these trains, and that those rules may have been disregarded by the persons who actually started these trains so near each other. It may be conceded that it is the duty of a railroad corporation to prescribe, either by means of time-tables or by other suitable modes, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation or any general agent of a corporation can personally oversee, and as to which employees must be relied upon. . . . Nothing appears in the evidence indicating that any distinction exists between the duty of the company in starting trains and in subsequently running them. In the absence, therefore, of any such proof, and of any proof showing negligence in this respect on the part of the defendants, the case must be determined by ascertaining on which party the burden of proof rests."

The principle that the carrying out of rules is a "matter of detail" was also relied upon in *Bryant v. New York C. & H. R. Co.* (1894) 81 Hun, 164, 30 N. Y. Supp. 737.

When the master has furnished—to be observed by those having the management of his business—such rules as may be reasonably essential to the safety of his employees in any emergency or condition which may be apprehended in the service, he has discharged his duty to them in that respect, and they assume the hazard of the observance of the regulations by those with whom the duty rests to execute them. *Tully v. New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29. See also *Drake v. New York C. & H. R. Co.* (1894) 80 Hun, 490, 30 N. Y. Supp. 671.

In *International & G. N. R. Co. v. Hall* (1890) 78 Tex. 657, 15 S. W. 108, the following charge was approved: "If defendant had established or provided such reasonable rules, regulations, etc., plaintiff cannot recover, though he may have been hurt through failure of one or more of his fellow servants to do what was required of him or them under the rules of that business. In other words, if defendant's established methods of management of that branch of its business were reasonably sufficient, had its employees observed and followed them, to have afforded defendant reasonable protection against the danger he incurred when working on the repair track, defendant would not be liable whether its other employees did their duty or not."

In *Durgin v. Munson* (1864) 9 Allen, 396, 85 Am. Dec. 770, the defect in the engine, which the plaintiff alleged was the cause of his injury, was the insufficiency of the brake to prevent the engine from running off while it was turned on the turn-table. The defendant proposed to show that the person who had charge for him of all the engines on the road had given instructions, before the accident, to the engineers, to have the wheels of their engines "chocked" while turning on the turn-table, and that this accident occurred by failure of some servant of the defendant to obey such instructions. It was held that the exclusion of this evidence was error, as it was not shown that the instruction was given or known to the plain-

tiff. The court said: "Proof that the accident which caused the injury to the plaintiff was caused by the neglect of a fellow servant would have been a defense to the action; and the offer went to that extent. The defects of the engine in the abstract were not the gist of the plaintiff's complaint, but its defects at the time and for the service in which the defendant allowed it to be used when it ran onto the plaintiff. If it were fit and sufficient for use in the manner in which the defendant then allowed it to be used, its insufficiency for other service, at other times, would not concern the plaintiff. Now it is plain that a machine may be safe and fit for one use, when it is not for another. To put an extreme case, by way of illustration: Suppose the defendant had a worn-out engine, unfit for any service, and he had given orders that it should not be run at all; yet some workman had, without his knowledge, undertaken to run it; could the master be held responsible to the fellow servant? Suppose a car that was not fit to run with steam power was kept for use only when drawn by horses; or an engine which had not the proper appliances for a locomotive was employed solely as a stationary engine; would an unauthorized change of the use make the master liable? If this engine, when 'choked' upon the turn-table, was absolutely safe against the possibility of running off, so that it needed no brake at all in that position, and it was not permitted to be turned until the blocking was applied to the wheels, it would be a question for the jury whether the want of a brake was the cause of the injury. There is no absolute requirement of law that the injurious action of a locomotive engine shall be prevented by the specific expedient of a brake. If other sufficient means of safety, equivalent in effect, were supplied, that is all that is necessary; and the jury were to judge of their sufficiency. The fact that the orders to the engineers were not known to the plaintiff would not be decisive, because the question on that part of the case was, whether the engineers were careless, and by their failure to obey instructions the accident occurred. The evidence which was rejected should therefore have been received, as having a direct tendency to show whether the defendant used such precautions and gave such rules for the use of the engine in the condition in which it was at the time of the accident, as made it then a proper instrument for the service to which it was to be applied."

Where all the testimony shows that a special order to an engineer to run his train "two hours late" was to be read in connection with the general rules of the company, and was so understood by all the employees concerned, and that such order meant that the train was to run with reference to the schedule of all passenger trains, and never to encroach upon the time of the train which it followed, the company cannot be held liable for injuries which a brakeman on the train in front received through the negligence of the engineer of the following train in running it too fast. *Kennelty v. Baltimore & O. R. Co.* (1895) 186 Pa. 60, 30 Atl. 1014.

Where a railroad company has employed a sufficient number of competent servants to shift its cars in a yard, and has promulgated proper rules for the management of the business, it is not liable for the consequences of a brakeman's failing to take his proper position on the top of moving cars. *Potter v. New York C. & H. R. Co.* (1892) 136 N. Y. 77, 32 N. E. 603, *Distinguishing Filke v. Boston & A. B. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545.

In *Wright v. New York C. R. Co.* (1862) 25 N. Y. 568, it was sought to support the judgment on the ground of the improper arrangement of the time-tables at the point where the collision

took place. The court, however, held that the time-tables were not in fault, but that the collision grew out of the carelessness of the employees in running the train not in conformity with the time-tables, and that the fault was therefore to be regarded as that of a fellow servant, and that the defendants were not responsible.

An employer is not liable for the death of an employee killed by the fall of a cornice which he was engaged in putting up without anchors, where he voluntarily assumed the risk, and the foreman in charge of the work had no authority to go on with it except in accordance with the plans and specifications, which provided for the use of anchors. *Homersky v. Winkle Terra Cotta Co.* (1899) 178 Ill. 562, 53 N. E. 346, *Affirming* (1898) 77 Ill. App. 42.

The duty of a railroad company to provide its employees a reasonably safe place to work does not render it liable for injuries received by a brakeman in a collision between his train and an engine, resulting from the negligent disregard by the engineer of such engine of his orders to proceed on a track other than that on which the train was running. *Healey v. New York, N. H. & H. R. Co.* (1897) 20 R. I. 136, 37 Atl. 676.

Even if it be assumed that rules for signals at crossings and as to speed are available to an employee, the negligence of the conductor and engineer of a train in failing to make such signals, and in running at excessive speed, is that of fellow servants as regards a section hand. *Wright v. Southern R. Co.* (1897) 50 Fed. 260.

The defendant is not entitled to a nonsuit where the evidence leaves it uncertain whether the injury was caused by the misconduct of the plaintiff's co-servants in violating a duly promulgated rule, or whether at the time the injury was received they were acting without any regulations, and simply following a dangerous practice sanctioned by time and custom. *Doing v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028.

A railroad company is not liable for the death of a brakeman in a collision, on the ground that the train dispatcher should have warned the conductor of the following train of the preceding one, where a despatch had been forwarded to the side-tracking station in ample time to afford an opportunity to side-track the first train but for its delay in reaching the station, and the conductor had been warned to guard against the following train, and knew of the increased danger, and took no precautions to guard against it. *Herrington v. Lake Shore & M. S. R. Co.* (1894) 83 Hun, 865, 31 N. Y. Supp. 910.

The plaintiff's action was also held not to be maintainable on this ground in the following cases: *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 37 Ohio St. 549 (trainmen injured through collision resulting from the negligence of an employee sent to flag an approaching train); *Niles v. New York C. & H. R. Co.* (1897) 14 App. Div. 58, 43 N. Y. Supp. 751 (engineer ran his train past a block signal so that it came into collision with another standing on the track); *Evansville & T. H. R. Co. v. Tohill* (1895) 143 Ind. 49, 41 N. E. 709, *Rehearing denied* in 143 Ind. 60, 42 N. E. 352 (collision caused by conductor's running train past station, instead of side-tracking, as required by the regulations); *Simpson v. Central Vermont R. Co.* (1896) 5 App. Div. 614, 39 N. Y. Supp. 464 (same species of accident); *Northern P. R. Co. v. Polrier* (1897) 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741 (collision caused by conductor's disregard of rule as to running a train closely behind another); *Ford v. Lake Shore & M. S. R. Co.* (1889) 117 N. Y. 638, 22

N. E. 946 (disregard by employees of rules regulating the loading of cars); *Byrnes v. New York, L. E. & W. R. Co.* (1889) 113 N. Y. 251, 4 L. R. A. 151, 21 N. E. 50 (railroad company not liable for the negligence of its employees in making inspection of loaded cars which is imposed on them by its rules); *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327 (brakeman thrown off car by a sudden check in its movements consequent upon a fellow servant's giving a signal to the engineer in breach of the custom in use); *Denver & B. G. R. Co. v. Sipes* (1896) 23 Colo. 226, 47 Pac. 287 (railroad company not liable for the consequences of a conductor's negligence in failing to observe a rule of the company with respect to the closing of switches); *Davis v. Staten Island Rapid Transit R. Co.* (1896) 1 App. Div. 178, 37 N. Y. Supp. 157 (switch left open by conductor—brakeman injured); *Moeller v. Delaware, L. & W. R. Co.* (1897) 13 App. Div. 467, 43 N. Y. Supp. 603 (car repairer injured by fellow servant's failure to put out a signal flag); *Enright v. Toledo, A. A. & N. M. R. Co.* (1892) 93 Mich. 409, 53 N. W. 536 (engineer disregarded rule requiring freight trains to approach stations under full control); *Peterson v. Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 260 (no signal flag placed, as required by rules to protect car repairers); *Renfro v. Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302 (breach of rules made for the protection of car repairers); *Duthie v. Caledonian R. Co.* (1898) 25 Sc. Sess. Cas. 4th series, 954 (breach of rule requiring foremen of track-repairing gangs to set a lookout); *Whalen v. Michigan C. R. Co.* (1897) 114 Mich. 512, 72 N. W. 323 (brakeman or conductor failed to pull automatic cord when brakes were whistled for); *Lunquist v. Duluth Street R. Co.* (1896) 65 Minn. 387, 67 N. W. 1006* (warning signal not given, as prescribed by rules); *McDonald v. New York C. & H. R. Co.* (1892) 63 Hun, 537, 18 N. Y. Supp. 609 (engineer's breach of rule requiring him to examine engine); *Henry v. Lake Shore & M. S. R. Co.* (1882) 49 Mich. 495, 13 N. W. 832 (rules requiring engineer to obey certain signals were violated by an engineer); *Terre Haute & I. R. Co. v. Leeper* (1895) 60 Ill. App. 194 (signals at switch disregarded); *Miller v. Southern I. Co.* (1891) 20 Or. 285, 26 Pac. 70 (breach of rule as to adjustment of switches); *Cooper v. New York, O. & W. R. Co.* (1898) 25 App. Div. 383, 49 N. Y. Supp. 481 (freight cars left on a siding without setting brake).

2. Cases of negligence in carrying out specific orders.

A railway company is not liable for an injury due to the neglect of orders properly communicated by the employer's representative as to the running of trains. *Galveston, H. & S. A. R. Co. v. Smith* (1890) 76 Tex. 611, 18 S. W. 562; *Chicago, St. L. & N. O. R. Co. v. Doyle* (1893) 60 Miss. 977 (where a conductor went on past a station without getting instructions, as the train despatcher had directed, with regard to the future movements of the train).

A railway company is not liable for injuries due to the negligence of an engineer, who, against orders, moved a train out of a siding, and thus caused it to collide with another owing to its being provided with a defective headlight. *New York, C. & St. L. R. Co. v. Perrigney* (1891) 138 Ind. 414, 31 N. E. 233, 37 N. E. 976.

Where the road superintendent of a railway company disobeys the manager's order not to take a train across a defective bridge the case should go to the jury on the question whether such an order was given. *Carney v. Carraquet R. Co.* (1890) 29 N. H. 425.

No action is maintainable where the cause
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of the accident was the sudden opening of a trap door in a passage, from below, by a co-servant of the plaintiff in disobedience to express orders of a foreman, the result being that the plaintiff fell through the opening. *Anthony v. Leeret* (1887) 106 N. Y. 591, 12 N. E. 561.

The failure of a brakeman on a train to stop the same when he sees a fellow servant upon a railroad bridge in what will be a dangerous position if the train proceeds, by reason of which such fellow servant is injured, will not render the company liable, although he is directed by the superintendent to move the train across the bridge. *Austin & N. W. R. Co. v. Beatty* (1894) 6 Tex. Civ. App. 650, 24 S. W. 934.

An employer's order to lower a beam during the construction of a bridge does not render him liable for the act of an employee charged with the execution of the order, in lowering the beam so carelessly as to inflict an injury on a fellow servant. *Ryan v. McCully* (1894) 128 Mo. 636, 27 S. W. 533.

n. Failure to give instruction.

Where a servant has notice of the general risks and dangers of his employment, as, for example, that many of the cars which he is required to handle as a switchman are defective, the master is not guilty of negligence in failing to notify him of each particular defect, as such duty, if required, is one necessarily devolving on fellow servants, for whose particular acts of negligence the master is not responsible. *Chesapeake & O. R. Co. v. Hennessey* (1899) 38 C. C. A. 307, 96 Fed. 713.

Evidence that an employer referred a servant to an experienced fellow employee for information as to the proper manner of dealing with a misspent charge of dynamite, and that, in consequence of following the instruction given, the servant was killed, is insufficient to support a charge of negligence on the employer's part. *Welch v. Grace* (1897) 167 Mass. 590, 46 N. E. 387.

o. Negligence in manipulation of the instrumentalities during the progress of the work.

Below are tabulated under headings calculated to facilitate comparison with III. c, d, *supra*, a number of cases illustrating the non-liability of the master for negligence in handling the instrumentalities, under various circumstances, during the actual progress of the work. See also V. f, i, *supra*.

1. Handling railway cars and locomotives.

A railroad company may, subject to its duty to provide proper rules, commit the handling of its trains and cars upon its road and in its yards to its employees, so as to avoid liability to employees from negligence in the handling of the same. *Sanner v. Atchison, T. & S. F. R. Co.* (1897) 17 Tex. Civ. App. 337, 43 S. W. 533.

Such a company, therefore, cannot be held liable for an injury to a laborer on a construction train, where the plaintiff seeks to recover on the theory that a special duty was incumbent on the engineer in charge to see that the cars were safely coupled before starting. *Ryan v. Cleveland Valley R. Co.* (1854) 23 Pa. 384.

The hand cannot recover for injuries caused by the act of the ordinary servants of the company in making up a train of cars with platforms of unequal height, under the direction of the station master. *Hodgkins v. Eastern R. Co.* (1876) 119 Mass. 419.

Negligence in making up a train was treated as a breach of a nondelegable duty in *Norfolk*

& *W. R. Co. v. Nuckols* (1895) 91 Va. 195, 21 S. E. 342, explaining, on this theory, *Moon v. Richmond & A. B. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401.

Nor can a trainhand recover for injuries caused by a coservant's neglect to observe the usual custom of chaining up a defective draw-head on a car. *Arnold v. Delaware & H. Canal Co.* (1890) 125 N. Y. 15, 25 N. E. 1084.

No action can be maintained where a collision is caused by the recklessness of an engineer (*Wright v. New York C. R. Co.* [1862] 25 N. Y. 562); nor where a train is run at excessive speed, and so derailed (*Stetler v. Chicago & N. W. R. Co.* [1879] 46 Wis. 497, 1 N. W. 112; *Sherman v. Rochester & S. R. Co.* [1853] 15 Barb. 574); nor where an engineer runs his engine against a brakeman (*Fowler v. Chicago & N. W. R. Co.* [1884] 61 Wis. 159, 21 N. W. 40); nor where a conductor of a work train runs it without a light and injures a trackman (*Coon v. Syracuse & U. R. Co.* [1851] 5 N. Y. 492); nor where an engineer disregards the signals at a switch, and so runs his train on to a siding (*Terre Haute & I. R. Co. v. Leeper* [1895] 60 Ill. App. 194); nor where an engineer caused the death of a fireman by his failure to notice a red light at a switch. *Illinois C. R. Co. v. Hosler* (1892) 45 Ill. App. 205.

In *Howard v. Denver & R. G. R. Co.* (1886) 26 Fed. 837, the court rejected the contention that, because the locomotive operated by the delinquent was in the way, and collided with decedent's train, the track was not clear, and therefore the master had failed in his duty of providing a safe place for the employee to work in and upon. See IV. a, *supra*.

A general charge in favor of defendant in an action by a brakeman against a railroad company for personal injuries alleged to have been caused by a defective appliance for controlling the motion of the engine should be given where the only defect was in the brake of the engine, and the shock causing the injuries was caused by putting the engine in motion, and there is no evidence that the defective brake contributed to causing the injuries. *Highland Ave. & B. R. Co. v. Miller* (1898) 120 Ala. 535, 24 So. 955.

A brakeman on a train ordered to run ahead of another train under circumstances requiring the employees in control to look out for such train and keep out of its way cannot recover for a collision caused by the failure of the conductor and engineer of his train to sidetrack the other train. *Hoover v. Beech Creek R. Co.* (1893) 154 Pa. 362, 26 Atl. 315.

Leaving cars standing on side tracks on each side of the main track in a switch yard, in such close proximity as to obstruct the view of a wagon road crossing the tracks at right angles, in consequence of which a foreman of a gang of men in the yard, whose business it was to locate the stored cars and see that the wagon way was left open, was killed by a collision between an engine on which he was riding and a loaded wagon, is negligence,—either his own contributory negligence or the negligence of his fellow servants. *Hebert v. Delaware & H. Canal Co.* (1891) 41 N. Y. S. R. 860, 16 N. Y. Supp. 561.

An engineer cannot recover where he is injured through running his train against some box cars left standing on the main track owing to the negligence of the station agent. *Brown v. Minneapolis & St. L. R. Co.* (1884) 31 Minn. 553, 18 N. W. 834.

Though an engineer may be charged with the duty of instructing an engine wiper when the latter's foreman is absent, the former does not stand in the relation of vice principal to the latter in regard to his work of shifting and

making up trains. *South Florida R. Co. v. Weese* (1893) 32 Fla. 212, 13 So. 436.

A railway company is not liable for the death of a brakeman, who, after a train had separated owing to a defect in the couplings of one of the rear cars, had undertaken to repair the defect, and was killed by the negligence of the engineer in backing up the cars in the forward part of the train. *Course v. New York, L. E. & W. R. Co.* (1888) 17 N. Y. S. R. 715, 2 N. Y. Supp. 312. Affirmed in (1889) 117 N. Y. 652, 22 N. E. 1133.

The retention of a car of another road in the yards of a railroad company after it has been ordered to be returned as defective, by the yardmaster or crews in the yard, is the act of a fellow servant of a switchman injured while attempting to couple such car to another for the purpose of removing it from the yard. *Atchison, T. & S. F. R. Co. v. Meyers* (1896) 22 C. C. A. 268, 46 U. S. App. 226, 76 Fed. 443, previous appeal (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793. The court said: "The only vice principal or representative of the railroad company in the occurrences of the day was the inspector, and he represented the company only in the inspection of the car, and in the giving of notice of defects. The company owed to the defendant in error no duty in respect to the time or manner of return. If the car had been retained in the Santa Fé yards by the order or authority of a general superintendent or other general officer of the company, and the plaintiff, being required to work about it, had suffered injury by reason of its defective condition, he would doubtless have had cause for complaint; but the crews engaged in the yards at Streator, including yard master, foremen, and engineers, were all his fellow servants, and for what they did with the car after the inspection, and after notice that it was to be returned to the other road, the plaintiff in error is not amenable."

A street-railway employee injured in a collision with an empty car which ran down an incline because the brake was not properly set by a fellow servant cannot recover therefor. *Hoover v. Carbon County Electric R. Co.* (1899) 191 Pa. 146, 43 Atl. 74.

2. Operating hand cars.

The negligent operation of a hand car by a section foreman is not a delinquency imputable to the company. *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 608 (see as to this case under V. f, *supra*); *Northern P. R. Co. v. Charles* (1896) 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848 (excessive speed); *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866 (foreman took no precaution to secure his hand car against a collision); *Justice v. Pennsylvania Co.* (1892) 130 Ind. 321, 30 N. E. 303 (workman struck by lever of hand car).

3. Improperly placing the loads on railway cars and other vehicles.

That a railway company is not liable for injuries due to the improper manner in which railway cars are loaded has been held in *Conger v. Flint & P. M. R. Co.* (1891) 86 Mich. 76, 48 N. W. 695 (carelessly placed side stake allowed log to fall so that train was derailed); *Lellis v. Michigan C. R. Co.* (1900) 124 Mich. 37, — L. R. A. —, 82 N. W. 828; *Indianapolis & St. L. R. Co. v. Johnson* (1885) 102 Ind. 352, 26 N. E. 200; *Fitzgerald v. Boston & A. R. Co.* (1892) 156 Mass. 293, 31 N. E. 7 (bales of hay carelessly stowed); *Sweeney v. Page* (1892) 64 Hun. 172, 18 N. Y. Supp. 890 (car jolted, throwing a heavy stone forward, the re-

suit being that the plaintiff was pushed off); *Bailey v. Delaware & H. Canal Co.* (1898) 27 App. Div. 305, 50 N. Y. Supp. 87 (loaded car, as a whole, not an appliance, as the trial judge laid down in his charge—projecting timber). In the last-cited case the court said: "It is the clear duty of the master to at all times furnish the servant safe material with which to do the work required, so far as the exercise of reasonable care in selection and inspection can make them so. But the use of such material is necessarily the work of the servant. Whoever accepts service under the master does so with the knowledge that it is the servant, and not the master, who will cause any injury that may result from a careless use of the material so furnished. And so far as protection against such careless use is concerned, he can, in reason, expect no more from the master than that competent coemployees be employed, and a judicious system be adopted for carrying out the work. The car is furnished for the express purpose of being loaded and run over the road, and the brakeman is one of the employees, and the man who loads and inspects the loading is another whose duty it is to carry out that purpose. Each uses, within his own sphere, the car furnished by the master, and both are engaged in carrying out the purpose for which it is furnished. Surely the loading of the car was not an act 'pertaining to the duty the master owes to his servants' any more than running it over the road was such an act; and, hence, within long-settled rules, the master is not liable for negligence in loading it."

In *Atchison, T. & S. F. R. Co. v. Seeley* (1894) 54 Kan. 21, 37 Pac. 104, the court declined to follow *Dewey v. Detroit, G. H. & M. R. Co.* (1893) 97 Mich. 329, 22 L. R. A. 292, 56 N. W. 756 (see VII. b, 6, *infra*), and held the company liable for improper loading. See III. d, 11, *supra*.

A similar principle is applicable with regard to the loading of other kinds of vehicles. Thus, it is held that the supervision of the loading of an elevator is a mere detail of the work. *Deneefeld v. Baumann* (1899) 40 App. Div. 502, 58 N. Y. Supp. 110.

So, a proprietor of iron works is not liable for an injury to an employee, caused by the negligent manner in which coemployees loaded iron upon an iron wagon or buggy. *Bemisch v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998.

So, an employer is not liable for injuries to an employee through the capsizing of a car having a superstructure for handling timbers not dangerous if properly used, due to the overloading of such car by coemployees. *Callaway v. Allen* (1894) 12 C. C. A. 114, 24 U. S. App. 363, 64 Fed. 297. The court said: "The primary cause of the accident was the careless and negligent use of the car by Anderson and the men under him. The weight of evidence is clear that the car, with the added superstructure, was not ordinarily or necessarily dangerous, if carefully handled and not overloaded. . . . The evidence shows clearly that the car was overloaded. The timbers were too heavy for the counterbalancing weight, and that was the fault of coemployees, and was the primary and controlling cause of the accident."

Cases involving injuries from the improper loading of cars often turn upon the question whether the servant assumed the risk as one of those ordinarily incident to the service. With these we are not concerned in this note. In other cases the liability of a railroad company for injuries caused by foreign cars so loaded that the freight upon them projects over the ends has been referred to the consideration whether it is negligence to receive into a train cars loaded in this manner. In one case the ground has been taken that its acceptance is

merely a fact bearing upon the question of the company's negligence. *Louisville & N. R. Co. v. Gower* (1887) 85 Tenn. 473, 3 S. W. 824. In another it has been held that the court may pronounce the company, as a matter of law, not to be guilty of negligence in exposing a servant to a risk of this character. *Northern C. R. Co. v. Hussion* (1882) 101 Pa. 1, 47 Am. Rep. 690; *Day v. Toledo, C. S. & D. R. Co.* (1880) 42 Mich. 523, 4 N. W. 203.

But this theory of the circumstances involved in cases of this class suggests a standpoint different from that occupied in the cases in which the responsibility of the master has been discussed with special reference to the existence of a duty to ascertain the condition of the cars which the servants are required to handle, and the right to maintain an action is tested by an examination of the question whether that duty is assignable or absolute. This question can only be material when it has been determined that there has been a breach of duty. See III. q, *supra*.

In a later subdivision it will be shown that the negligence of an employee in inspecting a railway car with a view to ascertaining whether it is properly loaded is that of a mere coemployee of the trainmen: See VII. b, 6, *infra*.

A master is not liable, where his foreman in helping to unload lumber from a wagon allowed a roller to fall off upon a servant. *Lundberg v. Shevlin-Carpenter Co.* (1897) 68 Minn. 135, 70 N. W. 1078.

4. Unloading railway cars or other vehicles.

Compare the cases cited V. o, 7, *infra*.

A conductor of a freight train acts as a mere servant in helping a brakeman to unload a car. *Louisville, N. A. & C. R. Co. v. Southwick* (1896) 16 Ind. App. 486, 44 N. E. 263.

5. Manipulating switches.

The duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master, but a duty of operation. *St. Louis, I. M. & S. R. Co. v. Needham* (1894) 25 L. R. A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107. The court said: "The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad together constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but, when this duty is performed, the duty rests upon the servants to operate it carefully. In the case before us there is no evidence that the conductor who negligently left the switch open was not selected with reasonable care. There is no claim that there was any defect in the switch that hindered or prevented the conductor from closing it. The company furnished a switch sufficient to move the rails, and used due care in selecting the servant to operate it. Before this servant commenced to operate it, the switch was closed, so that the passenger train on which the decedent was killed might have passed in safety. It became the duty of the conductor, in the operation of the railroad, to open this switch and to run his train through it upon the spur track. He did so. It then became his duty to take his train off the spur track, and to close the switch. He took his train off, and proceeded south, but carelessly left the switch open. His negligence was not in the construction, preparation, or repair of the railroad, but in its operation. The railroad was

safe before he made it unsafe by his negligence in operating it, and he was discharging none of the personal duties of the master, but one of the duties of the servant, when he became guilty of the fatal negligence. Any other holding would annihilate the now settled rule of liability for the negligence of fellow servants. It will not do to say that the timely movement and fastening of a switch in the ordinary operation of a railroad is requisite to provide a safe place for the next train to be operated in, and hence is one of the personal duties of the master. Under such a rule, it would become the absolute duty of the master to so operate all switches, all turntables, the levers of all engines, all brakes, all cars, and every appurtenance of the railroad that every place upon it should at all times be safe, and no negligence of any employee could ever cause an injury to another servant for which the master might not be held liable. At the instant of the injury, every place in which an injury is inflicted is unsafe. The test of liability is not the safety of the place nor of the machinery at the instant of injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation of the machine? To the same effect, see *Pleasants v. Raleigh & A. Air Line R. Co.* (1897) 121 N. C. 492, 28 S. E. 267; *Daves v. Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708 (train ran through the switch on to the siding and killed a track repairer); *Corcoran v. Delaware, L. & W. R. Co.* (1891) 126 N. Y. 673, 27 N. E. 1022 (car allowed to run on to repair track).

The proximate cause of the injury is the negligence of a fellow servant where a collision of a switch engine with a train was caused by negligence of the brakeman in manipulating the switch, and the water tank of the engine, insufficiently secured to withstand the shock of the collision, was thereby thrown forward onto a brakeman riding on the engine. *Vizelich v. Southern P. Co.* (1899) 126 Cal. 587, 59 Pac. 129; *Guthrie v. Southern P. R. Co.* (1891; Or.) 26 Pac. 76.

In *Miller v. Southern P. Co.* (1891) 20 Or. 285, 26 Pac. 70, the special contention was put forward that the effect of a general rule of the company providing that conductors would be held personally responsible for the proper adjustment of switches used by their trains was to create the conductor whose negligence caused the injury vice principal as regards the plaintiff. The court rejected this contention, reasoning thus: "The argument for the plaintiff proceeds upon the assumption that the switch was broken and disarranged when the Lebanon locomotive used it, and that Huston [the conductor] had devolved upon him the duty of seeing that the switch was properly adjusted, which being a personal duty the company owed to Miller, that the negligence of Huston in failing to discover that the switch was out of order was the negligence of the company, and rendered it liable for the injurious consequences which ensued. The rule was a proper and needful regulation, and disobedience to it was well calculated to insure safety, but it was not designed to create any new or distinct liability other than the law established. As a rule, it did not operate to change the rule of law which governed the relation of the parties and fixed their liabilities. The conductors were not expected to perform the duties of switchmen—someone under them, usually a brakeman, discharged this duty, by their direction; and the object of the rule in making them responsible was to secure the best possible performance of the duty of a switchman to insure safety in operating the trains. It added no new or other element to

the legal relation of the parties concerned than already existed. The whole duty combined and to be performed in this regard, by conductor and switchman, in operating the switch, only constituted the proper discharge of the duty of a switchman. It is not the duty of a master, 'as with a personal sight and touch,' to operate the switches on the road. . . . If we take the character of the act performed by such servant to determine whether he is an agent or representative of the company, or a fellow servant, what is there in the act of operating a switch so as to properly adjust the rails for the passage of trains which may be considered in any sense to impose or delegate the duty to such employee to furnish, construct, keep or maintain in repair such switch? However liberally we may construe the rule as to co-servants, it is difficult to perceive, if the rule itself is to remain, that a servant engaged in the operation of a switch is a representative of the master or other than a fellow servant engaged in a common employment for the successful management of the trains. The act he performs involves no duty of construction or repair, or other duty in regard to the switches of the road if out of repair or unfit for use, whether by wear and tear or by the criminal interference of strangers, than to promptly notify the company of its condition so that it may be repaired or its place supplied."

6. *Failing to prevent the movement of heavy pieces of machinery.*

The negligence of a servant in failing to secure railway cars on an incline so far as to prevent their moving is not chargeable to the company. *Kudik v. Lehigh Valley R. Co.* (1894) 78 Hun, 492, 29 N. Y. Supp. 533.

A train hand cannot recover for the negligence of a co-servant in failing to block the wheel of a railway car so as to prevent its moving. *Dodge v. Boston & A. R. Co.* (1892) 155 Mass. 448, 29 N. E. 1086.

An averment which shows that the proximate cause of the injury was the moving of a traveling crane shows that it was due to the act of a fellow servant, and no recovery can be had on the theory that another crane was defective. *Raxter v. Abernethy* (1893) 21 Sc. Sess. Cas. 4th series, 159.

A servant who was injured while working in the elevator of a mine which he had been ordered to clean cannot recover where the cause of the injury was the starting of the engine which operated the hoisting machinery, and the accident might have been prevented if the foreman had, as it was his duty to do, detached the endless chains used in running the elevator, and thus disconnected it from the machinery. *New Pittsburgh Coal & Coke Co. v. Peterson* (1894) 136 Ind. 398, 35 N. E. 7 (1896) 14 Ind. App. 634, 43 N. E. 270.

7. *Operating hoisting machinery.*

An employer is not liable for injuries to a workman handling the crank of a crane hoisting a heavy weight by the slipping of the shaft from slow gear into fast gear requiring much greater power, through fellow workmen stationing themselves upon the side of the crank opposite to the fast gear, and the pressure caused by their position. *Barlow v. Standard Steel Casting Co.* (1893) 154 Pa. 180, 26 Atl. 12.

The absence of a clutch to a machine does not render an employer liable for an injury to an employee while entangled in a rope, where the injury would have been prevented if the employee had held the rope tightly, or if a fellow employee at the machine had done the same thing, and there is no reason to believe that he

would have been more liable to use the clutch, if there had been one. *American Glucose Co. v. Lavin* (1898) 81 Ill. App. 482.

The death of an employee caused by the failure, either of himself or a coemployee, to take the twist out of a chain on a windlass used in operating machinery, will not render the employer liable. *DeLaney v. Heartt* (1890) 32 N. Y. S. R. 499, 10 N. Y. Supp. 595.

Plaintiff's intestate was employed by defendants, at the time of his death, at the bottom of a mine shaft, his duty being to fill the ore bucket, which was hoisted by a horse led by a boy. The employee at the top of the shaft, whose duty it was to dump the ore bucket and let it down to deceased, dropped it without looking to see whether the boy had hooked the rope to the hame of the horse, as was the custom, in order to let the bucket down steadily, which he had not done; and the bucket struck deceased and killed him. It was held that, though the boy was incompetent to manage the horse, such incompetency was not the cause of the accident, but that it was caused by the negligence of deceased's fellow servant at the top of the shaft, and hence there was no error in directing a verdict for defendants. *Adams v. Snow* (1900) 106 Wis. 152, 81 N. W. 988.

An employer is not liable for the negligent operation of an elevator, which is safe if carefully used. *White v. Eldilts* (1897) 19 App. Div. 258, 46 N. Y. Supp. 184; *Trewatha v. Buchanan* Gold Min. & Mill. Co. (1892) 96 Cal. 494, 28 Pac. 571, 81 Pac. 561.

The servant's action is not maintainable where upon the evidence the cause of the injury must have been the negligence of one fellow servant in leaving an elevator suspended at the floor from which it fell when another fellow servant got onto it, or in leaving the rope out of gear, or in descending on it while the rope was out of gear. *Kelley v. Boston Lead Co.* (1880) 128 Mass. 456.

The mate of a vessel is a fellow servant of a boatswain in managing the chain in lowering the topmast, which the boatswain has gone up to unfasten. *The Miami* (1898) 87 Fed. 757.

An employer is not liable for injury to an employee in the hold of a vessel by the overturning of a loaded bucket which hit the coamings of the hatch, where, on reaching the coamings, it was pulled sidewise by another employee, to be dumped on the dock, and there is no other showing of negligence. *McDonough v. Walsh* (1892) 49 N. Y. S. R. 361, 21 N. Y. Supp. 308.

A foreman of a stevedore gang acts as a fellow servant of a stevedore at work in the hold of a vessel, in stopping a draft of loaded bags as it comes over the vessel's side, to have them made tighter in the sling before being lowered into the hatch, and the ship is not liable for injuries caused by their being left unsecured, and falling and injuring the workmen below. *The Kensington* (1898) 91 Fed. 681.

Recovery cannot be had for the death of an employee on a steamship, caused by the falling of a barrel from a sling while being lowered into the hold, where the negligence, if any, causing its fall, was that of a fellow servant. *Moy v. Ocean S. S. Co.* (1895) 12 Misc. 375, 33 N. Y. Supp. 663.

The captain of a lighter engaged in delivering boards upon a vessel cannot recover for injuries from the fall of boards caused by the insecure manner of fastening the rope holding them while being hoisted, where the fault was that of one of the workmen. *The Ravensdale* (1894) 63 Fed. 624.

A ship is not liable for injuries to a longshoreman engaged in the hold helping to unload iron, caused by the fall of iron from a skid 54 L. R. A.

through the corner of which a lanyard pulled out, when the skid caught through the negligence of the guy-tender or engineer as it was coming up. *The Servia* (1891) 44 Fed. 948.

8. Operating machinery in sawmills.

Plaintiff was thrown onto a trimming saw which he was operating in defendant's sawmill, and was injured, having been struck by one end of a plank lying on rolls, the other end of which had been caught on the carriage of the main saw. It was the duty of a fellow servant to see that the plank was so placed on the rolls that it could not be caught by the carriage, and of another fellow servant not to run the carriage unless it was clear of the planks on the rolls. It was held that the injury was caused by the negligence of one or both of the fellow servants. *Demers v. Deering* (1899) 93 Me. 272, 44 Atl. 922.

9. Operating a fire hose.

The failure of water to run from a hose will, in the absence of positive evidence, be attributed to the negligence of fellow servants in failing to keep the apparatus in proper order, or in negligently putting it in operation. *Jones v. Granite Mills* (1878) 126 Mass. 84, 80 Am. Rep. 661.

10. Starting machinery without warning.

In several cases the principle is applied that there can be no recovery where the injury was caused by the negligence of a co-servant in starting machinery without notice, at a time when the plaintiff is in such a position that he is safe as long as it is not in motion. *Bergstrom v. Staples* (1890) 82 Mich. 654, 46 N. W. 1035; *Fournier v. Columbian Mfg. Co.* (1890) N. H. 44 Atl. 104; *O'Brien v. American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324; *Henshaw v. Pond's Extract Co.* (1892) 50 N. Y. S. R. 263, 21 N. Y. Supp. 177 (oilier injured); *Whitley v. Block* (1894) 95 Ga. 15, 21 S. E. 985 (elevator); *Porter v. Silver Creek & M. Coal Co.* (1893) 84 Wis. 418, 54 N. W. 1019 (sudden starting of machinery tautened a slack cable); *Wilson v. Hudson River Water Power & Paper Co.* (1893) 71 Hun. 292, 24 N. Y. Supp. 1072 (water turned on to a power wheel); *Davis v. Muscogee Mfg. Co.* (1898) 106 Ga. 126, 32 S. E. 30; *Kerr v. Crown Cotton Mills* (1898) 105 Ga. 510, 31 S. E. 166 (petition alleging that steam was turned on from an engine so negligently by the engineer, or some other employee of the defendant, that the plaintiff, who was washing a window, was injured, shows no cause of action).

11. Moving heavy articles.

See also V. b, h, i, o, 8, *supra*.

A railway company is not liable where injury was received by a section hand owing to the way in which his collaborators lifted a rail. *Coyne v. Union P. R. Co.* (1890) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382.

An employer is not liable for the negligent manner in which a foreman conducts the operation of moving a heavy wheel. *Richmond Locomotive & Mach. Co. v. Ford* (1897) 94 Va. 627, 27 S. E. 509.

A lumber company is not liable for an injury to a lumberman, caused by the negligence of co-employees in failing to keep rollers at right angles with a piece of timber being moved thereon, in consequence of which it slewed around so that the end struck a lumber pile, from which planks fell on his leg. *Weeklund v. Southern Oregon Co.* (1891) 20 Or. 591, 27 Pac. 260 (carelessness of workmen in using chute, not

negligence in its construction, declared to be the proximate cause of the injury).

There can be no recovery for an accident caused by the slacking of guy ropes in the hands of the plaintiff's fellow servants, while a heavy piece of a bridge was being moved. *Ludlow v. Groton Bridge & Mfg. Co.* (1896) 11 App. Div. 452, 42 N. Y. Supp. 343.

A servant has no cause of action against his master for an injury received while assisting to handle a heavy stone, through the neglect of his fellow workmen in letting the stone down too soon. *La Belle v. Montague* (1899) 174 Mass. 453, 54 N. E. 859.

12. Causing or allowing heavy objects to fall.

An employer is not liable for injuries caused to one servant by the carelessness of another in pulling away a choking guard in a pile driver, and thus allowing the hammer to fall. *McPhee v. Scully* (1895) 163 Mass. 216, 39 N. E. 1007.

A bridge foreman is a fellow servant of a carpenter in negligently and carelessly permitting a jackscrew to fall, which was set up by the two, and which the foreman agreed to watch. *Peirce v. Oliver* (1897) 18 Ind. App. 87, 47 N. E. 485.

A master is not liable for the death of a servant caused by the fall of a sliding door in a store, where it fell owing to the careless manner in which it was opened by the men in charge of it. *Collyer v. Pennsylvania R. Co.* (1886) 49 N. J. L. 59, 6 Atl. 437.

A laborer cannot recover where he is struck by a plank left loose on a scaffold by his foreman, and thrown off by a tank which is being hoisted through a window by himself and his co-servants. *Bagley v. Consolidated Gas Co.* (1896) 5 App. Div. 432, 39 N. Y. Supp. 802.

A superintendent, in answering in the affirmative when a laborer was about to throw down a block of wood and asked if all was clear below, acted as a mere servant. *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559.

The negligence of a foreman in dropping an implement and injuring an employee under his direction is that of a fellow servant, and not of a vice principal. *Frawley v. Sheldon* (1897) 20 R. I. 258, 38 Atl. 370.

A mining company is not liable where a miner is injured by the negligence of a blacksmith, whose duty it is to sharpen the tools, in lowering them down a shaft. *Snyder v. Viola Min. & Smelting Co.* (1891) 2 Idaho, 771, 28 Pac. 127.

A foreman in a machine shop is a fellow servant, with respect to his own negligence in the manner of bracing a section of a heavy condenser, of an employee who assisted him and was injured by the section falling upon him. *Killegel v. Welsel & V. Mfg. Co.* (1893) 84 Wis. 148, 53 N. W. 1119.

An injury caused by the fall of the door of a freight house, struck by a keg of nails which was being rolled out by the plaintiff's co-servants, is regarded as being due to the negligence of the latter, and not to the negligence of the company, where the evidence shows that the door, when rolled back, left a space of about 8 feet for the unloading of freight, amply sufficient for the passage of the keg if it had been handled with reasonable care. *Chicago, R. I. & P. R. Co. v. Becker* (1890) 38 Ill. App. 523.

An employee engaged with other employees in hoisting ice to the top of a car by means of a large sawhorse placed on the tops of two cars standing side by side cannot recover for an injury caused by the horse tipping over because of his negligence or that of his fellow servants in pulling laterally instead of perpendicularly in 54 L. R. A.

hoisting the ice. *Tobin v. Friedman Mfg. Co.* (1896) 67 Ill. App. 149.

Injuries sustained by a railway employee, who, with other hands, was carrying a rail, caused by the hands at the other end dropping it upon the section boss's order before he and the other hands at his end were ready, are not due to the order, but either to his own disobedience of the order, or to the negligence of the other workmen. *Coffman v. Louisville & N. R. Co.* (1892) 18 Ky. L. Rep. 866, 18 S. W. 1012.

An employer is not liable for injuries sustained in removing pieces of lumber, the cause of the accident being the act of one left in charge of the work by the foreman while he was temporarily absent, in releasing his hold upon a pile of rims which he was supporting while the employee was removing the lumber. *Hodges v. Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

The duty of a master to provide a safe place for the employees, in which to do their work, does not extend to conditions which the employees create in the performance and, as a detail of their work, as where the employees in shoveling coal leave an overhanging frozen crust of coal, which falls and injures one of them. *Miller v. Thomas* (1897) 15 App. Div. 105, 44 N. Y. Supp. 277.

Where a servant of a railway company is injured while putting a hose on an engine tender by the falling of loose coal dislodged by another servant standing on the tender to receive the hose, the company, its negligence in overloading the coal not being the proximate cause of the accident, is not liable. *Welsel v. Eastern R. Co.* (1900) 79 Minn. 245, 82 N. W. 578.

An employee of a railroad company cannot recover damages of the company for an injury received by the falling of a pile of lumber, caused by the negligence of himself and of his co-employees. *Langlois v. Maine C. R. Co.* (1892) 84 Me. 161, 24 Atl. 804.

A laborer injured by the fall of a steel ingot from a mass of such ingots, carelessly piled by his fellow laborers in the same employment, cannot recover of the employer. *Nash v. Nashua Iron & Steel Co.* (1882) 62 N. H. 406.

A laborer engaged in loading boxes on a railway car cannot recover for injuries due to the fact that they were unsafely piled and fell when he climbed on them. Such a danger is one incident to the progress of the work. *Carolan v. Southern P. Co.* (1897) 84 Fed. 84.

An employee is a fellow servant with a foreman by whose negligence in throwing a box upon a pile of iron posts the former was injured, where the latter was doing nothing which it was the master's duty to do. *Di Marcho v. Builders Iron Foundry* (1894) 18 R. I. 514, 28 Atl. 661.

A foreman acts as a fellow servant of his subordinates in moving loose stones which support a large rock, and thereby causing it to fall. *Ross v. Union Cement & Lime Co.* (1900) 25 Ind. App. 463, 58 N. E. 500.

13. Failing to prevent explosions.

A railroad company is not liable for the death of a fireman caused by the explosion of the boiler of a locomotive engine, where such explosion was due to the fact that the water was permitted by the engineer to get too low while running at night, if the boiler was properly supplied with gauge cocks to test the height and adequacy of the water. *Leary v. Lehigh Valley R. Co.* (1894) 76 Hun. 575, 28 N. Y. Supp. 187.

An employee in a fruit-canning factory does not cease to be a fellow servant of another employee, merely because he is directed by the superintendent to look after a barrel used for heating water with steam, and the employer is there-

fore not liable for his negligence in inserting or failing to remove a plug from the pipe through which the steam escapes, causing an explosion of the barrel. *Crowell v. Thomas* (1897) 18 App. Div. 520, 46 N. Y. Supp. 137.

A natural gas company is not liable for an injury to a servant from an explosion caused by the striking of a match by a fellow workman to light his pipe. *Allegheny Heating Co. v. Rohan* (1888) 118 Pa. 223, 11 Atl. 789.

14. *Work of blasting.*

See also *V. b, e, supra*.

To place and set off blasts in a mine is the function of a mere servant. *Anderson v. Daly Min. Co.* (1897) 16 Utah, 28, 50 Pac. 815.

15. *Failing to keep floors clean.*

An employee was injured by falling upon a slippery floor, rendered so by grease left thereon by two other employees, who had been directed by defendant's foreman to clean out a pit formerly occupied by the gearing of a machine. It was held that the injury was caused by a fellow servant, for whose carelessness the master was not liable. *Burke v. National India Rubber Co.* (1897) 21 R. I. 446, 44 Atl. 307.

16. *Exposing the servant to excessive heat.*

An employer is not liable for the death of an employee engaged in cleaning an oven used for heating air to be blown into a blast furnace, by the unexplained opening of a cock letting on through such oven the blast of air heated to nearly 1,000 degrees. *Dana v. Crown Point Iron Co.* (1893) 51 N. Y. S. R. 238, 22 N. Y. Supp. 455.

17. *Failing to keep place of work properly ventilated.*

An employer who furnishes a suitable place for a given machine and a particular kind of work, and instructs his foreman to ventilate the room by opening the windows when the machine is in use, is not liable for an accident to a workman caused by the foreman's failure on a particular occasion to open the windows. *McGuerty v. Hale* (1894) 161 Mass. 51, 36 N. E. 682 (plaintiff became dizzy from the smell of benzine, and was injured by uncovered gearing while he was attempting to adjust the parts of a machine.)

18. *Failing to keep place of work properly lighted.*

Where, in an action by a servant against his master for an injury partially resulting from a dark molding room, it appeared that the company furnished an adequate lighting plant, and that the gas could have been lighted by the servant, it is error to instruct that the question of the gas being lighted, and whether any negligence was to be imputed to the defendant, was for the jury, as the duty to light the gas was not on the defendant. *Hall v. United States Radiator Co.* (1900) 52 App. Div. 90, 64 N. Y. Supp. 1002.

There can be no recovery for injuries received by a stevedore or other employee on a ship, who falls through an open hatchway which is left insufficiently lighted through the negligence of a coemployee. *McCarthy v. Bristol Shipowners' Co.* (1883) Ir. L. R. 10 C. L. 384; *Byrne v. Fennell* (1882) Ir. L. R. 10 C. L. 307; *Mellen v. Thomas Wilson Sons & Co.* (1893) 159 Mass. 34, 34 N. E. 96 (injuries received by falling down a dark hatchway usually lighted by electric lights, because they were not going at the 54 L. R. A.

time owing to an accident that might have been remedied by the engineer, and other lights available were not put in place owing to the negligence of another employee).

19. *Exposing servant to peril from uncovered hatchways or other dangerous openings.*

Where injuries are received from a fall through a scuttle there can be no recovery where the inference from the evidence is that the cause of the accident was a temporary misplacement of the cover, which permitted the cover to tilt under the plaintiff's weight, and that the cause of the misplacement was the hauling of trucks over the cover by the plaintiff's fellow-workmen. *The Theresina* (1887) 31 Fed. 90; *Kraeff v. Mayer* (1896) 92 Wis. 252, 65 N. W. 1032 (existence of negligence on owner's part denied, as the stevedore and his fellow servants had, under the customary procedure, full control of the physical conditions).

The owner of a ship is not liable to an employee for negligence of the master, mate, or other officer in failing to close the doors of the gangway at night. *Geoghegan v. Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N. E. 507.

The failure to secure a removable section of a ship's railing is the negligence of a mere servant. *Quebec S. S. Co. v. Merchant* (1890) 133 U. S. 875, 33 L. ed. 656, 10 Sup. Ct. Rep. 397. Compare the ruling in *Hedley v. Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58, affirmed [1894] A. C. 222, that to leave a removable railing out of place while a ship was on a voyage (the consequence being that a seaman was thrown overboard by a lurch) was not a breach of the merchant shipping act 1876, § 5, which imposed on the owner and master of a ship an obligation to put and keep her in a "seaworthy condition." See III. a, 1, *supra*, where some extracts from the opinions are given.

There can be no recovery for injuries caused by the failure of a fellow servant to replace the planking which is used to cover a pit, when it is not in use. *Soffeld v. Guggenheim Smelting Co.* (1900) 64 N. J. L. 605, 50 L. R. A. 417, 46 Atl. 711; *Filbert v. Delaware & H. Canal Co.* (1890) 121 N. Y. 207, 23 N. E. 1104.

The leaving open of a hatchway by a squad of laborers is the act of fellow servants which will preclude recovery by a member of such squad for injuries from falling through such hatchway, where the duty of covering and uncovering it rests upon such squad. *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. 748. To same effect, see *Karl v. Maillard* (1858) 3 Bosw. 591 (stress was laid on the fact that the hatchway was opened without authority); *Baron v. Detroit & C. Steam Nav. Co.* (1892) 91 Mich. 585, 52 N. W. 22.

20. *Handling ships in docks.*

A foreman of a dock, who at the time the accident occurred was engaged in superintending the raising of a vessel, is not, as to such act, the *alter ego* of the dock company; and it cannot upon that ground be held liable for his negligence or for his errors of judgment in directing the work. *Hart v. New York Floating Dry Dock Co.* (1882) 16 Jones & S. 460 (vessel suddenly careened and fell on plaintiff).

21. *Navigating ships.*

In *The Queen* (1880) 40 Fed. 694, it was sought to hold the ship liable for the negligence of the officers in having too long a hawser, in a dense fog, in a fan-way, and in not having any whistle or other signal to indicate her presence in a very dangerous place. The court said: "These faults arose in the details of navigation

—a work in which all the ship's company were alike employed in their several grades. As to such details the seamen, as fellow servants, took the risk of each other's negligence. . . . It would be absurd to say that the owners owed a duty to the seamen that too long a hawser should never be used, or that signals in a fog should be properly given by their own vessel. These details belong to the ordinary work of navigation, and to the men employed to conduct it. As to this work, the owners owe no duty to the officers or seamen to see it properly performed. The duty lies the other way, *viz.*, from the ship's company to the owners. None of such acts, moreover, belong to the master to do as the *alter ego* or special representative of the owner, as in *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184. They may be all performed, and for the most part usually are directed and performed, by others than the master. Though there are many acts in the care and management of the ship and of the voyage, in which the master acts as the representative of the owners, and performs the duties and functions of the owners, such as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, freighting the ship, arranging her voyages, her times and places of sailing and stopping, and the discharge of all the general duties and legal obligations of the ship to the seamen, for which acts, if negligently performed, the owners are responsible to the seaman injured, they are not responsible for negligence in the mere details of the ordinary work of navigation on board the ship; because these acts are not at all duties of the master as the *alter ego* or representative of the owner, nor are they acts as to which the owner owes any duty to the seamen. As to third persons, all the ship's company represent the owner in the work assigned them, and their negligence makes the owner liable. As between themselves, no one more than another, in the ordinary work of navigation, represents the owner, or performs an owner's duty, and therefore each takes the risk of the other's negligence." The judgment accordingly provided that the seamen on board one of two vessels, who had been injured in a collision caused by the negligence of both crews, could only recover one half of the sums respectively assessed and allowed to them as damages.

A mate in managing a pilot boat acts as a mere servant. *Carlson v. United New York Sandy Hook Pilots' Asso.* (1899) 93 Fed. 468.

22. Driving horses.

An employee is not liable for injuries received by one servant owing to the negligent driving of another. *Dwyer v. American Exp. Co.* (1892) 82 Wis. 307, 52 N. W. 304.

p. Negligence in the transmission of the master's orders to other servants.

Compare cases as to signals *V. 1, supra*.

In transmitting the master's orders to other servants an employee is regarded as being in the performance of a merely ministerial duty. No damages therefore can be recovered for injuries caused by negligence in the discharge of that duty, whatever may be the agency employed for bringing the orders to the knowledge of those whose actions will be affected by them. Most of the cases illustrating this principle relate to the position of the telegraph operators of railway companies. In so far as these employees are not exercising any discretionary powers in regulating the movements of the trains (*III. m. 1, 2, supra*), they are by all the courts held to be fellow servants of trainmen.

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The whole duty of a railroad company is performed when it has promulgated rules which, if observed and followed by the subordinates who have to carry them out, will bring personal notice to everyone concerned of any special deviation from its time-table in regard to the running of its trains, and it is not liable for an injury caused to a fireman by the carelessness of operators and conductors in executing an order of the train despatcher to stop a train at a certain station. The servant's action cannot, under such circumstances, be maintained on the theory that the order so given was a change of the rules of the road. *Slater v. Jewett* (1881) 85 N. Y. 61, 29 Am. Rep. 627. The court said: "It cannot be contended that there was anything required of the conductor that raised him out of his relation to the intestate of a fellow servant. The act required of the conductor at the particular time was to receive an order from an authorized source of command, and in a prescribed mode to acknowledge the receipt of it, and then to follow the direction. This was service merely. . . . There is more plausibility in the position that the act that was to be done on this occasion was so essentially one for the master to do in his duty to his servants that whatever subordinate was taken by him to do it came to be the master in doing it. It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it; that when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to perform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants, who are to square their actions to it; that the same is his duty and act as to a variation from it, which is but a special time-table; and that, therefore, whoever he uses to bring those time-tables to the notice of his servants, he puts that person in his place to do an act in his stead inasmuch as the responsibility is upon him to see and know that it is done and done effectually; and that if, instead of doing it in person, he chooses to do it through an agent, that agent, *pro hac vice*, is he, the master, and he, the master, is responsible for a negligent act therein of that agent, whereby a fellow servant of him is harmed. The rule has been laid down in repeated cases in this court, in terms so broad as to come close to this case. *Flike v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545; *Fuller v. Jewett* (1880) 80 N. Y. 46, 38 Am. Rep. 575; *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521. Attentive consideration, however, will perceive a distinction between the cases. That the master has the right, as regards his servants, to vary from the time-table that he has set cannot be doubted. It is at times a necessity so to do, and a necessity so frequent as to fall within the occurrences that a railway servant is bound to expect in the course of his employment. Even as regards the public and passengers, a railway manager has a right, when needs press, to vary from his general time-table. All that can then be required from him, by the public and passengers, is that when he makes the variation, he acts under it with reasonable care and diligence (*Sears v. Eastern R. Co.* [1867] 14 Allen, 483, 92 Am. Dec. 780; *Gordon v. Manchester & L. R. Co.* [1873] 52 N. H. 596, 13 Am. Rep. 97); that is to say, due care and diligence in giving notice of the change, and in running the train upon the changed time. A servant cannot ask for or expect more than this. . . . We think that it is a misconception of the case to hold that the order of the train despatcher was a change of

the rules of the road, as established and promulgated by the superintendent. The train despatcher acted in exact accord with the general rules and regulations which foresaw, and with minuteness provided for, such an occasion as this, as much and as fully, so far as we can see from the case, as for the ordinary running of trains on the general time card. The order of the train despatcher was but a carrying out of those rules, and an application of certain provisions of them to a case for which they were made, and the arising of which had been foreseen as probable. In what other way could they be carried out in the detail of them, but through the service of the servants previously chosen and assigned to their parts? And can it with propriety be said that the parts of that detail are acts of the master, that he must do himself, or be liable for their negligent doing?" After laying down the principle that the master's liability depends on the character of the negligent act, the court proceeded thus: "The query, then, is in the case before us, Is it the duty of the master to give personal notice to every operative of a train of a special deviation from an established general time-table, or is his duty done when he has beforehand provided rules, minute, explicit, and efficient, and made them known to his servants, which, if observed and followed by all concerned, will bring such personal notice to every one entitled to it? We think that in the circumstances of this case the latter clause of the query propounds the true rule, and should be answered affirmatively. It is the duty of the master to provide rules and regulations for the running of the trains. He has done so here. One of them is that by telegraphic message, sent at any time through operators at the ends of the wires, to the conductor and engineer of a train, that train may be stopped at a station, or hurried forward to another, or made to go out of general order. These rules with that provision are made known to all servants. If, when the intestate entered the employment of the defendant, these rules had been read to him, and his especial attention called to this one, and he had agreed to serve under it, would not he have taken the risk of the carelessness of the operators and conductor in carrying it out? Is this case any different in substance from that? Really, by entering the employment with these rules in force, he did in effect agree that special orders might be so sent. The bargain between him and the defendant was not only that special orders might be given interfering with the general time-table, but that they might be given in this way. It is this feature of the case that distinguished it from some of those that we have cited."

One of the Federal circuit courts of appeals has also held that a local telegraph operator receiving and delivering the orders of a train despatcher to the person in charge of a train in respect to a change in the schedule is a fellow servant of the latter. *Oregon Short Line & U. N. R. Co. v. Frost* (1896) 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965 (dissenting, Hawley, J.). The court, in discussing the correctness of the charge of the trial judge, that it was the duty of the railroad company to give notice that it had changed the time of running the trains, that, if it intrusted that duty to the telegraph operator, his acts were the acts of the company, and that, if he was negligent in this matter, it was the negligence of the company, said: "The ordinary running of the train is established by a fixed schedule, of which all operatives have notice, and by which their acts must be governed. When occasion arises to disturb the regular schedule the duty rests upon the company to give timely notice to those that are to be affected thereby. This it is the office

of the train despatcher to do. But when he has given that information to a local operator, is that duty discharged, or does there rest upon the company the further obligation to see that all of its servants through whose hands that message goes on its way to the train employees shall deliver it as given, and that in case of any failure in the line of communication, the company shall be liable for the resulting injury? In support of the latter view it is argued that, if the duty to notify the train operatives of a change in the time-table is personal to the company, and cannot be delegated to the servant so as to excuse the company from liability, it follows that such power, since it may not be delegated to one servant, may not be delegated by him to another; and that the reasons which lead to the conclusion that the train despatcher is a vice principal lead directly to the further conclusion that the local telegraph operator stands in the same attitude to the company, and that the duty the company owes of furnishing a safe place of operation to its employees cannot be discharged short of actual notice to those who are to be affected thereby, and whose personal safety is dependent thereupon. After a careful consideration of the question, and of the strong reasons that may be urged in support of either view of this proposition, it is our conclusion that the better doctrine is that the local telegraph operator is the fellow servant of those who are in the control and management of the train. It is evident, and the court will take judicial notice of the fact, that a disturbance in the regular time schedule of trains is frequent and necessary in the operation of all railroads. It then becomes necessary to issue special orders for their direction. Conductors, engineers, and brakemen have knowledge of that fact, and they know when they enter into the employment of the railroad company that their notice of such orders must come through the local telegraph operator at the station, and that they incur the risk of accident through his negligence or mistake. The special orders issue in the first instance from the train despatcher. It is obviously impossible for him to give personal notice to all who are to be governed thereby. The orders must of necessity be conveyed to someone in behalf of the others. The local telegraph operator, the conductor, the engineer, and the brakemen are all engaged in a common employment,—that of moving the train. The operator, it is true, is subject to no personal risk from any change in the time card, but that fact is not a controlling one in deciding who are his fellow servants. There must be some point where the responsibility of the company ceases. If it does not cease at the time when information is given to the operator, where shall it cease? Could it be said that a conductor who received from the operator a message from the train despatcher, yet who failed to guide his action thereby, stands in the relation of vice principal to the conductor, engineer, or brakeman of another train who may be injured by his negligence, or that, if the operator should receive instructions from the train despatcher to send out a flagman to signal an approaching train, the company is responsible for the negligence of such flagman in failing to carry out such instructions? It seems just in principle to hold that the company has discharged its duty when it has given information to one of its servants, who is engaged in the common employment of the others that are to be affected thereby, and has instructed him to notify his co-employees; and that, when the company has exercised due care in selecting such local operator in the first instance, and has not been negligent in employing or retaining him in his office,

it has discharged its duty, and that such operator stands in the attitude of a fellow servant to the trainmen."

Very similar is the reasoning in a case decided in another circuit (Baltimore & O. R. Co. v. Camp [1895] 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952): "He [the telegraph operator] and the engineer and the conductor work together, at the same time and place, for a common employer, with an immediate common object, namely, the proper running of trains. It is essential, in the operating department of a railroad company, that there should be provision for communicating to those in charge of different trains the whereabouts of other trains, to avoid collision. This information is given by means of the general time-table and general rules for the running of trains with reference to each other, which the employees in charge of each train are obliged implicitly to obey. But it often happens that the general time-table must be varied from, and these variations must be communicated to those in charge of trains. This is effected usually by telegraphic orders from the superintendent or the train despatcher, who has supreme control of the running of trains. The information is also communicated by means of flagmen, by means of torpedoes, by red lights and green lights upon trains, by the block signal system, and in other ways. The subordinate employees, whose duty it is to transmit the orders of the officer in control, or to give information as to the presence of trains upon any part of the track, without special orders, are engaged at the same time and place with the persons operating the train, in a common employment, having an immediate, common object, namely, that of the running of trains, and therefore are fellow servants. The man who makes the signal at the station to the engineer on the approaching train to stop is as much engaged in the running and operation of that train as the flagman sent out ahead to signal the condition of a switch. . . . There can be no separation of the signal department and the operating department, for the employees engaged upon the train, in the actual, manual operation of the train, are expected to be part of the signal department of the company. The man who puts out the green light at the back of the train, to indicate that a train is following, communicates to every station agent, every conductor, and every engineer who sees it, knowledge upon which they, each of them, must act, and yet it can hardly be said that the brakeman, in displaying this green light, is acting in a different department from the man who opens and closes the throttle valve of the engine." See also *Illinois C. R. Co. v. Bents* (1900) 40 C. C. A. 56, 99 Fed. 657 (railroad company is not liable for the death of an engineer in a collision, due to the negligence of an operator in failing to report the passing of a train at his station).

Where an engineer was killed through the negligence of a telegraph operator at one of the stations on the defendant's road, in failing to notify the conductor of the train of a fact telegraphed to him from the station ahead which would require him to slacken speed and to cross over a switch on to another track at a given point, the consequence being that the engine driven by the intestate jumped the track and caused his death, the court held that the telegraph operator was a fellow servant with the engineer. *Dealey v. Philadelphia & R. R. Co.* (1886: Pa.) 8 Cent. Rep. 112, 4 Atl. 170. In this case the court considered that the main duty of a telegraph operator is the receipt and delivery of messages regarding the running of trains upon the roadway, in which he is merely the automaton or communicator to give the in-

formation as to the condition of the track ahead of the moving train, and part of the general machinery by which the whole roadway is operated.

The same doctrine is applied in the following cases: *McKalg v. Northern P. R. Co.* (1889) 42 Fed. 288; *Monaghan v. New York C. & H. R. R. Co.* (1887) 45 Hun, 113, where the correctness of the application of the general principle seems rather questionable, as the operator had the duty of controlling the movements of trains at a particular point under a temporary system organized by the company in view of the fact that the progress of certain alterations in the track rendered it necessary to run all trains going in one direction on a single track.—*Dana v. New York C. & H. R. R. Co.* (1881) 23 Hun, 473 (message misinterpreted—case appealed, but merely on the question of the insufficiency of the company's rules). See also *Cincinnati, N. O. & T. P. R. Co. v. Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125, where, however, the nonliability was predicated directly from the fact that the operator was at all events a fellow servant as to the negligent act which caused the injury, *viz.*, in not putting out proper signals for passing trains, and thus seeing that no train passed within less than ten minutes of another.

But the principle itself is equally applicable where other methods of transmitting the master's commands are involved in the case.

In *Card v. Eddy* (1894; Mo.) 28 S. W. 979, a section foreman was held not to be entitled to recover where a fireman undertook to deliver to him a telegraphic despatch by tying it to a lump of coal, and in throwing the lump off inadvertently struck him. The court said: "The act the fireman was required to perform was the delivery from a running train of a message to the plaintiff. It cannot matter how important the message may have been, nor that it contained an order the receivers, through their road master, or other agent, were required to give. The injury did not result from the nature of the message or from a failure to transmit it. The service required of the fireman was that of a servant, which any messenger could have performed, and the manner of its delivery did not pertain to the duty the receivers owed to plaintiff. They owed him the duty only of using reasonable care to select a competent and careful messenger. After the master has discharged the duty he owes his servants, such as proper care in the selection of those with whom they are required to work, providing suitable tools and machinery, etc., yet the servants must look to each other for protection in the performance of their respective duties. The fireman can be regarded as the agent or vice principal of the receivers under no test which has ever been applied by the courts of this state, or elsewhere, so far as I have been able to discover. He was given no power to superintend, control, or direct the plaintiff,—which is the usual test; nor was he performing a duty the receivers owed to plaintiff other than such as they owed to every other employee in their service."

VI. Negligence of coservant in respect to the preparation or structural modification of instrumentalities or their parts; when not imputed to the master.

As to cases in which the delinquency resolves itself into negligently selecting, or failing to use, the appliances to be adjusted, see also *V. b. 1, supra*.

a. Introductory.

Ordinarily, as has been shown above (III.)

the duty of taking care that the servant is not exposed to danger from what may be called intrinsic defects in the instrumentalities is deemed to be nondelegable. But this principle is subject to some important qualifications, the precise extent of which is, as the authorities now stand, a matter of uncertainty.

It may perhaps be taken as a proposition universally conceded that the right and liabilities of the master and servant are to be gauged with reference to the principle that, where the master furnishes the materials for securing the safety of the servant as the work progresses in a place the condition of which is constantly changing, the use and application of those materials according to the exigencies of the work is the duty of the servants themselves, unless that function is specially assumed by the master. *Floyd v. Sugden* (1883) 134 Mass. 563.

But the practical construction of a rule so broadly expressed as this obviously affords scope for infinite differences of opinion. The reports carry us, by gradations sometimes almost imperceptible, from cases involving groups of facts which may without difficulty be admitted to be such that recovery could not have been allowed consistently with any reasonable interpretation of the doctrine of common employment, to cases which virtually nullify in some very important respects the theory that the master must answer for the negligence of the employees who provide the place of work and other appliances. Judicial ingenuity has been taxed to the utmost for the purpose of discovering distinctions of sufficient importance to take the evidence out of the operation of this theory.

In *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977, one of the most eminent of modern judges protested against whittling away by refined exceptions the rule by which the master is required to provide suitable appliances, and no one who has had occasion to carry out any extensive researches among decisions of this class will say that this caution is unnecessary.

The desperate predicament in which the courts sometimes involve themselves in the attempt to deal with antagonistic principles at places where they overlap has assuredly never been more strikingly illustrated than by the recent remark of a New Jersey judge that "a duty may be ambiguous, or may have a double aspect, and be, in some sense, incumbent on the master and on the fellow servant," and that "such a problem may, perhaps, be solved by determining which duty is paramount over the other." *Flanigan v. Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 702. What more "lame and impotent conclusion" could be reached than the conception of a duty which may be regarded as the master's or the servant's according to the standpoint from which it is viewed, and the suggestion that the rights and liabilities of the parties should be settled by an unintelligible method of analysis? When such a confession of helplessness is forced from a judge, it seems to be high time for the legislature to play the part of a *deus ex machina*.

b. Negligence which produces structural unsafety of a temporary character.

It seems to be well settled that, in the absence of evidence going to show that the conditions which caused the injury were, or ought to have been, known to the master or the agent whose special function it is to see that the instrumentality in question is reasonably safe for use (see VII. f, *infra*), no action can be maintained for injuries caused by details of work which temporarily result in introducing some structural modification into the environment of the injured person.

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1. Defects in railway tracks.

Contrast cases in III. d, 1, 2, *supra*.

Where the evidence is that, in the operation of a railroad at a certain point, it was frequently necessary to remove temporarily the planks covering a pit for the purpose of making repairs thereon, and that the employees were repeatedly instructed to cover the pit when the repairs were finished, the efficient cause of an accident resulting from the pit being left uncovered is the carelessness of coservants, and not an imperfection of the road. *Filbert v. Delaware & H. Canal Co.* (1890) 121 N. Y. 207, 23 N. E. 1104.

A brakeman who knows of a lumber pile near the track, and is injured in jumping upon a train moving by the pile, cannot recover if the piling of the lumber was an act of a fellow servant. *Gaffney v. New York & N. E. R. Co.* (1887) 15 R. I. 456, 7 Atl. 284.

Where a deposit of sand alongside a railway track results in injury to a brakeman, the injury is regarded as being due to the act of a mere fellow servant. *Robinson v. Houston & T. C. R. Co.* (1877) 46 Tex. 540.

A brakeman who, in coupling cars in a yard, slips on a pile of wet ashes, dropped from a locomotive fire-box and left between the rails, cannot recover. *Hughes v. Winona & St. P. R. Co.* (1880) 27 Minn. 137, 6 N. W. 553.

A railway company is not liable for the death of a brakeman who was brushed off the train by a car placed by fellow servants on a side track in dangerous proximity to the main track. *Schaub v. Hannibal & St. J. R. Co.* (1891) 106 Mo. 74, 16 S. W. 924.

2. Displacement of guards provided for dangerous machinery.

The negligence of servants charged with the duty necessarily involved in the ordinary use of machines, of oiling the same and changing the rolls operated in connection therewith, in failing to replace the guard over the gearing after oiling it, is not chargeable to the master so as to render him liable for injuries to another workman employed to tend the machine, where the oiling of the machinery and the changing of the rolls required no special skill, and might properly have been intrusted to the person injured. *Wosbigian v. Washburn & M. Mfg. Co.* (1896) 187 Mass. 20, 44 N. E. 1058. The court said: "The men who tended the machines were not accustomed to oil them and change the rolls, but two other men were regularly employed to do this. Were these men doing a part of the work that was within the department of the master, whose duty it was to furnish his servants with tools and machinery as suitable and safe as the exercise of reasonable care would secure, or were they doing the work of mere servants in making necessary changes of parts incident to the management of the machines in the ordinary use of them? If these changes had regularly been made in the ordinary course of their business by the persons who tended the machines, there would have been no doubt that in making them they would have been mere servants, for whose negligence the master would not be liable, and to whom, if competent, he could trust the work without any other duty than to furnish them proper materials and appliances for carrying it on. The only ground for doubt arises from the fact that the work was done by machinists who were specially employed for that purpose. But it appears that there was work to be done in repairing the rolls which were taken out, and in fitting them for use again, which could not be done by ordinary persons who were only taught to tend the ma-

chines, and which called for the employment of machinists. So far as appears, the changing of the rolls and oiling of the machines was a simple kind of work, which the machine tenders might have done as well as others. We are of opinion that these changes were necessarily involved in the ordinary use of the machines, and could properly be left to competent servants as a part of their work of managing the machines that called for no attention by the master if he kept the workmen properly supplied with suitable rolls and other necessary articles."

An employer cannot be held liable for the negligence of a coservant in displacing a plank which forms part of the fence by which dangerous machinery is protected in accordance with the provision of a statute requiring such protection to be furnished. *Honor v. Albrighton* (1880) 93 Pa. 475.

3. Dangers supervening in excavation work; trenches, mines, quarries, etc.

Contrast cases cited in III. d, 6, *supra*.

A master is not liable where the foremen, or other employees whose duty it is to see that the sides of a trench are properly shored and braced, either fail to use, or use improperly or unskillfully, the materials provided for that purpose, and cause injury to other servants who are at work in the trench. *Floyd v. Sugden* (1883) 134 Mass. 563.

In *Zeigler v. Day* (1877) 123 Mass. 152, a case involving similar facts, the court said: "The work was committed to the supervision of a skillful and competent superintendent. It required for the protection of the men the frequent use of temporary structures, the location and erection of which, as the digging progressed, was a part of the work in which the superintendent and the men under him were alike employed, and for the preparation of which, as in the case of the scaffold of the mason or carpenter, the master is not liable, unless there is something to show that he assumed it as a duty independent of the servant's employment." See also *Johnson v. Boston Tow-Boat Co.* (1883) 135 Mass. 209; *Dube v. Lewiston* (1891) 83 Me. 211, 22 Atl. 112; *Durst v. Carnegie Steel Co.* (1890) 173 Pa. 162, 33 Atl. 1102 (plaintiff was himself excavating the trench); *Dwyer v. Hickler* (1891) 43 N. Y. S. R. 221, 16 N. Y. Supp. 814 (same facts); *Bergquist v. Minneapolis* (1890) 42 Minn. 471, 44 N. W. 530 (plaintiff was laying pipes).

It is error to refuse an instruction to the effect that the sheet-piling in a trench was a detail of the work, and that, if the failure of the foreman in charge to use such piling was the cause of the sides of the trench falling in, the plaintiff could not recover. *Golden v. Sieghardt* (1898) 33 App. Div. 161, 53 N. Y. Supp. 460.

The negligence of a foreman in charge of workmen engaged in excavating a trench, in continuing to drive curbing timbers into the ground in close proximity to a laborer, after discovering that they were throwing off splinters, is that of a fellow servant of the laborer, whatever may be his relation to him in other respects. *Friedrich v. St. Paul* (1897) 68 Minn. 402, 71 N. W. 387. See, however, *Kranz v. Long Island R. Co.* (1890) 123 N. Y. 1, 25 N. E. 206, VI. g, 2, *infra*.

Since the danger that a bank which is being taken down in a gravel pit may fall at any moment is open and obvious, and the servants engaged in the work have ample facilities for discovering and removing such danger, the master may fairly be allowed to impose upon the servants themselves the duty of providing against such an occurrence. *Larsson v. McClure* (1897) 35 Wis. 533, 70 N. W. 662. The 54 L. R. A.

court said: "The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow servants practically created the place and its attendant perils from hour to hour, in the prosecution of their labors; and the condition was constantly shifting by reason of their own acts, of which, as well as their probable consequences, they must be held to have had notice. The negligence, if any, in this view of the case, would be that of the plaintiff and his fellow servants, and the risk of it must be regarded as assumed by the plaintiff as incident to his employment; and, in any view that may be taken of the case, it must be regarded as a risk assumed by the plaintiff, as incident to his employment."

A master is not liable where employees in shoveling coal leave an overhanging frozen crust of coal which falls and injures one of them. *Miller v. Thomas* (1897) 15 App. Div. 105, 44 N. Y. Supp. 277.

A tunnel in a mine in course of excavation, being a place in which conditions are constantly changing, and of which the furnishing and preparation are in themselves part of the work the employees are required to perform, is not a place furnished by the master for employees, within the spirit of those decisions which deny the right of the master to delegate to a servant the duty of providing a safe place for his employees. *Coal & Min. Co. v. Clay* (1894) 51 Ohio St. 542, *sub nom.* Consolidated Coal & Min. Co. v. *Floyd*, 25 L. R. A. 848, 38 N. E. 610.

As to the incidents or means of excavating ore, a mine owner has only the duty of furnishing competent men and suitable materials for the use of those engaged in the common employment. Hence, the negligence of a mine foreman in having too large a space mined before preparing to set the supports is that of a fellow servant of a miner. *Petaja v. Aurora Iron Min. Co.* (1895) 106 Mich. 469, 32 L. R. A. 438, 66 N. W. 951, Affirming on rehearing 106 Mich. 463, 32 L. R. A. 435, 64 N. W. 835. The court said: "It is apparent that if we are to adhere to the holding that miners and trammers are fellow servants, and that the shift boss, like the foreman of a section gang, is not an exception, there can be no theory upon which the plaintiff can recover, except that, immediately the room was in readiness for timbers, it was the duty of the master to see that they were properly set and maintained. And it is obvious that this claim must be, as it is, planted upon the rule that, in appropriate cases, requires the master to provide a safe place. The operation of mining, in this and similar mines, is to sink a shaft, and from the shaft start a drift, from which stopes or rooms are excavated across the vein, from the lower to the upper or hanging wall. It is accomplished by caving down and removing the ore. It is manifest that this cannot proceed unless the roof is supported behind the miners, and this is done by putting up timbers to support the roof until the ore shall be excavated beyond. It is said that, when the room has been excavated sufficiently large, it is the practice to cave the room down into the mining sets, and place more timbers on top of the first. Now, if this room can properly be said to be a place furnished to the servants in which to carry on the master's business, and which he must, at his peril, keep in reasonably safe condition, as a factory or warehouse, then the case should have gone to the jury; but, if it is not such a place, then it falls within that other rule, that the duty of the master is performed by using reasonable care in furnishing suitable material, and employing capable and

efficient men to do the work. . . . As we understand from the brief of counsel and the record,—and we do not discover a denial of it,—this stope or room starts from a drift at or near what is called the 'foot wall,' which is the bottom as distinguished from the overlying stratum of the vein of ore. Both foot wall and top wall depart from the level, and dip sharply, so that, in running the stope on a level, it can go but a short distance until the top or overhanging wall is reached; and then the operation is repeated above the lagging, removing the lagging and caving down the roof, supporting the new roof thus formed by new sets placed upon the first. Thus, so far as the lagging is concerned, it has a temporary use merely to enable the miners to push the breast through to the overhanging wall, by supporting the roof. It is a part of the operation of mining, as much as a blast or a staging, and is not a part of the permanent structure."

The case is for the jury, where the evidence is conflicting as to whether the plaintiff, a miner, was making his own place of work. *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249 (see IV. j, *supra*, for general rule).

One employed by the manager of a mine to take down loose slate which is liable to fall, but not invested with any greater authority than any other laborer, is not a vice principal while so engaged, but is a fellow servant with the miners. *Fosburg v. Phillips Fuel Co.* (1894) 93 Iowa, 54, 61 N. W. 400.

A workman employed in a quarry, in which, by reason of the constant removal of stone therefrom in the course of its operation by himself and his fellow servants, the conditions and surroundings are constantly changing, assumes the risk of the place becoming unsafe, and cannot recover for an injury due to the falling of a mass of stone loosened by succeeding blasts. *Mielke v. Chicago & N. W. R. Co.* (1899) 103 Wis. 1, 79 N. W. 22.

4. *Dangers arising from the changing condition of buildings and other structures while in course of erection or repair.*

The fact that a master failed to comply with a request by an employee for material to make a new floor in one place, to replace a section of floor which it had been necessary to frequently remove and replace, does not render him liable to a fellow servant of such employee for injuries due to the fact that such employee, in replacing the old floor without instructions to do so, failed to nail down the boards, where, had that been done, the floor would have been entirely safe. *Nemier v. Riter* (1897) 179 Pa. 557, 36 Atl. 335.

The owner of a steam propeller is not liable for an accident to an employee engaged in painting the iron floor, caused by the fall of a section of a plank floor which had been safely placed on end, but which was rendered unsafe after the commencement of the work owing to the fact that fellow servants removed other sections which helped to support it. *Smith v. Empire Transp. Co.* (1895) 89 Hun, 588, 35 N. Y. Supp. 534.

In *Armour v. Hahn* (1884) 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 455, the plaintiff, a man of full age, was, with one of his comrades, directed by their foreman to push a joist out on the sticks of timber projecting from a wall in course of erection. The usual course, as he himself testified, was to put the timber in, and leave it in that way temporarily, and afterwards build the wall up over it. The court said: "If it [the stick of timber] was at the time insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building, or

else by reason of some negligence of one of the carpenters or brick-layers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same place and time, with an immediate common object,—the erection of the building,—and, therefore, within the strictest limits of the rule of law upon the subject, fellow servants."

The selection of sound beams out of a sufficient quantity of proper and suitable material furnished by an employer for the erection of a structure is the duty of the fellow servants of one employed on such structure, instead of the duty of the master. Hence, there can be no recovery where an employee was injured by the breaking of a crossbeam upon which he was sitting while engaged in work, where such beam formed part of the structure on which he was at work. *Stourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128. There the master procured the timber for a structure from a reputable dealer; as a "lot" or quantity of it was good, but some of the sticks were found defective, or with curls in them. It was therefore necessary to test the timber so that knots or curls should be cut off or rejected. With respect to this test, the court said: "We think that the master discharged its duty when it supplied a sufficient quantity of proper and suitable material; that the choice of material, the selection of sound beams, the rejection of such beams or parts as were defective, work necessarily involved in the erection of structures of wood, were details of the work and strictly the duty of the fellow servants. . . . It is here that the vital distinction occurs between the question of a place to work and that of a part of the work itself; a question of liability to employees who might use the structure when built and the liability to those engaged in building it. It may well be that, after the construction of the trolley car, the defendant would be liable to any line-man who might be injured from its defective condition, whether occasioned by the negligence of the employees who put up the structure or those who selected the materials. Such rule does not apply to the plaintiff." Discussing the contention of the plaintiff that the case fell within the principle that a master is bound to furnish a reasonably safe place for his servants to work, the court said: "If this rule is applicable to the present case, then it would follow that for the negligence of any servants to whom the master had committed the duty of providing a safe place, the master himself would be liable. I think, however, that this is not the case of a 'place' within the meaning of the rule. As stated in *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017, doubtless, in one sense of the term, the employee must always be in some place, and doubtless, also, the place, in a certain sense, is not safe if an accident occurs there. But the rule that the master must provide a safe place for work only applies where the work and the place are not connected; where the work is not in the construction of the place, as in the case of a mill, a factory, mine, ship, well, etc. In the present case the cross beam was not furnished for the purpose of providing the plaintiff a place to work, but as a part of the structure which he and the other workmen were engaged in erecting. The defendant might have provided a beam of such dimensions as to have been wholly unable to sustain the plaintiff's weight; yet if good in its character, and sufficient for the purpose intended, there could have been no liability on the part of the defendant for that reason alone. I do not mean to say that the defendant owed no duty to its workmen in the premises. If there was a latent danger of which it had knowledge, it should

have apprised the workmen. But the distinction I seek to impress is that here the beam was a part of the structure, the common work upon which all the employees were employed, and the use of it by the deceased for support the mere incident. In the case of nearly all buildings or structures it is the common practice to use the part of the structure that may at the time be erected as a means to enable the workmen to obtain position from which to prosecute the remaining work. It makes a vast difference in the question of the liability of the master whether, when a servant meets with an accident from a defect in the previous work, occurring through the negligence of a servant engaged in its construction, the negligence is to be deemed as arising from a failure to provide a safe place, or as negligence in the general enterprise in the prosecution of which all the workmen are engaged. If the first, the master is liable, even though the negligence is that of a servant, because the duty is that of the master; if the second it is the negligence of a co-servant, and the master is not liable for it. If the workman who placed the beams on the flanges of the elevated railroad had been negligent, and improperly fastened them, and from this cause the accident to the plaintiff's intestate had occurred, and if the case is one of a safe place, the defendant would have been liable. Still I think such a proposition would hardly be contended for. Would it not be clear that it was the negligence of a fellow workman? It is also clear from the same reasoning that the beam was not an appliance the furnishing of which was the master's duty." To the same effect is *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017, where a laborer was injured owing to the insufficient strength of one of the caps of a jetty in course of construction. There it was contended by the plaintiff that, in neglecting to provide a cap of sufficient strength to support the mat upon which he was working at the time of his injury, the defendant failed to comply with the non-delegable duty to provide a safe place of work. After laying down the general principles already quoted the court proceeded thus: "The work upon which the plaintiff was employed in the present case was to construct a jetty extending from the shore several thousand feet out into the waters of the bay. Manifestly, the place at which the work was to be done was not provided by the defendant, nor can it be said that different portions of the work in which the laborers might be engaged as it progressed were the 'place' furnished by their employer, within the meaning of the above rule, or that the bent or trestle, from which was suspended the mat on which the plaintiff was at work at the time of his injury, was one of the appliances to be furnished by the defendant. On the contrary, the making of this bent was a part of the work to be done by the laborers themselves in the construction of the jetty, and the bent was in fact made by them out of materials furnished by the defendant."

If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. The rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employees are to adjust the appliances by which the work is to be done.

The owner of a building upon which extensive repairs are being made is not liable for an in-

jury to an employee caused by stepping upon a roof board which is laid in place on the roof, but which has not been nailed down. *Richardson v. Anglo American Provision Co.* (1897) 72 Ill. App. 77.

5. Dangers incident to the demolition of buildings.

An employer of a gang of men engaged in taking down a building is not liable for an accident caused by the tipping up of a joist from which the support at one end had been removed. *Clark v. Liston* (1894) 54 Ill. App. 578. The court said: "In the destruction of a building there is not an attempt or obligation to make it or any part thereof secure; on the contrary, the work of removal is one in which, in turn, each part of the structure is rendered insecure; this every workman understands."

c. Negligence in failing to adjust or secure instrumentalities or their parts while in use.

Another group of cases may be conveniently referred to the principle that the duty of the master to see to it that the machinery furnished for the use of his servants is reasonably safe does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of the use and with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the machine. *Eicheler v. Hanggi* (1889) 40 Minn. 263, 41 N. W. 975.

It will be observed, however, that, as regards the facts stated, many of the cases cited below approach quite close to those which are reviewed in the next two subdivisions, while others might perhaps with equal propriety be associated with the decisions which treat the duty of maintenance as delegable. See VII. *infra*.

The negligence of a fellow servant on one occasion in failing to readjust the cylinders of a machine after oiling it cannot be imputed to the master, where he was competent when selected. *Ebjjian v. Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265. The ground of the decision was that "the oiling of the machine is one of the daily matters regularly incident to its ordinary use, which must be intrusted to servants." This case was followed in *Wosbigian v. Washburn & M. Mfg. Co.* (1896) 167 Mass. 20, 44 N. E. 1058. VI. b, 2, *supra*.

The change of rollers in a feed mill for those that are sharper is a mere detail of work. *Frazee v. Stott* (1899) 120 Mich. 624, 79 N. W. 896.

A machine manufacturing company is not liable for injuries sustained by an employee by the falling upon him of a section of a heavy condenser, caused by the failure of himself and his coemployees to retain wooden braces between the various sections until the complete removal of a header, raised at the ends of the several sections on one side by a crane and tackle, and then coupled or bolted to each of the sections, although if a bolt which he was engaged in driving out had been put in in a different manner by the foreman the injury would not have ensued. *Kliegel v. Welsel & V. Mfg. Co.* (1893) 84 Wis. 148, 53 N. W. 1119.

A foreman in a mine, whose duty it is to employ and discharge workmen, direct them in their work, look after the machinery, and direct when it shall run, is a fellow servant with a workman employed by him while the two are cleaning the sprocket wheels used in running an elevator in such department; and the employer is not liable for an injury to such workman by the negligence of the foreman in failing to detach endless chains used in running the

elevator, as it is his duty to do. *New Pittsburgh Coal & Coke Co. v. Peterson* (1896) 14 Ind. App. 634, 43 N. E. 270.

An employer is not liable for an injury resulting from a defective block and hook selected from a number available, and arranged by a fellow servant as "a temporary incident of a particular job." *Harnols v. Cutting* (1890) 174 Mass. 395, 54 N. E. 842.

A servant cannot recover for an injury caused by the negligence of a fellow servant in setting him to work on a movable platform without securely fastening it. *Howard v. Hood* (1892) 155 Mass. 391, 29 N. E. 630.

Employees engaged in loading or unloading coal are co-servants of each other as regards negligence in the splicing of pieces of rope upon buckets in which coal is hoisted, for the purpose of pulling the buckets toward the dumpers. *Ryan v. Smith* (1898) 29 C. C. A. 427, 56 U. S. App. 604, 85 Fed. 758.

The task of setting up or rigging appliances for stavedores, and safely maintaining them, is a part of the duty of the fellow employees of a stavedore who is injured thereby, where they are all under the charge of a foreman, who directs several of them to rig the vessel. *Burns v. Bennett* (1896; Cal.) 44 Pac. 1068, reiterating opinion on former appeal (1893) 99 Cal. 363, 33 Pac. 916.

Properly to use pulleys, blocks, ropes, and other ordinary tools and appliances which have been furnished by a master to the workmen employed upon a derrick is a part of the duty of the workmen. It is incidental to the management and use of the derrick. In working with a derrick the foreman and his assistants are fellow servants, and the master is not responsible to any one of them for the negligence of any other in the use of the materials and implements which the master has supplied. *McKinnon v. Norcross* (1889) 148 Mass. 533, 3 L. E. A. 320, 20 N. E. 138.

Where the moving, adjusting, and securing of a derrick are among the regular duties of workmen, any negligence in the manner or place of putting down a post to which one of the guy ropes is fastened is their own negligence or that of the superintendent, and the latter is a mere fellow servant of the workmen in securing the post. *McGinty v. Athol Reservoir Co.* (1892) 155 Mass. 183, 29 N. E. 510.

The omission of workmen to fasten a guy rope of a properly constructed derrick which is in process of being moved is negligence which cannot be imputed to the master. *Marvin v. Muller* (1881) 25 Hun. 163.

An employer who furnishes with all the necessary appliances a derrick intended for use in different parts of a building in the process of its construction does not owe to his employees the duty of properly setting up and supporting it at each place where it may be required. *Kennedy v. Jackson Agri. Iron Works* (1895) 12 Misc. 336, 33 N. Y. Supp. 630.

An employer is not liable for an injury resulting from the fall of a derrick occasioned by the absence of a check rope which a co-servant in charge had forgotten to attach thereto. *Jenkinson v. Carlin* (1894) 10 Misc. 22, 30 N. Y. Supp. 530.

In one New York case it was held that the owner of a derrick was not liable where a workman was injured by its defective rigging, the ropes having become stretched by the rain of the night before the morning of the accident, and the starting was superintended by the foreman who had charge of it. *Courtney v. Cornell* (1883) 17 Jones & S. 286. *Sedgwick, Ch. J.*, dissented on the ground that the plaintiff "accepted the risk that would be involved in arranging the derrick and its several attachments" 54 L. R. A.

from occasion to occasion." This view seems more in harmony with the later cases.

An employee injured by the falling of a derrick on account of the neglect of a fellow servant to fasten a guy rope cannot recover of the master, who had cautioned the man never to let go a guy rope after it was untied until it had been tied again. *Nellson v. Gilbert* (1885) 69 Iowa, 691, 23 N. W. 666 (all the negligent acts antecedent to that of untying the guy rope and leaving it unsecured held to be remote causes of the accident).

In *Peschel v. Chicago, M. & St. P. R. Co.* (1885) 62 Wis. 338, 21 N. W. 269, the apparatus used for raising a part of the framework for a water tank consisted of a windlass crab, tackle blocks, ropes, the tank itself, and an anchor post set in the ground, the whole of these being placed in position and adjusted under the direction of the foreman. The plaintiff, a mason employed with other masons, carpenters, and section men in the erection of the tank, was injured by the fall of the framework owing to the fact that the anchor post was not set deep enough in the ground. A verdict for the defendant was set aside for reasons thus explained. The court said: "The stress of the argument is to bring the case within the rule which charges the master with the duty of supplying the servant with reasonably safe and suitable machinery and appliances to do his work. But, as I have said, I see no sufficient reason for saying the defendant was under obligation to furnish the men employed to erect the water tank and windmill with a machine or instrumentality for raising the bents in a complete condition ready for use. There is no claim that the materials and appliances provided were not suitable and sufficient for the purpose intended. They were in a detached condition, and necessarily had to be adjusted on the ground; but the defendant did not contract with the plaintiff that these various appliances should be adjusted and put in order fit for use before he went to work. On the contrary, it was what the foreman, Brooks, with his gang of men, including the plaintiff, was employed to do, to take the materials of stone and wood, and all other appliances, and build the piers, construct the tank, frame the bents, adjust the machinery, and hoist the bents to their proper position. All this labor was necessarily involved in what they undertook to do and were paid for doing. It is unsound reasoning to compare this hoisting apparatus to a steam engine, a railroad car, or to some machine which is all adjusted so that its sufficiency can be ascertained before the servant is called upon to use it. Here the materials had to be prepared and put together, frames made, and hoisting apparatus adjusted—which included the setting of the anchor post—by the men themselves; and, to use the forcible and pertinent language of defendant's attorneys on this point, if placing the post in the ground, in this particular case, was a duty which the master owed to the servant, then in doing work of this kind the rule as to nonliability for the negligent acts of fellow servants would be practically nullified. If in the adjustment of this machinery a pulley, although perfect in itself, had been improperly placed or secured; if the anchor rope, although proper and sufficient in itself, had been insecurely tied to the post and slipped therefrom; if one of the men, furnished with a proper crowbar, had negligently held it at the foot of the bent; if the framework made by the men themselves, in the shape of timbers underneath the bents and upon which they rested, had been improperly made,—the logic of the position of plaintiff's counsel would make the master liable in all the cases supposed for an injury caused by such negligence of a fellow

servant. This is, indeed, extending the liability of the master further than the adjudications of this court have carried it, and further than the law will warrant."

Where a piece of iron used as a counter balance of a lathe flies off and strikes a servant he cannot recover where the evidence shows that if there was any negligence it was that of the foreman of the lathe in not securing the weight, and that this weight was as safe as any other piece of iron if it had been properly secured. *Faber v. Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621.

An employee cannot recover for injuries which, upon the evidence, could have been occasioned only by the loosening of a button upon a carding machine, owing to the neglect of a fellow servant to tighten a screw. *Smith v. Lowell Mfg. Co.* (1878) 124 Mass. 114.

A foreman superintending the construction of a bridge acts as a mere servant in choosing the method of fastening the tackle employed. *Ulrich v. New York C. & H. R. R. Co.* (1898) 25 App. Div. 465, 51 N. Y. Supp. 5.

A master is not liable for the negligence of a fellow servant in so placing a suitable rope as to be cut and weakened unnecessarily. *Prescott v. Dall Engine Co.* (1896) 176 Pa. 459, 35 Atl. 224.

A servant whose duty it is to superintend the laying of temporary rails leading to a ballast pit, and to change their position as the work progresses, is a fellow servant of a laborer engaged in filling trucks with ballast. *Lovegrove v. London, B. & S. C. R. Co.* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, 10 Jur. N. S. 879, 10 L. T. N. S. 718, 12 Week. Rep. 988. But the case was not decided with reference to the character of the act.

An employer is not liable for injuries caused by the failure of a fellow servant to fasten properly a skid, bridge, plank, or other similar instrumentality used for the purpose of transferring goods from or to ships, railway cars, etc. *The Islands* (1886) 28 Fed. 478 (here it was shown that the usual practice preferred by the workmen themselves was not to tie the skid); *Hudson v. Ocean S. S. Co.* (1888) 110 N. Y. 625, 17 N. E. 342; *McCampbell v. Cunard S. S. Co.* (1895) 144 N. Y. 552, 39 N. E. 637 (some stress was laid on the fact that the appliance—a skid—was of simple construction, but this factor is not material, as is shown by the authorities here referred to); *Dwyer v. Hall* (1897) 21 Misc. 452, 47 N. Y. Supp. 630, Reversing 20 Misc. 677, 46 N. Y. Supp. 533; *Conway v. New York C. & H. R. R. Co.* (1895) 13 Misc. 53, 34 N. Y. Supp. 113, Reversing 11 Misc. 641, 32 N. Y. Supp. 921.

Where a master employing plaintiff's intestate and others to load a vessel furnished a proper clamp and ropes with which to safely lash it to the deck beam, and the clamp was not lashed but insecurely attached by one bolt, by direction of the master's foreman, and in consequence of this insecure fastening a barrel in process of loading slipped and fatally injured plaintiff's intestate, defendant is not liable for his foreman's negligence. *O'Connor v. Hall* (1900) 52 App. Div. 428, 65 N. Y. Supp. 136.

Putting a gang plank into position for the purpose of loading a heavy piece of machinery in a railway car is the function of a mere servant. *Trimble v. Whitin Mach. Works* (1898) 172 Mass. 150, 51 N. E. 463.

A master is not liable for the improper setting of a ladder by a fellow servant of the injured person. *Trcka v. Burlington, C. R. & N. E. Co.* (1896) 100 Iowa, 206, 69 N. W. 422.

A master is not liable for an injury caused by the insecure fastening of a ladder which it was the duty of the employee and his coservants

to fasten. *Quinn v. Fish* (1893) 6 Misc. 105, 26 N. Y. Supp. 10.

d. Negligence in the preparation of temporary structures or other instrumentalities as a part of the work; general rule.

We now come to the decisions which cut most deeply into the doctrine of nondelegable duties, those, namely, in which the preparation of entire instrumentalities, and not merely their arrangement or adjustment of their parts, is treated as the function of the servants themselves. The general rule to which, for reasons to be explained in the following section, the courts have now committed themselves, may be stated thus: If the master supplies suitable material for the construction of an appliance which he is not obliged and has not undertaken to furnish in a completed state, and the workmen themselves construct it according to their own judgment, the master is not liable for the manner in which they use the materials thus supplied. *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860, Reversing (1894) 81 Hun, 599, 30 N. Y. Supp. 1103.

Persons engaged in the same general work are fellow servants in respect to the negligence of one of them in constructing appliances with which they are to work, where their work includes the construction of such appliances. *Marsh v. Herman* (1891) 47 Minn. 537, 50 N. W. 611.

The master is never liable for failing to supply a safe place to work, where the work consists in making safe the place and the condition of which he complains. *Bedford Belt R. Co. v. Brown* (1895) 142 Ind. 659, 42 N. E. 359.

The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. The rule does not apply to a case where several persons are employed to do certain work, and, by the contract of employment, either express or implied, the employees are to adjust the appliances by which the work is to be done. *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

Where the master does not undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this duty is intrusted to or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do that which they thus undertake. *Kelley v. Norcross* (1877) 121 Mass. 508.

1. Application of the rule in the case of scaffolds, stagings, etc.

The earliest reported case turning upon the liability of a master for a defective scaffold is *Wigmore v. Jay* (1850) 5 Exch. 354, 14 Jur. 837, 19 L. J. Exch. N. S. 300. There the plaintiff's husband was one of the brick layers employed by the defendant for that purpose. The

scaffold was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger, in consequence of which the scaffold broke while the plaintiff's husband was at work upon it. The unsoundness of the pole had been previously pointed out to the foreman, but the deceased could not see its defect on account of some planks being laid across it. Recovery was denied on the grounds that the defendant had not personally superintended the erection of the structure, and that his foreman was a fellow servant of the plaintiff's intestate, and not shown to have been a person deficient in skill, or an improper person to be employed for that purpose. The main contention of plaintiff's counsel was that *Priestley v. Fowler* (1837) 3 Mees. & W. 1, *Murph. & H.* 305, 1 Jur. 987, had no application for the reason that the persons erecting a scaffold are not fellow laborers of a man who is merely employed to work thereon, and the case followed was *Hutchinson v. York, N. & R. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837, where the plaintiff was traveling on a train and the delinquents were the trainmen. The actual decision thus rendered is quite in harmony with the more recent authorities, but it will become clear as we proceed with the review of the cases cited in this and the next subdivisions that the tests at present applied for the purpose of determining the right of the servant to maintain his action are in some important respects different from those referred to by the English judges.

The doctrine which is now regarded as defining the nature and extent of the master's responsibility under such circumstances as those involved in *Wigmore v. Jay* is that which is set forth in the following extracts:

Where the servant is injured by defects in a temporary staging intended to be used only in finishing the building where it was constructed, "if the plaintiff's employers furnished sufficient quantities of suitable materials for staging, employed suitable workmen, and did not themselves undertake the duty of furnishing the staging as a structure, but only of supplying materials and labor by which it might be built and from time to time adapted to the work; and if the duty of furnishing or adapting the staging as an appliance for use in the work of finishing the room was intrusted to, or assumed by, the workmen themselves, within the scope of their employment,—the employers are not answerable to the plaintiff for his injury.

On the other hand, if the staging was furnished by the employers as a completed structure, or if they themselves supervised and directed its construction, or if, relying upon its construction by their workmen for themselves, the employers negligently failed to provide suitable and sufficient materials, or negligently hired incompetent workmen, the employers might be answerable to the plaintiff." *Brady v. Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

It was not enough to prove that the scaffolding gave way under the circumstances resulting in an accident, or that it was in fact defective, unless it was made to appear that this was the proximate result of some omission of duty on the part of the defendants or their foreman. If they furnished suitable materials for the construction of a proper platform, and the workmen themselves constructed it according to their own judgment, the defendants were not liable for the manner in which they used the material so furnished. *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860.

Where an employer employs mechanics to do a certain amount of work, the doing of which

requires the use of scaffolds which it is a part of the work of the mechanics so employed to construct, and the employer furnishes proper materials with which to construct the scaffolds, the master is not liable for the negligent use of such materials, either by improperly uniting them together, or by selecting materials not proper for the particular use for which they are selected, whereby one of such mechanics is injured, as the accident was not the result of the neglect of a duty that a master owed to his employees; and to establish a cause of action for such an injury, the plaintiff must prove, in addition to the fact that there was negligence in the selection of the materials for the building of the scaffold, the additional fact that the master, or some one that stood in the relation of representative of the master, assumed to construct the scaffold, and then directed the employers to use it as a constructed scaffold.

Where an employer employs men to do particular work, furnishing them with a completed scaffold as an appliance with which to do the work, if that completed scaffold is an unsafe or an improper appliance for the purpose for which it is to be used, there is a violation of the duty imposed upon the employer to furnish his employees proper appliances with which to do the work. Where, however, the employee, as a part of the work that he is to do, is to construct the scaffold out of the materials furnished by the employer, and the employer furnishes proper materials for that purpose, and such employee, either by negligence in putting the materials together or in selecting the materials, erects an unsafe appliance, which results in injury to one of those employed to do the work, the neglect is not that of the employer. *McCone v. Gallagher* (1897) 16 App. Div. 272, 41 N. Y. Supp. 697.

If the plaintiff and his coemployees had, without specific instruction from the master, or one acting for the master and under his authority in the performance of the duty which he owed to his employees, constructed a scaffold of improper material, it would undoubtedly be a case where the negligence was that of a fellow employee or co-servant with the plaintiff, for which the master would not be liable. *Richards v. Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234.

Where the master employs competent workmen, and provides suitable materials for the necessary staging to be used by them, and intrusts the duty of erecting it to them as a part of the work which they are engaged to perform, he is not liable to one of them for injuries resulting to him from the falling of the staging. *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398.

For an injury received by one workman from the negligence of others in increasing the scaffold's height, the employer would be no more liable than he would be for the fall of a ladder furnished by him to his workmen, when the fall was the result of its being negligently placed insecurely by one of them. *Maher v. McGrath* (1896) 58 N. J. L. 409, 33 Atl. 945.

With respect to the building of ordinary scaffoldings and other simple structures of that nature which laborers and mechanics are in the habit of constructing for themselves, the master is under no obligation to do more than to supply a sufficient quantity of material which is reasonably well adapted for the making of such structures. *Kerr-Murray Mfg. Co. v. Hess* (1899) 38 C. C. A. 647, 98 Fed. 56.

In *Hopkin v. Worcester* (1885) 140 Mass. 222, 2 N. E. 779, a city employed a master builder to furnish labor and tools required in the erection of a building by the city highway commissioner. The city furnished the materials

necessary and paid the bullder and his men. A directed B, one of his men, to erect a staging; and the man used a defective bracket belonging to A, whereby one of A's workmen was injured. It was held that, the master bullder not having had any authority from the city to furnish the bracket except an implied permission to use it under his contract, the negligence was that of servants in constructing unsafe staging, and not that of a master in not furnishing proper materials.

Other cases in which the principles thus set forth have been held to prevent the injured servant from recovering are the following: *Noyes v. Wood* (1894) 102 Cal. 389, 36 Pac. 766; *Perigo v. Indianapolis Brewing Co.* (1899) 21 Ind. App. 338, 52 N. E. 462 (injury caused by the removal of the supports by a fellow servant, plaintiff having notice of what was going on); *Kennedy v. Spring* (1893) 160 Mass. 203, 35 N. E. 770 (mason's "tender" injured by negligence of mason in selecting improper materials, or in improperly fastening them); *Oelschlegel v. Chicago G. W. R. Co.* (1898) 73 Minn. 327, 76 N. W. 56, 409 (negligent selection of plank for temporary scaffold); *Marsh v. Herman* (1891) 47 Minn. 537, 50 N. W. 611; *Beesley v. F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 260, 61 N. W. 658 (riveter and carpenter under the same superintendent engaged in ship building held to be fellow servants, so as to preclude recovery by the riveter for injuries caused by negligence of the carpenters in constructing a scaffold on which he works); *Olsen v. Nixon* (1898) 61 N. J. L. 671, 40 Atl. 604 (part of work—no undertaking to furnish—ship carpenter injured); *Judson v. Olean* (1889) 116 N. Y. 635, 22 N. E. 535, *Reversing* (1886) 41 Hun, 637; *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017, *Reversing* 32 N. Y. S. R. 1055, 10 N. Y. Supp. 809; *Hogan v. Smith* (1891) 125 N. Y. 774, 26 N. E. 742; *Donnelly v. Brown* (1887) 43 Hun, 470 (foot of ladder used for supporting a scaffold was insecurely placed); *Hogan v. Field* (1887) 4 Hun. 72; *McCormack v. Crawford* (1886) 4 N. Y. S. R. 935; *Thompson v. Libbey* (1892) 46 N. Y. S. R. 324, 10 N. Y. Supp. 680; *Stutz v. Armour* (1893) 84 Wis. 623, 54 N. W. 1000 (foreman directed plaintiff to adjust a plank in a scaffold); *Cadden v. American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800.

Other cases applying the same doctrine in one or more of its various phases are cited in the next three subdivisions.

Both on the ground relied upon in these cases, and also on the ground of the unauthorized use of the appliance, a contractor who provides a sufficient scaffold for his work is not liable for the death of an employee from the giving way of an insufficient scaffold constructed for the use of another contractor's employees, and not adopted by him for the use of his workmen, upon which such workman goes in the performance of his work. *Mauer v. Ferguson* (1892) 44 N. Y. S. R. 372, 17 N. Y. Supp. 349.

2. Application of the rule in the case of other instrumentalities.

A railway contractor is not liable for defects in a trestle which is not a structure furnished for employees to work on, but is itself a part of the work which they are engaged to perform, and is a thing which they themselves make, and "as much a part of the construction of the road as was digging in the pit, loading cars, driving teams, or tampling dirt on the dump." *Lindvall v. Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020.

The making of the projecting steps in a pile of lumber being a part of the work which the men in the yard are hired to perform, none of

them, whether pilers, sorters, or measurers, can recover for injuries caused by the selection of a knotty plank for one of the steps. *Fraser v. Red River Lumber Co.* (1890) 42 Minn. 520, 44 N. W. 878 (1891) 45 Minn. 235, 47 N. W. 785.

A master is not liable for injury to a servant, caused by the fall of a heavy pump, due to the giving way of an eyebolt insecurely fastened in the ceiling by a fellow servant for the purpose of raising such pump. *Watts v. Beard* (1897) 18 App. Div. 243, 45 N. Y. Supp. 873. The court said: "There is no question about the competency of the plaintiff's coemployees, nor of the strength and sufficiency of the eyebolt. The difficulty arose from the failure to securely fasten it in the ceiling for the purpose designed. If this preparation for the work of hoisting the pump was within the duties of the defendants, then whoever did it represented them, and the negligence was theirs. This is the contention of the plaintiff's counsel, by whom it is insisted that they failed to use the care required of them to afford to the plaintiff a safe place for his work. When the men commenced the performance of the work of adjustment of the pump there was no want of safety in the situation, or in the existing conditions, at the place where this was to be done, nor was there any defect in the appliances employed in the work. The accident arose from the failure to make such use of them as to give safety to its performance. It is not important to inquire whether the failure of the eyebolt to retain its place in the ceiling was attributable to the use of a larger sized bit than should have been used, or to an unsubstantial condition at the place in the wooden ceiling where the hole was made for it. The eyebolt was not designed as a permanent attachment to the ceiling, or for subsequent use in the business of the defendants. It was adopted as a temporary expedient for the occasion,—employed as a means to accomplish the purpose then in view, and the use made of it was within the details of the work which the workmen were proceeding to perform. In that view any negligence to which the plaintiff's injury may have been attributable was not that of the defendants, but was that of his coemployees."

A member of a bridge gang cannot recover for injuries caused by the fact that a wedge used in constructing a temporary track for the conveyance of materials slipped out of place. *Bedford Belt R. Co. v. Brown* (1895) 142 Ind. 659, 42 N. E. 350.

The breaking of a defective plank used as a bridge to transport articles from a car to a shed will not render the master liable where the plank was apparently sound and selected by a fellow servant of the plaintiff. *Van den Heuvel v. National Furnace Co.* (1893) 84 Wis. 636, 54 N. W. 1010.

An employer is not liable for defects in a "trussed plank," a temporary contrivance constructed out of materials selected by the workmen themselves while fitting a roof on a building. *Keystone Bridge Co. v. Newberry* (1881) 96 Pa. 246, 42 Am. Rep. 543 (plank gave way while a rafter was being carried across it).

Compare with these decisions the cases cited in VI. c. *supra*.

e. Rationale and limits of a master's exemption from liability for the adjustment or preparation of instrumentalities.

The limits of a master's liability for an injury caused by a scaffold or other appliance constructed or adjusted as a part of the work are determined upon the hypothesis that it is his duty, in the alternative, "to furnish either a suitable platform or scaffold for doing the

work that the plaintiff and his employees were required to do, or proper and suitable materials for the construction of such a platform." *Richards v. Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234; *s. p.*, *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

Under the general principle stated in IV. j, *supra*, the question whether the one or the other of these duties was chargeable to the master is primarily one for the jury under proper instructions. *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874 (negligence here was in the erection and support of a run for large stones, and in the selection of the gear), *Citing Arkerson v. Dennison* (1875) 117 Mass. 407, where the general rule was laid down as follows: "When the preparation of the appliances is neither intrusted to, nor assumed by, them, the master may be held guilty of negligence if defective appliances are furnished, even though the workmen themselves are employed in the preparation of them. In such case, negligence appearing, it is a question of fact for the jury whether that negligence was in respect of what was done or undertaken by the fellow workmen, or was the negligence of the master."

So far as regards the control or review of the conclusions of a jury, the essential matter for the consideration of a court is the effect of the evidence as indicating the relation which the servant responsible for the defects in the instrumentality bore to the plaintiff and the defendant in directing the work which resulted in the production of that instrumentality, or in providing the materials of which it was to be constructed. *Richards v. Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234.

What that relation is may, as an analysis of the cases shows, be determined by following either one of two lines of investigation, to each of which certain logical conceptions are peculiarly appropriate. For the sake of clearness, therefore, it will be well to differentiate between the alternative theories of the evidence which is customarily presented in cases of this class, though at the same time it should be remarked that the interval between them is so easily bridged that the courts quite commonly pass from one to the other in the course of the same opinion. The starting point of one of the lines of investigation may be said to be the question whether the construction or adjustment of the defective instrumentality was a function which the master was justified in leaving to the servants themselves. Thus, to take the most numerous group of cases under this head for the purposes of illustrations: The mere fact that a staging was not built under the immediate personal supervision of the master is manifestly not sufficient to justify a trial judge in ruling, as a matter of law, that the plaintiff cannot recover. The omission to exercise such supervision may itself have been negligent. *Arkerson v. Dennison* (1875) 117 Mass. 407. There the plaintiff by direction of his employer went onto a staging which, being either constructed of unsuitable materials, or insufficiently fastened together, was insecure, and which was built before the plaintiff began work, by persons who were afterwards his fellow workmen, the defendant directing what lumber was to be used therefor, and, although the staging was not built under his direct personal supervision, superintending the work generally. The court said: "Whether a particular structure or appliance is one for which the master is responsible to his servant may depend upon circumstances including the nature and scope of the employment of those engaged in its preparation and use. It may depend upon the question whether the direction and charge of the work is confided to the workmen or some of them, or

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retained by the employer or left unprovided for. If the employer directs his workmen to do certain work, leaving it to them to provide the structures and appliances required for its prosecution, he may be responsible only for care in selection of the men and material assigned for it. But if he simply employs them to work under his direction, giving them no charge or responsibility in regard to the result to be accomplished or the appliances to be used, that responsibility remains with him. The negligence of fellow workmen for which the master is held to be exempt from responsibility is negligence in respect to that which the workmen undertook or were set to do. . . . It would have been competent for the jury to find that the defendant had not intrusted the preparation of the staging to anyone else, and therefore that he retained the charge and direction of it himself, and was bound to exercise some degree of care in regard to it, which he neglected to do."

When the selection of materials or construction of the appliances to the business is such that it may properly be left to the workmen, in their capacity as workmen, and within the scope of their employment, and it is so left by the master, he is relieved from responsibility for their negligence. *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

The liability of the master cannot be determined merely by showing that the place where the workmen were engaged in his service was a scaffold; but it must depend upon the nature of the scaffold and the purposes it is to subserve,—whether it could be properly left to the workmen to determine and control the method of its erection, and whether they did in fact control its erection, or whether the master had charge thereof. *F. C. Austin Mfg. Co. v. Johnson* (1898) 32 C. C. A. 309, 60 U. S. App. 661, 89 Fed. 677. See further, as to this case, VI. g, 2, *infra*.

Another case recognizing the principle in the text is *O'Connor v. Rich* (1895) 164 Mass. 560, 42 N. E. 111, where the same principle is conceded *arguendo*.

That the delegation of the function was not culpable is sometimes inferred from positive evidence showing that such workmen as those in question generally construct their own scaffolds and adjust their own appliances.

In *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860, the court remarked that "when a gang of masons are engaged in plastering or painting a room, the construction of proper platforms or places upon which to stand while doing the work is one of the details of the business that is generally left to the workmen themselves."

In *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697, one of the evidential factors enumerated was that it was "customary" for carpenters employed to do the particular kind of work in question to construct the necessary scaffold. See also *Noyes v. Wood* (1894) 102 Cal. 389, 36 Pac. 766, where the same conception is adverted to.

But specific testimony of such a custom is not necessary to negative fault in this regard. The virtual effect of the authorities is that whenever the defective scaffold or other appliance was essentially one of a temporary character, constructed or adjusted with a view to some particular piece of work, the master cannot be held negligent merely for the reason that he left such construction or adjustment to the servants themselves.

In a recent case it was observed that the courts draw a distinction between a scaffold which is a permanent platform furnished by the employer on which he invites his workmen to stand in doing their work, and a temporary

and movable platform to be increased in height as the work progresses by the workmen themselves as their needs require. *Maher v. McGrath* (1896) 58 N. J. L. 469, 38 Atl. 945, *Contrasting Mulchey v. Methodist Religious Soc.* (1878) 123 Mass. 487.

In *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697, it was considered that the cases containing the latest expressions of opinion of the court of appeals established this principle: "Where an employer employs mechanics to do a certain amount of work, the doing of which requires the use of scaffolds which it is a part of the work of the mechanics so employed to construct, and the employer furnishes proper materials with which to construct the scaffolds, for the negligent use of such materials, either by improperly uniting them together or by selecting materials not proper for the particular use for which they are selected, whereby one of such mechanics is injured, as the accident was not the result of the neglect of a duty that the master owed to his employees, the master is not liable."

A servant cannot recover for injuries caused by the fall of a scaffold, where the evidence is merely that a rope which should have secured a spar slipped or became untied. *Pickett v. Atlas S. S. Co.* (1884) 12 Daly, 441. (Compare also the rulings cited in the following paragraphs.) In other words, whenever the instrumentality is one of this character the burden of proof lies on the servant to overcome the presumption of non-culpability by adducing some positive evidence from which an obligation on the master's part to furnish such instrumentality in a completed state is reasonably inferable. See, for example, *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860, where one of the grounds on which it was held that the plaintiff failed to make out a case for the consideration of the jury was that he had not shown that it was the duty of the master, under the circumstances, to construct the platform on which the masons were to do the work, but that, on the contrary, the proof showed that this duty was assumed by the workmen as one of the details of the work.

On the other hand, it is also clear, both upon principle and authority, that the fact of an appliance being ordinarily prepared by the plaintiff's fellow servants is not necessarily a bar to the action. Since the duty to furnish safe appliances rests upon the master, he must discharge his duty in the premises. Negligence, however often repeated, will not ripen into an excuse for neglect from which injury results. *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

It will be observed that the theory upon which recovery is, from this standpoint, permitted or denied, is simply that, as there is no culpability on the master's part, the general principle is left to operate that in selecting and using the materials the workmen act as each other's fellow servants.

In *Ross v. Walker* (1891) 139 Pa. 42, 21 Atl. 157, 159, where the action was held not to be maintainable for an injury caused by a defective false work, the court said: "It is not material to this inquiry to know whether 'Duffey had entire charge and control of the work' as a foreman or not; nor to know whether he selected from the mass furnished by the employer the materials to be used for any particular purpose or not; nor whether he hired and discharged men or not. The inquiry is, Was it the employer's duty, after having provided materials ample in quantity and quality, to supervise the selection of every stick out of the mass for every purpose? To state this question is to answer it. This was not his duty, and for 54 L. R. A.

that reason Duffey, if he did select the timber, which is more than doubtful under the testimony, did not represent Walker as a vice principal in such selection. He and his fellow workmen were to judge of the suitability of the pieces of timber they used for the uses to which they put them, and their error in judgment, or their careless discharge of this duty, was their fault or failure, and not that of their employer. He had discharged his duty when he furnished an abundance of materials from which they could select what was needed. The actual selection out of this stock of the sticks needed from time to time was not his duty, but that of the workmen themselves. If there was a visible defect in a stick, common prudence and common care on their part would have rejected it and supplied its place with another out of the stock at their command." It was held error to have refused to instruct the jury that, if they found the defendant put the work in charge of a competent foreman, and provided suitable materials for the scaffolding in sufficient quantity, then he was guilty of no negligence, and the verdict must be in his favor. See also the language used in *Keystone Bridge Co. v. Newberry* (1881) 96 Pa. 246, 42 Am. Rep. 543.

The essential question to be determined, if we choose the alternative line of investigation, is whether the master, as a matter of fact, assumed to furnish the scaffold or other instrumentality in a completed form, or left it to be prepared by the servants themselves.

In one of the cases already cited it was laid down that, generally, "to establish a cause of action for such an injury, plaintiff must prove, in addition to the fact that there was negligence in the selection of the materials for the building of the scaffold, the additional fact that the master, or someone who stood in the relation of representative of the master, assumed to construct the scaffold, and then directed the employees to use it as a constructed scaffold." *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

Clearly, if such assumption is established, the master will be liable, as for negligence, even if the circumstances were otherwise such that he would have been justified in leaving the servants to prepare the defective instrumentality themselves. *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860 (where, however, the action was held not to be maintainable for the reason that there was no evidence that the defendants actually constructed, or directed the construction of, the platform which gave way); *Adasken v. Gilbert* (1896) 165 Mass. 443, 43 N. E. 199; *Brady v. Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

Where an employer employs men to do particular work, furnishing them with a completed scaffold as an appliance with which to do the work, if that completed scaffold is an unsafe or an improper appliance for the purpose for which it is to be used, there is a violation of the duty imposed upon the employer to furnish his employees proper appliances with which to do the work. *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

In *Miller v. Missouri P. R. Co.* (1891) 109 Mo. 356, 19 S. W. 58, the court said: "Cases often arise where the master becomes liable by reason of the fact that he undertakes by himself, or through a representative, to do certain things which might have been left to the servant to perform. Thus, where the master provides suitable materials for a staging, and intrusts the duty of erecting the structure to the workmen as a part of the work which they undertake to perform, he is not liable for injuries resulting to one of them from the falling of the staging; but, if the master undertakes to furnish the

stage, he must use due care in its erection, and, if there is negligence on his part or on the part of one representing him in that regard, he is liable for injuries resulting to the servant using the structure."

The case is for the jury where the evidence is conflicting, or reasonably consistent, either with the hypothesis that the defective appliance was constructed by the fellow servants of the injured person out of materials furnished by the master, or with the hypothesis that it was constructed under the direction of the defendant or his representative. *Bryer v. Foerster* (1896) 9 App. Div. 542, 41 N. Y. Supp. 617. See, generally, IV. j. *supra*.

The instructions proper to be given for the guidance of a jury were very elaborately discussed in *Colton v. Richards* (1878) 123 Mass. 484. There the evidence tended to show that the staging was erected by fellow workmen of the plaintiff, out of material furnished by the defendant; that the staging was insecure by reason of a small piece of defective timber, called a putlog, on which the floor of the staging rested, and which had been in use by the defendant about two years; that the material for the staging was lying on the ground in piles near the building, and, from the mass, persons, who were afterwards the fellow workmen of the plaintiff, selected such material as they wanted, including the putlog in question; that some of the workmen were journeymen, whose trade it was to learn to build safe and proper staging, and that they superintended the erection of this staging. The plaintiff asked the judge to instruct the jury as follows: "1. It is the duty of an employer to provide reasonably safe and proper material and implements for his workmen to work with and use, and his failure so to do is negligence. 2. If it was the duty of the defendant to provide for the plaintiff a completed staging as a structure, as an implement or appliance to carry on this work, then he was bound to see that the staging was a reasonably safe and strong one, and suitable to the work required of the plaintiff, and the fact that fellow workmen of the plaintiff used poor material furnished by the defendant, in the erection of such staging, is no defense. 3. If the putlog was a manufactured and completed implement or utensil, and was furnished by the defendant for the plaintiff's use, he is liable, even though it was put in use by the act of the plaintiff's fellow workmen." The judge refused to give these instructions, and instructed the jury that the plaintiff could not recover, unless they were satisfied that the defendant did not exercise ordinary care in the selection of men and materials to erect the staging, and that such want of ordinary care caused the accident; and that, if the defendant was to furnish a staging as a completed structure, he was to use such care in so doing as any person of ordinary prudence would use in providing such a structure; and that, if he was only to furnish material, he was to use ordinary care in the selection of material; that if he was to furnish this putlog as a manufacturer's utensil, he was to use ordinary care in so doing. In the substitution of these instructions for those requested there was held to be no error, and that the jury must have found, either that the defendant did not assume the alleged duty in any of the forms suggested, or that the duty, whatever it was, was faithfully performed. There being evidence in the same case, which the defendant contended showed that he did not superintend the erection of the staging, the judge also instructed the jury, at the defendant's request, as follows: "1. If the defendant employed competent men to take charge of the erection of this building and of the necessary staging, and furnished suitable

material for building the staging, out of which material a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog which broke after the staging was erected, by which the plaintiff was injured, the defendant was not liable. 2. The defendant is not liable if he used ordinary care and prudence in the selection of competent workmen and materials, from which this staging was made." After these instructions had been given, the court, at the defendant's request, further ruled, in substance, that if the defendant employed competent men to take charge of the erection of this building and of the staging necessary, and furnished suitable material therefor, he would not be liable, if a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog, by the breaking of which the plaintiff was injured; and added that the defendant would not be liable if he used ordinary care and prudence in the selection of competent workmen and materials from which the staging was made. It was objected by the plaintiff that this last and additional sentence does not state the full measure of the defendant's duty, when, as master, he takes upon himself the business of furnishing a completed staging for the use of his workmen. The court said: "In such case, it may indeed be true that the exercise of due care in selecting men and materials will not always satisfy the obligation assumed. It may still be his duty, especially when he superintends the work himself, to see that the completed structure is in itself reasonably safe and fit for the uses to which it is devoted. But this last statement appears to have been only intended to apply to a case where the duty of the master did not include the building of the staging, but ended with the supply of materials. The judge has just told the jury that, if the defendant was to furnish a completed staging, he was bound to use such care as a person of ordinary prudence would use in providing such a structure. This was sufficiently definite in the absence of any request for more specific instructions. The plaintiff relied on the defendant's neglect of duty in several forms, as we have seen, and the instructions asked by the defendant, taken together, imply that they all refer only to that which related to the supply of suitable material for the work. They expressly refer in terms to the case where the plaintiff and his fellow workmen are employed to take charge, not only of the erection of the building, but of the necessary staging also, and where the defective timber is selected by a fellow workman, not working under the superintendence of the defendant or his agent. As applied to such a case, all parts of the instructions given at the defendant's request are correct and consistent; and the plaintiff's objection is not well taken."

f. Special circumstances not affecting the extent of the master's liability.

As to the effect of an express undertaking on the master's part to furnish an appliance the construction of which he might have left to the servants, see the preceding subdivision.

1. Superior rank of the delinquent employee.

It would seem that inferences unfavorable to the defendant will more readily be drawn where the delinquent coservant was in a position of control which normally left him free to arrange the details of the work at his own discretion without any interference on the master's part.

In *Woods v. Lindvall* (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62, a contractor for railway construction was held liable for defects in a trestle erected by his superintendent for the

purpose of the work. The court said, speaking of his official: "He had authority to direct all the men on that section, between thirty and forty in number, when to work, where to work, and how to work, and it was their duty to obey his orders. He superintended and supervised all the work on the section, and hired and discharged workmen at his discretion. In these respects he was invested with all the power and authority his principals possessed. He did not ordinarily do manual labor; his chief duty was to supervise personally the work, including the building of the trestle, and to give directions how all parts of the same should be done. He went back and forth between the places where the different crews were at work on the section, directing and instructing, and occasionally assisting each of them in the work they were doing. Johnson, who framed the bents and put up the trestle, worked in obedience to his orders, as well as the other men. As the plaintiffs assumed through Murdock the superintendence and control of the construction of the trestle, they were bound to exercise ordinary care to make it reasonably safe and secure for those called to do work upon it. In the discharge of this duty Murdock occupied the place of the plaintiffs in error, and any failure on his part to exercise ordinary care in the discharge of this duty is imputable to them. Whether the trestle was one of those structures the building of which the master might have committed to ordinary fellow laborers, without any instructions or superintending care, by simply providing them with adequate materials and tools to do the work, need not be discussed. The plaintiffs in error did not attempt to build the trestle in any such way. They did not leave the mode and manner of its construction to the discretion or judgment of the laborers doing the work, but they constituted Murdock their representative, and imposed on him the duty, and conferred on him the authority, to supervise, direct, and control its construction, and required the laborers to obey his orders and directions in the premises. Under these relations Murdock did not sustain the relation of a fellow servant to the defendant in error in respect to this work. He stood in the shoes of his employers, and was their representative, and they are responsible for the results of his negligence in the work so committed to his direction, supervision, and control."

In *Blomquist v. Chicago, M. & St. P. R. Co.* (1895) 60 Minn. 426, 62 N. W. 818, it was held that a foreman of a crew of stone masons, with power to hire and discharge the workmen, is a vice principal in respect to a common laborer aiding the masons, who is injured by the negligent manner in which a derrick is constructed, when the foreman directs where and how it shall be built. The case was distinguished from *Lindvall v. Woods* (1889) 41 Minn. 212, 4 L. R. A. 798, 42 N. W. 1020, on the ground that the place, the plan, and the manner of putting up the appliance had been especially and unconditionally delegated to the foreman (Canty, J., dissented).

The case here cited was a decision upon the same facts as *Woods v. Lindvall* (1891) 1 C. C. 37, 4 U. S. App. 49, 48 Fed. 62, *supra*, and placed the supreme court of Minnesota in conflict with the circuit court of appeals.

But it is clear from the decisions that, if the rest of the facts show that the work of construction was intrusted to the servants as part of their duties, the mere fact that the delinquent employee was a foreman, exercising some control over the injured person, is not sufficient to show that the master assumed to furnish the servants with such a structure as was necessary to do the work. See *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860; *McCons v. 64 L. R. A.*

Gallagher (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

In *Killea v. Faxon* (1878) 125 Mass. 485, the defendant employed a carpenter to superintend the entire job of repairing a building, and directed him to erect a staging, which was solely for putting on the gutters. In doing so, he insecurely fastened the brackets to the building. On the next day the defendant ordered copper gutters of a coppersmith, and directed him to send a man to put them on. This man was sent accordingly, and was directed by the carpenter where to go on the staging, which fell and injured him. The court said: "There was no evidence which would justify the jury in finding that either of the defendants undertook to furnish a staging for the plaintiff, or to assume the risk of its safety. It was like the ordinary case where a man, in building or repairing a house, employs various servants in different departments of labor. Neither of the defendants retained any charge or direction of the work of putting up the staging, but intrusted it to Higgins. He and the plaintiff were fellow servants employed in the same service, and each took the risk of the negligence of the other. It is not contended that there was any evidence of negligence on the part of the defendants in the employment of Higgins, it appearing that he was a skilful and competent carpenter. It follows that the plaintiff has proved no negligence for which the defendants, or either of them, are responsible."

2. *Similarity or dissimilarity of the work in which the delinquent and injured servants were engaged.*

In many of the cases belonging to this category the court has laid more or less stress upon the fact that the plaintiff himself was one of that particular set or group of servants to whom the construction of the defective instrumentality was intrusted. *Colton v. Richards* (1878) 123 Mass. 484; *Kelley v. Norcross* (1877) 121 Mass. 508; *Adasken v. Gilbert* (1896) 165 Mass. 443, 43 N. E. 199; *Moore v. McNeill* (1898) 35 App. Div. 323, 54 N. Y. Supp. 956; *Whallon v. Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174; *Noyes v. Wood* (1894) 102 Cal. 389, 36 Pac. 766; *Maher v. McGrath* (1896) 58 N. J. L. 469, 33 Atl. 945 (master not liable to a hod carrier for an injury from the negligent manner in which masons constructed a scaffolding); *Crawford v. Stewart* (1886; Pa.) 6 Cent. Rep. 140, 8 Atl. 5; *Stutz v. Armour* (1893) 84 Wis. 623, 54 N. W. 1000; *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874; *Willis v. Oregon R. & Nav. Co.* (1884) 11 Or. 257, 4 Pac. 121.

If the plaintiff and his coemployees, without specific instruction from the master, or one acting for the master and under his authority in the performance of the duty which he owed to his employees, constructed a scaffold of improper material, it would undoubtedly be a case where the negligence was that of a fellow servant or co-servant with the plaintiff, for which the master would not be liable. *Richards v. Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234.

It is undoubtedly under such circumstances that the rule operates with the least harshness, especially if the injured person was himself an expert as regards the construction of the appliance which proved defective. See, for example, *Hopkin v. Worcester* (1885) 140 Mass. 222, 2 N. E. 779; *Vincent v. Mauststock* (1898) 30 App. Div. 308, 51 N. Y. Supp. 494; *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y.

Supp. 697; *Griffiths v. New Jersey & N. Y. R. Co.* (1894) 8 Misc. 3, 28 N. Y. Supp. 75, Affirming (1893) 5 Misc. 320, 26 N. Y. Supp. 812; *Perigo v. Indianapolis Brewing Co.* (1899) 21 Ind. App. 338, 52 N. E. 462, where the plaintiffs and their fellow servants were all carpenters, and had erected or modified the scaffold which fell.

In some states of the evidence such a situation may even render the defense of contributory negligence available to the master. It has been laid down that, where the workmen of whom the plaintiff is one, although the construction of the appliance is no part of their business, undertake, without objection, to construct it, and do this so carelessly that it is insecure, the plaintiff is considered to be debarred from recovery on the ground that he, as well as his co-laborers, is guilty of negligence. *Hogan v. Field* (1887) 44 Hun, 72.

But it may now be taken as settled law that the mere fact that the injured and negligent persons were not doing the same kind of work is not, of itself, a sufficient ground for predicating a right of recovery.

In *Beesley v. F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 638, it was held that riveters working on a ship could not recover for the negligence of the carpenters in constructing a scaffold. The court reasoned thus: "Here the defendant was engaged in the enterprise of building a ship. Artisans of various kinds were employed to do their respective shares of the work. The building of stagings, the erection of derricks, and the raising of materials were parts of the necessary work, incident to and simultaneous with, and in fact a part of, the building of the ship. Stagings were for temporary use, and indispensable. All was under the charge of one superintendent, who directed the different gangs through their respective foreman. There is nothing to indicate a contract to provide a safe scaffold to work upon, or an assumption of that duty by the master, and the case seems to be clearly within the rule of *Killea v. Faxon* (1878) 125 Mass. 485, which it closely resembles, and of *Hoar v. Merritt* (1886) 62 Mich. 386, 29 N. W. 15. [See below.] The duty was one which was left to those engaged in the construction of the ship. It is believed that this does no violence to the rule of safe place. The case is different from those where the master furnishes a permanent place to work, as in a ship or factory. A master's duty in such a case is to make and keep the place reasonably safe; but that rule would apply as to those working in, but not necessarily as to those constructing, the factory. Such employees would not be fellow servants with each other, for the enterprises would not be the same. The service of one would be the erection of the completed factory; that of the other its use for the purpose for which it was designed. But here the scaffold builder and the riveter are engaged in the common service of building a ship. The work of both goes along together, and it seems to us that the case is clearly within the rule of *Priestley v. Fowler* (1837) 3 Mees. & W. 1, *Murph. & H.* 305, 1 Jur. 987, and kindred cases."

See also *Killea v. Faxon* (1878) 125 Mass. 485, cited in VI. f, 1, *supra*.
So, a lumber company is not liable where a knotty plank, negligently selected by a servant piling lumber to serve as a step for persons having occasion to mount the pile, gives way under a scaler and measurer. *Fraser v. Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785.
Nor is any larger measure of liability imposed on the master merely for the reason that the appliance which proved defective had been constructed by another set of servants for their own

use, and afterwards incorporated with the appliance which the injured servant and his co-laborers constructed for their own purposes. *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 960. Compare subdivision 3, *infra*.

The action has been held not maintainable where a scaffold carelessly constructed by carpenters for their own use from suitable materials furnished by the master is subsequently used by painters working on the same building, and injures one of them. *Hoar v. Merritt* (1886) 62 Mich. 386, 29 N. W. 15.

The fact that the delinquent and injured servants were engaged in different kinds of work may, however, be material as tending to show that the undertaking of the master was to furnish the instrumentality in a completed condition. See also cases cited in VI. g, 2, *infra*.

3. Completion of appliance before plaintiff began to work.

The established doctrine is that, wherever the circumstances were otherwise such that the injured servant could not have recovered if he had already entered the defendant's service, where the defective appliance was completed, his position is not in any way improved by the mere fact that he began work after such construction was completed.

An employer "owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be intrusted to them without liability to their fellow servants for their negligence." *O'Connor v. Rich* (1895) 164 Mass. 560, 42 N. E. 111, where the servant was injured by the fall of a scaffold erected by his fellow workmen a few days before he entered the service, from suitable materials supplied by the master; *Arkerson v. Dennison* (1875) 117 Mass. 407; *Olsen v. Nixon* (1898) 61 N. J. L. 671, 40 Atl. 694; *McCone v. Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697. In the latter case the judges, while not differing in opinion as to the general principle, disagreed as to the propriety of applying it under the circumstances in evidence. The reasoning which led the majority to the conclusion that the servant could not recover was as follows: "Great stress is laid, in this case, upon the fact that the plaintiff was employed to do the carpenter work after the timbers or sleepers upon which the planks were to be put had been placed in position by the carpenters employed by the defendant to do this work; but it seems to me that that fact is not at all material. The question is not so much as to whether the particular neglect or negligence which selected this improper piece of timber and placed it in this position was the negligence of a fellow servant, as it is whether it was the duty of the master, as master, to furnish these carpenters, employed by him to do carpenter work, which work involved the placing of these timbers in the position in which they were placed, a completed structure or scaffold for the purpose of doing the work. . . . Suppose one of these planks which he used in this way had broken, and the injury had resulted therefrom; it is clear that the master would not have been liable. Upon what principle, then, can he be said to be liable because one of the timbers that the plaintiff used to rest the planks upon was insufficient for the purpose? Is it because the timbers had been placed in the position in which they were when the plaintiff used them, by some men in the employ of the defendant, who, when the accident happened, were the plaintiff's fellow workmen? It seems to me clear that no liability of the defendant could be predicated upon such a distinction. Upon what principle can it be said that this plaintiff was not as much bound to examine

use, and afterwards incorporated with the appliance which the injured servant and his co-laborers constructed for their own purposes. *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 960. Compare subdivision 3, *infra*.

these particular timbers which had been placed in this position by others as he was bound to examine the planks upon which he stood, and which he shifted as the necessities of the work required? Both the planks and the timbers were materials furnished by the master for the use of his men. An examination of the timbers would have disclosed this knot, which it is alleged was the cause of the plank's breaking. It was not the master's duty to examine each timber before it was put in place by the carpenters, nor did he assume that task. If the master furnished for his workmen proper timbers for the purpose,—and it is conceded that these timbers were proper if they had been of ordinary strength and without knots,—and employed competent men to put the timber in place, he had performed his duty to the men who used them. It seems to me that this is expressly within the principle established by the cases before cited." The following passage from the dissenting opinion is well worth quoting as an extremely able exposition of the other possible theory of the evidence: "If, with the latter, he and his fellow servants, as a detail of their own work, had undertaken to construct the scaffold and had selected improper, where they might have chosen proper, materials, the defendant would not be liable for injuries resulting from such defective construction. Here, however, the scaffold was erected ten days before the accident and one week before the plaintiff went to work upon it; and the plaintiff was directed by the defendant's foreman to get on this scaffold to do the ceiling work. The scaffold was about 10 or 11 feet above the floor at the wall, and about 7 feet above the floor in front, and, unless properly constructed, was necessarily a dangerous place for the plaintiff and the other carpenters to work. That the knot in the sleeper made it dangerous to use in the construction of the scaffold was fairly to be inferred; and it is undisputed that the plaintiff had no part in the selection of the defective sleeper. When he went to work he found the scaffold already erected; and, having been ordered by the foreman to go to work thereon, he was justified in assuming that the master had discharged the duty which rested upon him of supplying a safe scaffold. I do not think this inference is in any way weakened by the fact appearing that the scaffold was actually constructed by the other carpenters who had preceded the plaintiff upon the work. If the plaintiff had assisted in its construction, or had been present and working at the time it was erected, a different question would be presented. Where, however, as here, the plaintiff under what must be regarded as the master's instructions, went to work upon the scaffold already erected, he had a right to assume that the master had discharged the duty of supplying a safe scaffold. If the accident, instead of occurring on this armory, had occurred subsequently on another building which the defendant was engaged in constructing, and to and upon which he had furnished for the use of the workmen this defective scaffold, I do not think, as against a workman who had no previous knowledge of how or by whom the scaffold was constructed, that the master could claim, as matter of law, that he was relieved from responsibility, because, as a matter of fact, at some previous time the scaffold had been constructed by workmen in his employ. I can see no distinction in principle between the position of the plaintiff, who came upon the building after the scaffold was erected, with no knowledge of its prior history or hand in its construction as connected with this armory, and his position as affected by a defective scaffold furnished in another building."

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The only peremptory inference which can be drawn from such a circumstance, coupled with the servant's ignorance of the defective construction, is that the servant was not guilty of contributory negligence. *Hogan v. Smith* (1891) 125 N. Y. 774, 26 N. E. 742.

Evidence of this character, however, like that adverted to in the last subdivision, may tend to show the actual character of the master's undertaking in regard to the defective instrumentality.

g. When the delinquency is deemed not to be in respect to the details of the work.

The limits of the doctrines discussed in the preceding subdivisions of this subtitle will be more clearly apprehended if we contrast with the cases already reviewed those cited below, in which the servant was held entitled to recover.

1. Appliance furnished by the master in person.

Where, in unloading a vessel in a shipyard, an iron hook was fastened by the owner of the yard to the wharf, to hold a rope and tackle used for the work, running from the ship to the wharf, the hook must be considered an appliance used in the business, for reasonable care in maintaining the security of which the owner of the yard for whom the work was done is responsible to his employees. *Olsen v. Starin* (1899) 43 App. Div. 422, 60 N. Y. Supp. 134. See also *Colton v. Richards* (1878) 123 Mass. 484, where the effect of a personal superintendence by the master is adverted to.

2. Implied undertaking to supply instrumentality in a completed condition.

Compare VI. g, 5, 6, *infra*.

A scaffold which is in the nature of an appliance furnished to the workmen to enable them to put in place the steel superstructure of a bridge is not within the scope of the doctrine that the master is not liable for the unsafety of a structure the erection of which is part of the work to be done. *F. C. Austin Mfg. Co. v. Johnson* (1898) 32 C. C. A. 309, 60 U. S. App. 681, 89 Fed. 677. The court said: "In the case at bar the scaffold was intended, not only as a place whereon the workmen were to stand, but as a support upon which was to be placed the entire superstructure of the bridge during the course of its erection. If it should fall through faulty construction it might cause the entire or partial destruction of the steel work furnished by the company, and the company would be compelled to make good all damages thus caused. It is clear that such workmen as the defendant in error could not be expected to know the strain that would be placed upon this scaffold in the erection of the steel superstructure. It is equally clear that it would not have been open to the defendant in error to exercise any control over the method in which the scaffold was erected or the material used in its construction. The purpose for which this scaffold was to be used renders inapplicable the reasons upon which the rule is based, that ordinarily the master is not responsible for the safety of stagings which the workmen put up as aids in carrying out the particular work they are employed to perform. The use to which it was intended to subject this structure, in that there would be placed thereon, not only the dead weight of the material composing the bridge, but also the strain caused by placing the different parts in proper position, clearly shows that the erection of the staging was not a matter that could be safely left to the control of ordinary laborers, but required skilled control by

persons who from experience would know what strain would be placed on the staging; and the evidence shows that in its erection the defendant in error exercised no control or judgment, but, on the contrary, it was erected solely under the direction of Charles Killifer, who, as a skilled expert, had been sent out by the company to erect the bridge and settle for it with the county authorities."

A servant who is set to work in a chamber of a mine after it has already been timbered may recover for injuries caused by the fall of the roof, if the defective conditions could have been discovered by a timely inspection. *Western Coal & Min. Co. v. Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219.

In *Tomaselli v. John Griffiths Cycle Corp.* (1896) 9 App. Div. 127, 128, 41 N. Y. Supp. 51, plaintiff, after he had been in defendant's employ a day and a half, was called to assist about the raising of a heavy box, containing material manufactured by defendant, from the basement of the building to the sidewalk above. The elevator by which this material was usually hoisted was out of repair, and the shipping clerk, having the matter in charge, directed and assisted about providing a temporary hoisting apparatus for raising the box in the elevator shaft. This, when complete, consisted of a piece of iron laid across the space and resting upon the combing of the elevator shaft on either side. The tackle to hoist was a block pulley, which was attached to the iron, and a chain run through the pulleys, which the men pulled upon in hoisting the box. Plaintiff had nothing to do with fixing this apparatus, although he saw the iron and knew generally what it was. While the box was being hoisted, the iron broke and plaintiff was precipitated into the cellar. The court said: "It is quite evident from this testimony that the construction of the tackle, by means of which the box was to be raised, was not a detail of the work which plaintiff was required or expected to perform, but was an appliance by means of which he performed the labor required of him. The obligation was therefore imposed upon the defendant to exercise reasonable care and prudence in the selection of this appliance, and to see that it was reasonably suitable and safe for the purpose to which it was applied. This duty was primary, and could not be delegated to a servant so as to shield the master from liability for damage occasioned through an omission of the servant to properly discharge it."

A servant ordered by the master to perform work as a machinist in underground trenches opened and prepared for him has a right to assume that the place has been made reasonably safe by the master through other and competent servants employed by him, and does not assume the risk of neglect of the latter to brace or protect the sides of the trenches. *Krans v. Long Island R. Co.* (1890) 123 N. Y. 1, 25 N. E. 206.

Men comprising a crew of workmen exclusively engaged in putting up such staging and scaffolding as are needed for the use of workmen engaged in the general business of a ship-building company are not fellow servants with men engaged in the general work of the company. *Sims v. American Steel-Barge Co.* (1894) 56 Minn. 68, 57 N. W. 322 (distinguishing the cases in which the furnishing and preparation of a structure is part of the work which the employees are hired to perform).

A master is liable for defects in a ladder made at his carpenter's shop and issued for the use of the masons in his employ. *Flanigan v. Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762 (same distinction relied on).

In *McConer v. Gallagher* (1897) 16 App. Div. 54 L. R. A.

272, 44 N. Y. Supp. 697, the court instanced the case of painters employed to paint the outside of a building, who are required to work upon a completed scaffold built for that purpose, which is lowered or raised as the work progresses, and said: "It is quite obvious that it is the duty of the master to furnish such an appliance; and where the men must rely upon the care of the master, or those employed by him, in putting together a proper structure necessary for the men to use in the performance of the work upon which they are employed, and where any negligence in the selection of the materials, or the proper use of those materials, in constructing the completed scaffold, would expose the men to serious danger, neglect in the performance of that duty will render the master liable."

In *Corson v. Coal Hill Coal Co.* (1897) 101 Iowa, 224, 70 N. W. 185, in sustaining an instruction to the effect that the owner of a coal mine having a sloping entry through which the coal is brought to the surface owes to an employee riding in the cars through such entry the duty of exercising reasonable care to have the roof of the entry sufficiently propped so that rock will not fall on the track, the court said: "The rule of the instruction applies to a case where a place is furnished for the servant to do his work, and the keeping of the place in repair is not incidental to the work to be performed. . . . The undisputed facts of this case bring it within the latter rule, so far as concerns the duties of the parties. The duties of the plaintiff had no concern with the preparation or looking after the entry. It was the general passageway to and from the mine,—a completed work; a place in which work was to be done in no way connected with its construction or preservation. It was a place for such work as the plaintiff was doing, and furnished by the employer. This holding is not against that in *Fosburg v. Phillips Fuel Co.* (1894) 93 Iowa, 54, 61 N. W. 400. That case was expressly determined on the rule as to the negligence of a fellow servant. As the work of riding the trip was disconnected from duties as to the roof of the entry in which plaintiff was riding, it was defendant's duty, through a competent person, to look after its safety. The case, as now presented, does not involve a question as to the negligence of a fellow servant."

Where a fireman, while working in the boiler room of the defendant, fell into a hole that had been dug and left open in front of the boiler, by the defendant's employees, who were making a foundation there for an "economizer," leaving the hole uncovered or the excavation in an unsafe condition was the negligence of the master. *Frye v. Bath Gas & Electric Co.* (1900) 94 Me. 17, 46 Atl. 804 (operation of digging the holes said to be connected with and a part of the plant itself).

Where a permanent tunnel is under construction, as fast as completed the finished part becomes an "appliance or means furnished by the master by which the remaining work is to be prosecuted." *Hanley v. California Bridge & Constr. Co.* (1899) 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 577.

In *Manning v. Hogan* (1879) 78 N. Y. 615, the evidence was that it was a particular branch of mechanical occupation to put up a scaffold like the one in question (i. e., for doing the plaster work in a building); that the persons employed were not of that occupation; and that it was built of insufficient material, both in quality and quantity. It was held "that the question of negligence in building the scaffold was for the jury; that it was not sufficient that there was enough of suitable material provided to build the scaffold. It needed that there

should be skill and judgment in the use thereof." But the case is not fully reported, and it may also be regarded as having turned upon the failure of the master to employ competent servants,—the construction placed upon it in *Beesley v. F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 658.

Another doubtful case is *Green v. Banta* (1882) 18 Jones & S. 156, which, while it asserted the existence of a duty of furnishing a safe scaffold, does not state whether such duty arose by express contract, by necessary implication from the peculiar facts, or upon the broad ground that a scaffold builder and a plasterer are, under no circumstances, fellow servants. But probably this decision is to be explained in the same way as the one last cited.

In *McMahon v. McHale* (1899) 174 Mass. 320, 54 N. E. 854, the master was held liable for defects in a derrick on the ground that it "was a piece of machinery, part of the fitting up of a stone yard, . . . rather than an appliance to be put together and set up and moved from place to place by workmen who were using it."

Where there were furnished to the plaintiff and his coemployees materials with which to construct a scaffold which were not proper for the purpose, and which made the scaffold, when constructed, an unsafe and improper appliance for the doing of the work, . . . If the master employed a person to act in his place to furnish such material, the negligence of such person, so appointed to act for the master in the discharge of the duty which he owed to his employees, was the negligence of the master, for which the master was responsible. *Richard v. Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 324. Compare also the rule that the furnishing of slide stakes for retaining the load of a railway car is not a part of the operation of loading, such stakes being a part of the equipment of the car. See III. c, 11, *supra*.

8. Suitable materials not furnished.

A city is not, as matter of law, free from liability for personal injuries to a workman caused by the caving in of a trench in which he was digging, although there were materials 2 miles away which the foreman had authority to use to shore up the sides and make the trench safe, since the jury might properly find that they were practically inaccessible on account of the distance, as in such case the negligence is that of the city, and not merely of a fellow servant in failing to use the materials at his command. *Fitzsimmons v. Taunton* (1893) 160 Mass. 223, 35 N. E. 549. "On this view of the facts," said the court, "the . . . [workman] was set to work in a place of danger without the precautions being taken for his safety which his employer was bound to see taken."

4. Servants not left free as to the selection of the materials.

See VIII. a, *infra*.

5. Permanent character of the instrumentality relied upon.

If the implement, appliance, or structure is permanent in its character, the duty of exercising a reasonable degree of care in its selection and maintenance is one from which the master cannot escape. Whereas, if it is portable, its erection, location, and operation may be, and generally are, regarded as mere details of the work, which pertain to the employee. *Yaw v. Whitmore* (1899) 46 App. Div. 422, 61 54 L. R. A.

N. Y. Supp. 731. There a derrick consisting of a mast 10 inches square and 40 feet long, with a boom of the same dimensions, was firmly attached to the ground by planks in which a metal plate had been imbedded, and which were weighted down with heavy stones. The derrick remained in this place nearly five months, and until the completion of the work for which it was used. It was held that it was a permanent structure, within the rule that a master must use reasonable care in providing his servant with suitable appliances and in keeping them in repair.

In *Cunningham v. Sicilian Asphalt Paving Co.* (1900) 49 App. Div. 380, 63 N. Y. Supp. 357, the defendant was held liable for defects in a platform regularly used by laborers to stand on while they were unloading cars. The fact that the planks were loose and movable was denied to be material. The structure was said to be "permanent in its nature," and distinguished from an "ordinary appliance" relating to an isolated job or a transient undertaking."

Plaintiff was taken by defendant's foreman from outside the grain elevator, where he was accustomed to work, to a place within, comparatively dark, and, being instructed to step on a raised platform, walk to a bin, and ascertain if it was open, started to do so, when the platform collapsed, and one of his legs was crushed in a hopper beneath. The platform was constructed nearly nine years previously, and, until a few weeks before, its sole use was to enable workmen, on removing the cover, to watch the movement of grain through the conductor. Since then, temporary bins were constructed on that floor, and, to open them, it was necessary to step on the hopper boxes. No inspection was ever made of the condition of the box, and the only evidence in that regard was that the foreman had stood thereon two minutes before the accident. It was held that defendant was guilty of negligence. *Berry v. Atlantic Storage Co.* (1900) 50 App. Div. 590, 64 N. Y. Supp. 292.

A complaint for injuries to a servant, alleging that the latter, in the performance of his duty for defendant, was necessarily required to stand and work at and near an embankment of earth on defendant's land; that such embankment was supported by timbers, braces, and planks; that said supports gave way and broke by reason of their rottenness and insufficiency, thereby causing the injuries; that said supports had been allowed to remain for an unusually long time, and a much longer time than they should have been permitted to remain, and that they were not properly inspected by defendant, and had become worn and rotten,—sufficiently alleges that defendant was guilty of negligence in failing to furnish a safe place. *Nicholas v. Burlington. C. R. & N. R. Co.* (1899) 78 Minn. 43, 80 N. W. 776.

6. Adjustment treated as a nondelegable function.

See III. d, 20, *supra*.

7. Operation not one of the transitory class.

An employer is not, as matter of law, free from liability caused by the fall of shafting which had been attached to the ceiling by the carpenter the day before, on the theory that the putting up of such shafting belongs to the "transitory class for which the employer is not responsible beyond furnishing a choice of proper materials or instrumentalities." *Copthorne v. Hardy* (1899) 173 Mass. 400, 53 N. E. 915.

VII. *Negligence of servants whose duty it is to keep the instrumentalities in proper condition; whom not imputed to the master.*

a. *Theory that a master is never liable for negligence in regard to inspection and repairs.*

One view, for which there is a considerable body of judicial authority, is simply that a master is liable for the negligence of the agents by whom the instrumentalities were originally supplied, but not for the negligence of the agents to whom he has deputed the function of seeing that they continue to satisfy the legal standard of safety. Such a conception has the merit of simplicity, but is regarded by the writer as wholly illogical, for reasons already explained in a note to *O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 569. The decisions which are certainly or apparently referable to this doctrine are collected below. Some of them, however, have been entirely overruled, while others have been greatly qualified by later rulings in the same jurisdiction, which reflect more or less strongly the influence of the theory that the duty of maintenance, no less than the duty of supply, is absolute. Whenever there has been a merely partial recognition of this theory, the situation is probably due to the fact that the courts have been unable to break away altogether from existing precedents which date from a period at which the character of the negligent act had not yet assumed its present importance as a differentiating element. United Kingdom.

A master has been held not to be liable for the negligence of an employee appointed to examine materials, in *Ormond v. Holland* (1858) El. Bl. & El. 102; of a chief engineer who allowed defective tackle to be used, in *Searle v. Lindsay* (1861) 11 C. B. N. S. 429, 8 Jur. N. S. 746, 31 L. J. C. P. N. S. 106, 10 Week. Rep. 89, 5 L. T. N. S. 427; of an "underlooker" in a mine, whose duty it was to keep the workings in safe condition, in *Hall v. Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411.

In *Webb v. Rennie* (1865) 4 Fost. & F. 608, Cockburn, Ch. J., charged the jury as follows: "In the case of a manufacturer employing machinery which might be attended with danger to the persons employed about it, a danger which might be greatly aggravated by the machinery not being in proper condition,—as, for instance, in the case of the boiler of a steam engine bursting, as it would be more likely to do if in an improper condition,—the master manufacturer might have no means of personally knowing its condition himself, and, the question being whether he had used reasonable care and diligence to ascertain it, all that could be reasonably expected of him would be that he should employ some competent person from time to time to examine it. The master must either ascertain the state of the machinery or apparatus himself, or employ some competent person to do so; and if he did employ such a person, and a workman was injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence of a fellow servant in the particular matter."

In *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, it was held that a mine owner was not liable for injuries due to an explosion of fire-damp which resulted from the faulty construction of a temporary scaffold by the manager of the pit. A full review of this case will be found in the note to *O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. pp. 564 et seq.

A similar ruling had previously been made in 54 L. R. A.

Wright v. Roxburgh (1864) 2 Macph. Sc. Sess. Cas. 3d series, 748.

Negligence in allowing structures to fall into a state of decay, and to remain in that state, was regarded as the act of mere employees, in *Allen v. New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541.

British colonies.

An injury caused by the failure of brakes to work properly, so that a train runs down two trackmen, is conclusively presumed to have been due to the negligence of one of the trainmen, where the evidence is that an examination at the last inspecting station had not disclosed any defects, that the defects which prevented the brakes from working were of the most obvious character, capable of being remedied merely by tightening a bolt and taking up a rod, and that shortly before the accident the train had been easily kept under control upon a gradient as steep as the one where the injury was received. *Plant v. Grand Trunk R. Co.* (1867) 27 U. C. Q. B. 78.

A running foreman, whose duty it is to look after the condition of locomotives, is not a vice principal. *Brown v. Board of Works* (1882) 2 Vict. L. Rep. 414 (dissenting, Highbotham, J.).

In the event of a master not personally superintending the repairs of his machinery, the limit of his duty is to select competent persons for this purpose, and to furnish them with all adequate materials required for the work. *Baird v. Dunn* (1893) 83 N. B. 156.

Alabama.

In a very recent Alabama case it was laid down that the common-law duty, resting upon an employer, of maintaining ways and appliances reasonably safe for the employees' use, may be delegated by its committal to competent agents; and that a complaint which avers negligence in respect of such maintenance to have been that of a person in the same common service, who is intrusted by the employer with the duty of maintenance, does not show a breach of such common-law duty when there is no averment of negligence in the selection of such person. *Woodward Iron Co. v. Cook* (1899) 124 Ala. 349, 27 So. 455 (employee intrusted with the duty of seeing that a tram track in a mine is in proper condition held to be a fellow servant with an employee engaged in spragging the wheels of the tram cars for the purpose of checking their speed on the track).

This rule is said to have been established by *Mobile & O. R. Co. v. Thomas* (1868) 42 Ala. 672; *Mobile & M. R. Co. v. Smith* (1877) 59 Ala. 245; and *Alabama G. S. R. Co. v. Carroll* (1898) 97 Ala. 126, 18 L. R. A. 433, 11 So. 803.

In *Smoot v. Mobile & M. R. Co.* (1880) 67 Ala. 13 (negligence in inspecting loading of cars), the court said: "When such appliances have been furnished,—when diligence has been observed in procuring them,—the use of them is necessarily intrusted to the servants of a railroad company, as is their care and inspection, and the repair of them, and determining when the use must be abandoned until repairs are made. This duty may be intrusted to those operating the appliances, or confided to other servants having no other duty than that of inspection or of repair. However this may be, the several servants are in the same circle of employment,—derive duty and compensation from the same source, and are laboring for a common purpose. They are fellow servants, and the master cannot be made answerable to the one for the negligence of the other. . . . Knowledge of the defective condition of the car, a want of prudence in its use, is traceable only to fellow servants of the

appellee, whose care and diligence he is presumed to have consented to risk; whatever of guards against the use of defective cars were reasonable, so far as the evidence shows, and to which it could justly be expected the appellant would resort, were adopted."

It was denied that a master mechanic was a vice principal, in *Columbus & I. C. R. Co. v. Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615, but this decision is no longer good law in Indiana. See later cases cited in III. d. *supra*, especially *Indiana Car. Co. v. Parker* (1885) 100 Ind. 181.

Louisiana.

An engine-driver and an employee whose duty it was to keep locomotives in repair were held to be fellow servants, in *Hugh v. New Orleans & C. R. Co.* (1851) 6 La. Ann. 496, 54 Am. Dec. 565. This is one of the cases which antedate the formulation of the rule as to a general class of nondelegable duties. The decision was a simple application of the doctrine of common employment.

Maine.

In *Beaulieu v. Portland Co.* (1860) 48 Me. 291, it was regarded as well settled that the responsibility of a master is restricted to the employment of competent servants and the provision of adequate appliances. But the doctrine of nondelegable duties has since been adopted. *Shanny v. Androscoggin Mills* (1876) 66 Me. 420.

Maryland.

It was denied that a master mechanic of a railway was a vice principal, in *Shauck v. Northern C. R. Co.* (1866) 25 Md. 462; *Cumberland & P. R. Co. v. State use of Moran* (1875) 44 Md. 283. The distinction between absolute and delegable duties was not discussed by the court, the nonliability being referred to the conception that the plaintiff, a train hand, and the delinquent were in the same general service.

In *Wonder v. Baltimore & O. R. Co.* (1870) 82 Md. 411, 3 Am. Rep. 143, a railway company was held not to be liable for injuries to a brakeman resulting from a defective brake, which it was the duty of fellow servants to keep in repair. The theory that the character of the act determines whether or not the negligence is that of a vice principal was not noticed. The case followed was *Searle v. Lindsay* (1861) 11 C. B. N. S. 429, 8 Jur. N. S. 746, 31 L. J. C. P. N. S. 106, 10 Week. Rep. 89, 5 L. T. N. S. 427, *supra*.

In *State use of Hamelin v. Malster* (1881) 57 Md. 287, the master was held to be liable only for the negligence of an employee to whom is intrusted the selection of subordinates and the procuring of instrumentalities.

That the duty of repair is delegable is also, in part at least, the foundation of the decision, in *Yates v. McCullough Iron Co.* (1888) 69 Md. 870, 16 Atl. 280. See note to *O'Neill v. Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 567.

Massachusetts.

In *King v. Boston & W. R. Corp.* (1851) 9 Cush. 112, it was held that keeping a railway in proper repair is "the work of servants or laborers, as much as any other part of the business of the corporation," and that the company was not liable for the negligence of the repairers.

In *Seaver v. Boston & M. R. Co.* (1860) 14 Gray, 466, a servant of a railroad company was held unable to recover for an injury caused solely by the breaking of an axle, where the failure to discover the flaw resulted from the negligence of the employee whose duty it was to examine the cars and other running apparatus of the road, and to keep them in proper repair. In this case the distinction between furnishing and maintenance is distinctly drawn, 54 L. R. A.

the instruction approved being that "the corporation in conveying the plaintiff in their cars, acting through their agent, whose duty it was to provide and keep in use safe and suitable engines and tenders on the road, were bound to use due and reasonable care in providing and using on the road engines and tenders suitably constructed with all the appliances and safeguards necessary to render them safe; and if the omission to provide a safety beam to the tender at the time of the accident constituted a want of due and reasonable care, which rendered the tender unsafe, and such omission was the efficient cause of the accident and of the injury to the plaintiff, he might maintain this action."

In *Cooper v. Hamilton Mfg. Co.* (1867) 14 Allen, 193, it was laid down, although a master was required to use proper care in order to see that his floors were of sufficient strength to support any machine which it was necessary to move over or upon them, "the nature of this case which they are bound to use was such that [they] the defendants might have performed their legal duty by employing suitable persons of competent skill and experience, whose business it was to keep the floors in such condition as to repairs that they were fit and safe for use for any of the purposes for which it might become necessary to appropriate them," and that, "if they were diligent and careful to this extent, and any want of repair had not existed for so long a time as to show absolute negligence on the part of the defendants [master], then the accident would have been attributable to the negligence of an agent or servant in the service of a common employer with the plaintiff."

The fact that water failed to run from a hose during a fire is *prima facie* attributable to the negligence of the servants in not keeping it in proper order or in putting it in operation, and does not constitute evidence sufficient to justify holding the master responsible for injuries caused by the fire. *Jones v. Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661.

In the next subdivision we shall see how far these decisions have been qualified by the more recent ones. See also II. j. *supra*.

Mississippi.

In *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258, and *Howd v. Mississippi C. R. Co.* (1874) 50 Miss. 178, it was held that servants engaged in repairing a railroad or its appurtenances are not, in order to hold the company responsible to an employee, representatives of the company. The nonliability of the company for anything beyond the selection of servants and the furnishing of materials was distinctly affirmed in the latter case.

Missouri.

The ruling in *McDermott v. Pacific R. Co.* (1860) 30 Mo. 115, that the negligence of a superintendent in allowing a bridge to get into bad repair was not imputable to the employer, is no longer law in this state. See cases cited in II. d. *supra*.

New Jersey.

In *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427, it was said: "It is a matter of judicial disagreement whether a master can discharge the duty . . . [of examining and ascertaining whether appliances have become unfit or unsafe from wear and tear or otherwise], and the similar duty of keeping tools and appliances in repair, by selecting and employing competent persons to make inspections and repairs. In our courts it is held that the master's duty may be thus discharged." The court cited *Rogers Locomotive & Mach. Works v. Hand* (1888) 50 N. J. L. 464, 14 Atl. 766, and *Harrison v. Central R. Co.* (1866) 31 N. J. L. 293. In the latter of these cases, where the

plaintiff was injured by the fall of a bridge, the court remarked: "From the relation between the company and their brakeman, the legal consequence seems to have been deduced by the pleader that the former, with regard to the latter, was bound to keep the bridge in a safe condition. This is not a true statement of the obligation of the company. It was not near so absolute; for if the bridge was insecure from a secret defect which the company was not able to discern by the exercise of reasonable diligence and skill, no responsibility would have fallen on the defendant on account of its defective state. If, as was stated on the argument, the company, in point of fact, directed its agents, who were possessed of competent skill, to examine at stated periods the bridge in question, and such agents reported to the company that the structure was in a secure condition, and no circumstances existed which were calculated to impair a reasonable confidence in such report, I think it is plain, upon the principles of law above propounded, that, even if the agents making such report acted carelessly in the discharge of their duties, or even falsely reported their conclusions to the company, that under such a state of facts the plaintiff could not sustain this suit. To warrant a recovery in this case in favor of the employee, who is here represented by the plaintiff, the fault which forms the basis of the action must be that of the company, and not simply the negligence of a fellow servant."

A master is not liable for injuries to a workman in a tunnel, caused by the negligence of a laborer whose duty it is to deliver on the surface at the shaft, or there use or keep in repair, the instrumentalities provided for the safe transportation of the workmen. *McAndrews v. Burns* (1876) 39 N. J. L. 117. But see the later New Jersey cases cited in VII. b, *infra*. New York.

In *Chapman v. Erie R. Co.* (1873) 1 Thomp. & C. 526, the opinion, after quoting the headnote in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, to the effect that the only ground of liability which the law recognizes is that which arises from the personal negligence of the master, proceeded to criticize the case as follows: "The rule as thus stated is obviously of small consequence as a protection to the servants or employees of a corporation, when it is considered that a corporation acts entirely through officers and agents, and there can be no other personal negligence committed by, or imputed to, it except the negligence of such officer or agent; and when it is held, also, that all the agents and employees of a corporation are fellow servants of a common master, it is difficult to see why, under such rules, corporations are not virtually absolved from all the common-law liability of a master to take care of his servants, and protect them from unjust and unreasonable danger and injuries resulting from the negligence of others. But the recent case of *Laning v. New York C. R. Co.* (1872) 49 N. Y. 531, 10 Am. Rep. 417, shows that the present court of appeals is receding from this extreme ground. This case asserts a sounder and more reasonable rule. Judge Folger, who gives the opinion of the court, says: "The duty of the master to his servants is to use reasonable care to provide and employ none but competent and skillful servants, and to discharge from his service, on notice thereof, any who fail to continue such." This criticism, however, appears to be based on a misapprehension of the true purport of the earlier case, which merely decides that, in the absence of testimony going to prove negligence in the construction of a bridge or in the selection of the servants employed to supervise and test it, or in the performance of their duties by these serv-

ants, the injured servant must fall in his action unless he shows that the managing officers of the corporation had notice, actual or constructive, of the defective condition of the bridge. In other words, there are several states of facts upon which an employer may be charged with personal negligence, and if the evidence is inconsistent with the theory that he was negligent in certain specified ways, the servant must fall back upon some other theory. Under the circumstances in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, where the testimony shows that due care has been exercised by the directors themselves in seeing that sound structures and competent supervising agents have been provided, and that these agents themselves have not been guilty of negligence in the premises, there was no theory to fall back upon except one based upon the hypothesis that the directors had knowledge of the decayed condition of the bridge through some other avenue of information than the supervising agents appointed by them, and with any such hypothesis the evidence was quite inconsistent. That the case really goes no farther than this so far as the actual decision is concerned is quite apparent from the opinion. But it must be admitted that, by citing with approval the ruling in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, the court has shown a disposition to countenance that much more sweeping doctrine under which a master is not liable, even for the negligence of a servant to whom he deposes one or more of the duties which the law imposes on him for the benefit of all persons in his employment. The extent of the liability of a master for the negligent act of a competent servant is, however, a very different question from that raised in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, and the approval of the English case may, for this reason, be regarded as quite supererogatory. Except in so far as the broad principle of *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, may be supposed to have been adopted by the court in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, it cannot be said that, as was suggested in *Chapman v. Erie R. Co.* (1873) 1 Thomp. & C. 526, the court of appeals has changed its ground in *Laning v. New York C. R. Co.* (1872) 49 N. Y. 531, 10 Am. Rep. 417, for there the master was held liable for the reason that personal negligence was shown by the retention of an incompetent servant,—a species of negligence which was negated by the testimony in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

In *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573 (Church, Ch. J., and Rapallo, J., dissenting), it was held that an employer is not liable for the negligence of a carpenter employed to examine and make repairs in the building in which his business is carried on. The majority of the court cited with approval *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, but it seems to be impossible to reconcile the ruling with the other decisions of the same court, referred to in III. d, *supra*. Ohio.

In Ohio a car inspector is held to be a fellow servant of the trainmen. *Little Miami R. Co. v. Fitzpatrick* (1884) 42 Ohio St. 318; *Lake Shore & M. S. R. Co. v. Lamphere* (1894) 9 Ohio C. C. 263, both following *Columbus & X. R. Co. v. Webb* (1861) 12 Ohio St. 475, which was itself based upon *Ormond v. Holland* (1858) El. Bl. & El. 102, one of the rulings in which the decision of the House of Lords in *Wilson v. Merry* was anticipated.

Pennsylvania.
In *Bemisch v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998, the court approved of an instruction in which the jury were told, among other things,

that the defendant was not liable for an accident caused by a defect of which he knew, or ought to have known, provided he had a person in his employ whose duty it was to keep the appliances in good condition. But there was no testimony showing that the employer or any agent of his having control had any knowledge of the defect, and the case was ultimately made to turn on the facts that the state of the appliance was as open to the observation of the plaintiff as of the defendant, and that the proximate cause of the accident was the negligence of the plaintiff's fellow servants in selecting an unsound appliance when they had the opportunity of selecting one that was in good condition.

A car inspector was held to be a fellow servant of a brakeman in Philadelphia & R. R. Co. v. Hughes (1888) 119 Pa. 301, 13 Atl. 286. The court said: "If, however, the company employ competent and skillful persons for the purpose of inspection, and afford them reasonable opportunities and facilities for the work under proper instructions, the company will not ordinarily be liable for the negligent performance of the work by their employees, to a fellow employee, unless the company knew, or by ordinary diligence ought to have known, of the defective manner in which the inspection was conducted. We are clearly of opinion, too, that a brakeman and a car inspector are in the same circle of appointment: they co-operate in the same business, and the former knows that the employment of the latter is one of the incidents of their common service. But while the performance of the duty of inspection must necessarily be committed in detail to the employees, the general regulation is in the hands of the company, and it is the duty of the company to provide suitable persons, in sufficient numbers at proper places, with reasonable opportunities to accomplish the work."

But see the decisions of this court cited in the next subdivision.

Tennessee.
In Nashville, C. & St. L. R. Co. v. Foster (1882) 10 Lea, 351, the court followed Mobile & O. R. Co. v. Thomas (1868) 42 Ala. 672, to the point that a car inspector and brakeman were fellow servants.

A master has also been held not to be liable for a failure to retemper knives of nail machines after being heated for the purpose of sharpening them, if the omission is that of a fellow servant. Knoxville Iron Co. v. Dobson (1881) 7 Lea, 367 (discussing charge; no opinion expressed as to whether the act was that of a fellow servant. Turney, J., dissented, holding that a servant having such a duty to perform was not a fellow servant of a feeder of the machine). *Vermont.*

In an early case in Vermont, following, as may be surmised from the citations of counsel, the trend of the English decisions which preceded and anticipated the ruling in Wilson v. Merry (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 80, *supra*, it was held that an engineer injured through the negligence of a master mechanic, whose duty it is to see that the engines are kept in repair, cannot recover damages from the common employer. The ground was taken that the rule by which the master impliedly warrants the soundness of machinery, so far as the exercise of due care will enable him to discover any unsoundness therein, applies only to the condition of the machinery at the time it is put into the hands of the servant. There is no warranty that the servants shall faithfully discharge their duty in keeping the machinery in the original safe condition. Hard v. Vermont & C. R. Co. (1860) 32 Vt. 473, holding that an engineer injured through the negligence of a master mechanic whose duty it is to

see that the engines are kept in repair, cannot recover damages from the common employer. But this decision is practically overruled by Davis v. Central Vermont R. Co. (1882) 55 Vt. 84, 45 Am. Rep. 590, holding that a railroad company is liable for injuries caused by a defective condition of its track, which would have been known to the company's bridge builder and roadmaster if proper inspection had been exercised.

b. *Theory that the liability of the master depends on the subject-matter of the inspection or repairs neglected.*

According to another theory, which is a compromise between the doctrine applied in the cases just cited and that which declares the duty of maintenance to be nondelegable (see III. d, *supra*), the question whether an employee engaged in inspecting or repairing instrumentalities is a vice principal or a mere servant depends upon the nature of the defects which were left undiscovered or unremedied owing to his remissness. It is admitted that the decisions in which it has been attempted to give effect to this theory are admitted to be incongruous and inconsistent. See the remarks of the court in Nord Deutscher Lloyd S. S. Co. v. Ingebreghsten (1894) 57 N. J. L. 402, 31 Atl. 619. And contrast the cases tabulated in VII. b, 1-6, *infra*, with those reviewed in III. d, f, q, t, *supra*, to impart greater definiteness to the very vague conception thus relied upon.

The fundamental principle upon which the courts rely is indicated by the statement that "one line of distinction between vice principals and coemployees is in the duty, in one instance, to supply or maintain instrumentalities of the service, and, in the other, of using the instrumentalities supplied." Neutz v. Jackson Hill Coal & Coke Co. (1894) 139 Ind. 411, 38 N. E. 324, 39 N. E. 147.

On this topic a rational distinction would seem to be that when the employee's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault; but that, if the master has cast a duty of inspection or repair upon an employee, who is not engaged in using the apparatus in a common employment with his fellow servant, then that employee in that duty represents the master, and the master is chargeable with his default. Nord Deutscher Lloyd S. S. Co. v. Ingebreghsten (1894) 57 N. J. L. 402, 31 Atl. 619.

It was considered that the distinction was noticeable in McAndrews v. Burns (1876) 39 N. J. L. 117; Smith v. Oxford Iron Co. (1880) 42 N. J. L. 407, 36 Am. Rep. 535; Collier v. Pennsylvania R. Co. (1886) 49 N. J. L. 59, 6 Atl. 437; Ross v. Walker (1891) 139 Pa. 42, 21 Atl. 157, 159; Moynihan v. Hills Co. (1888) 146 Mass. 586, 16 N. E. 574; Daley v. Boston & A. R. Co. (1888) 147 Mass. 101, 16 N. E. 690; and many other cases.

In Moynihan v. Hills Co. (1888) 146 Mass. 586, 16 N. E. 574, we find the following elaborate statement of the relations existing between servants repairing or inspecting and servants using instrumentalities: "It is obvious that difficult questions arise in cases of this kind in determining the implied obligations of the respective parties under peculiar circumstances. In many kinds of business the condition of a machine as to safety is constantly changing with the use of it, and it is safe or unsafe at a given moment according as it is properly or improperly used and managed by the servant who operates it. Moreover, certain kinds of repairs

can be conveniently and properly made, under direction and supervision, by servants regularly employed in the business. In such cases both parties to the contract of service must be presumed to have contemplated that, to a certain extent, fellow servants would be employed by the master to do work in keeping the machinery safe. Work negligently done within that field, if an accident should happen from it, would seem at first to introduce a conflict between the obligation of the master to hold himself liable for want of due care in keeping his machinery safe, and the obligation of the servant not to claim damages resulting from negligence of a fellow servant. It becomes necessary, therefore, to consider the rights of the parties in such cases. The application, in each particular case, of any general rules which may be laid down, will involve a consideration of two questions of fact: First, what is the nature and character of the business, and the usual and proper general method of conducting it? Secondly, in such a business, what is reasonably necessary to be done on the part of the master to secure for the use of the workmen machinery and appliances which will always be reasonably safe? First, there is that class of cases in which the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, from materials or new parts supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employees, negligence of a fellow servant. So far as the condition of machinery depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with everything needed for their work. A second class of cases includes those in which repair or reconstruction of a machine is necessary, of such a kind as is commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow servants of the employee, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of that work for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be insured by his exercise of proper care. And so he is bound to bring to this department of the business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom in an important particular the safety of others is intrusted; and he is bound also to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow servant with his other employees, within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable. There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine, or send an agent or servant to buy it. In either case the purchase would be in the line of the master's duty, and he would be liable for the consequences of negligence in making it. He might hire privileges and men in a machine shop in a distant city, and build it there. His servants in that work would not

be fellow servants with an employee engaged in an entirely different business. And under the doctrine of *respondet superior* he would be held liable for the consequences of their negligence. If he saw fit to construct or reconstruct it, in the same way, in or near the building in which it was to be used, the result would be the same. Upon our hypothesis it would be inconsistent with his implied contract to employ fellow servants of his employee in this work, and he therefore could not relieve himself from his general obligation as to the safety of his machinery by setting up that his servants in the construction or reconstruction were fellow servants with his employees in the business in which it was to be used."

Another passage relating to the first class of cases adverted to in the above extract occurs in the opinion in *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101: "It is the duty of the master to exercise due care in employing competent servants, in providing suitable machines, and in keeping them in proper repair; and the master cannot wholly escape responsibility by delegating these duties to a servant. If this could be done, a master might escape all responsibility by employing a competent superintendent to perform all these duties. But there are defects in machinery which are of such a character that the master has been held to perform his duty if he furnishes suitable materials, and employs competent servants, and instructs them to keep the machinery in repair, although the servants neglect to make the repairs, or make them in an improper manner. The master must exercise a reasonable supervision over the manner in which his business is done; but the repairs which machines properly constructed require to keep them in running order may be intrusted to competent servants. They are regarded as incidental to the use of the machines, because they are such as machines in substantially good repair must from time to time need."

In a somewhat earlier case it was laid down that servants intrusted with the making of such ordinary repairs as the use of a machine requires to keep it in order from day to day are not vice principals. *McGee v. Boston Cordage Co.* (1885) 139 Mass. 445, 1 N. E. 745.

In *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, 36 N. E. 117, the rule laid down in *Moynihan v. Hills Co.* (1888) 140 Mass. 586, 16 N. E. 574, *supra*, was approved.

The rule as formulated in a Pennsylvania case is that, where the conditions from which the servant's injury resulted were produced by the ordinary use of the appliance, and not by any defect in the substance, size, or adjustment of the part of the appliance which caused the injury, and the master maintained a thorough and adequate system of constant inspection, and the defect was not known to any of the persons engaged in that inspection, no action can be maintained. *Mensch v. Pennsylvania R. Co.* (1892) 150 Pa. 598, 17 L. R. A. 450, 25 At. 31.

In *Cregan v. Marston* (1891) 128 N. Y. 568, 27 N. E. 952, the court, in discussing the charge of the trial judge that it was the duty of the master to the servants to watch the use of the defective rope by them, and its changes of condition, that the engineer was his agent and deputy for such purpose, and that the negligence of the engineer, if it existed, was that of the master, said: "The doctrine at once renders unexplainable all the line of cases in which some defect in a machine has occurred from its use, and the master has been held freed from responsibility if the machine furnished was originally safe, and he neither knew nor ought to have known of the existence of the defect, for it puts the duty of daily watch and discovery on him,

and so requires no notice or complaint or lapse of time to put him in default. I think the doctrine asserted was an extension of the master's duty beyond its natural and proper limits. Probably the existing rule was founded upon the truth that certain things essential to the safety of the servants must necessarily, in the management of the business, emanate from the master, and remain in his absolute control; and so the servants should not be responsible to one another for defects which they could not repair for lack both of authority and means. The servants cannot furnish the machines. That is the master's right and duty, but the servant who uses them can and should keep them in order for their proper and safe daily use, when furnished with the necessary means of so doing, and when perfectly capable of correcting the defect. It is undoubtedly true, as we have often said, that it is the duty of the master to keep a machine or appliance in order, and that he cannot delegate the duty so as to escape responsibility. But that is a general rule, and has its qualifications and limitations. One of those is that it is not the master's duty to repair defects arising in the daily use of the appliance, for which proper and suitable materials are supplied, and which may easily be remedied by the workmen, and are not of a permanent character, or requiring the help of skilled mechanics. . . . The cases cited, and their doctrine, appear to be founded upon what is determined to be the implied contract relation between the master and servant. Their mutual duties grow out of that relation, and change and vary as it is changed or varied by the facts which indicate and measure it. Where those facts show that, in the understanding of both parties, a class of ordinary repairs are to be made by the servants with materials furnished by the master for that express purpose; that they and he regard it as a detail of their own work; that it is something entirely within their capacity, and not dependent upon the skill of a special expert; and that the necessity springs from their daily use of the appliance, occurs at different and unknown periods in their service, and is open to their observation in the absence of the master,—the inference is inevitable that the contract relation between the parties makes it a duty of the servants and a detail of their work to correct the defect when it arises with the materials furnished."

"The master's duty is fully performed when he 'supplies adequate machinery with all the appliances necessary and desirable for adaptation to some particular purpose, even though the same becomes temporarily impaired by reason of constant use, when the impairment is of such a character as to be easily and readily remedied by the servant, a part of whose duty it is to attend to such matters.'" *Yaw v. Whitmore* (1899) 46 App. Div. 422, 61 N. Y. Supp. 731. This distinction is predicated, to some extent, upon the fact that a smaller amount of technical skill and knowledge is, in most cases, required for what are termed by the court ordinary repairs than for those of a more permanent character.

In many kinds of service the care and keeping of tools and machinery in a condition of safety require merely the attention and repairs occasioned by ordinary use and wear, and are properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the duty of the employer is performed by furnishing safe tools and machinery and the means of making needed repairs, and the duty of making repairs may be intrusted to servants, and any neglect in the performance of this service is the negligence of a servant. *McGee v. Boston Cordage Co.* 54 L. R. A.

(1865) 139 Mass. 445, 1 N. E. 745. But in cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill, and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure to exercise proper care and skill the employer is accountable. *Jaques v. Great Falls Mfg. Co.* (1891) 66 N. H. 482, 13 L. R. A. 824, 20 Atl. 552. See also the quotations from *Cregan v. Marston* (1891) 126 N. Y. 568, 27 N. E. 962, *supra*, and from *Smith v. Potter* (1881) 46 Mich. 458, 41 Am. Rep. 161, 9 N. W. 278, in VII. b, 3, *infra*.

This conception is apparently the basis of the doctrine laid down in Arkansas, that the boundary line between liability and nonliability is to be drawn with reference to the distinction between the higher officials exercising a general supervision over the instrumentalities with a view to keeping them in proper condition and the subordinate employees by whom incidental repairs are carried out. See the decisions from this state cited in VII. b, 2, *infra*.

In the subjoined paragraphs are tabulated, under headings adapted to facilitate comparison and contrast with former subdivisions of this note, a number of cases showing what repairs the courts regard as permanent or as ordinary.

1. Inspection and repair of railway tracks.

In *Michigan C. R. Co. v. Austin* (1879) 40 Mich. 247, a railway company was held not to be liable for the failure of trackmen in not removing ashes and cinders, the decision being afterwards said, in *Balhoff v. Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592, to rest on the ground that the condition of unsafety was temporary, resulting from an omission, which pertained merely to the operation of the road, where trackmen were held to be vice principals as regards their failure to level the track. To the same effect is *Anderson v. Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585, where it was said that the daily repair of tracks by section-men is not a discharge of a nondelegable duty.

2. Inspection and repair of rolling stock.

The virtual effect of a decision in the circuit court of appeals is to make an engineer a fellow servant of his fireman as regards the inspection of the engine between the regular inspecting stations. *Texas & P. R. Co. v. Patton* (1894) 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259.

But it is difficult to see how such a doctrine can be reconciled with the Federal decisions cited in III. a, *supra*, especially *Atchison, T. & S. F. R. Co. v. Mulligan* (1895) 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569.

Where plaintiff, a head-end brakeman, while standing on a car in the performance of his duties, was thrown to the ground by reason of the breaking of a link connecting the engine with the car on which he stood, causing the train to stop with a jerk, it was held to be error to instruct that it was the duty of defendant "to keep them [links] in such condition that they should be proper and sufficient for work to be done by them," and "to prevent the use of unsuitable and dangerous links," since defendant's whole duty was performed when it furnished a sufficient supply of suitable links. *Miller v. New York, N. H. & H. R. Co.* (1900) 175 Mass. 363, 56 N. E. 282.

A railroad company is not liable for injuries to a conductor from the turning of a loose step upon the engine, where the engineer was furnished with proper tools for its repair, and the

company had no knowledge, actual or constructive, of its condition. *Miller v. Chicago, & G. T. R. Co.* (1892) 90 Mich. 280, 51 N. W. 370.

A railway company is not liable for the failure of a fellow servant to set apart for repairs a disabled car, as it was his duty to do. *Dodge v. Boston & A. R. Co.* (1892) 155 Mass. 448, 29 N. E. 1086.

In *McDonald v. Michigan C. R. Co.* (1895) 108 Mich. 7, 65 N. W. 597, it was held that a railroad company which imposes on its engineers the duty of inspecting their engines, and provides no other method of inspection, to keep them in a reasonably safe condition, is liable to one of its brakemen for an injury received through the failure of the engine to respond promptly to the airbrake, which defect was known to the engineer, who continued to use the engine after knowing of the defect, whether such conduct is considered as a complete neglect of the master's duty of inspection, or the illegal imposition of such duty upon a fellow servant. The court said: "Such inspection, in the ordinary operation of the road, is the act of a fellow servant, as between the engineer and brakeman, and, as between them, does not constitute the engineer a representative of the master. . . . But if the company makes no other provision for inspection, and chooses to rely upon the reports of its men, deferring repairs until breaks occur, or until the operators in due course of business report defects, we must either say that it has neglected the duty of inspection altogether, or that it has imposed one of its duties upon its operatives, and that it does not fall within the limits of fellow service, or that it may avoid the duty which the law imposes by invoking the rule of fellow servants."

It has been laid down that, although a car inspector may not be a fellow servant of a brakeman, yet an instruction which treats all "servants whose duty it is to examine the cars" as not fellow servants of the brakeman is erroneous. Such an instruction is broad enough to cover the negligence, not only of the car inspectors at the various car shops, but also that of conductors and other trainmen who have a like duty to perform, while in charge of the train. *Chicago & A. R. Co. v. Bragonier* (1882) 11 Ill. App. 516. This case was reversed on appeal ([1886] 119 Ill. 51, 7 N. E. 688) but on the altogether different ground that the brakeman was guilty of contributory negligence in not making such an inspection as he should have done.

In *St. Louis, I. M. & S. R. Co. v. Rice* (1888) 51 Ark. 467, 4 L. R. A. 173, 11 S. W. 699, the court said: "While we recognize the liability of the railway company for the wilful or negligent default of its chief inspectors and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice principal." The function of the yard inspector was to inspect cars on their arrival, make trifling repairs, and mark them unfit for use whenever they were seriously damaged.

In *St. Louis, I. M. & S. R. Co. v. Gaines* (1885) 46 Ark. 555, a car inspector was held to be a fellow servant of a brakeman on the ground that he was not in charge of a separate department, and that his duties did not require special mechanical skill.

In another case it was said that the rule as to the furnishing of appliances and maintaining them in repair is limited in its operation to the agents who are employed to look after and see that these things are done. "We do not mean," said the court, "to determine that this rule would extend to every subaltern who hammers on an engine in the course of repairs; but when

the company appoints an agent for a particular purpose, his acts in the line of his specialty are the acts of the company." *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524.

It has also been laid down that where the relation sustained by a car inspector to car repairers is merely that of a foreman directing their labors, he is not a vice principal. *Fordyce v. Briney* (1893) 58 Ark. 206, 24 S. W. 250.

The negligence of an engineer in running an engine without a headlight, instead of obeying rules requiring him to examine the engine, and, in case of defects, to take it to the repair shop, the consequence being that a flagman at a crossing was killed, is that of a fellow servant. *McDonald v. New York C. & H. R. R. Co.* (1892) 63 Hun, 587, 18 N. Y. Supp. 609.

A mining company is not liable for the negligence of its foreman in failing to see that the bumpers of a car were in proper repair. *Voahakey v. Hillside Coal & I. Co.* (1897) 21 App. Div. 168, 47 N. Y. Supp. 386. Here, however, the master's nonliability seems to be asserted in terms too broad, as the court speaks of the fact of the coervice of the injured and delinquent servants as sufficient to prevent recovery.

3. Inspection of rolling stock belonging to other companies.

An inspector of foreign railway cars is a fellow servant of a brakeman engaged in operating them. *Mackin v. Boston & A. R. Co.* (1883) 135 Mass. 201, 46 Am. Rep. 456; *Smith v. Potter* (1881) 46 Mich. 238, 41 Am. Rep. 161, 9 N. W. 273; *Mexican C. R. Co. v. Shean* (1891; Tex.) 18 S. W. 151, *Following Galveston, H. & S. A. R. Co. v. Farmer* (1889) 78 Tex. 86, 11 S. W. 156; *Kelly v. Abbot* (1885) 63 Wis. 307, 309, 53 Am. Rep. 202, 23 N. W. 890.

The special consideration relied on by the court in the Massachusetts case cited, that a system of inspection may be adequate, even though it does not provide for the examination of foreign cars at the points where they are taken into the trains of the employer, is not supported by any satisfactory reasons. The assertion that there is no duty in the premises because the servant knows such a system to be in operation, and therefore assumes the risks incident to it, is a mere *petitio principii*. The question still remains, whether the circumstances are appropriate for the application of the doctrine of assumed risks. The present writer is strongly of the opinion that this question should be answered in the negative. In the first place the conclusion of the court, that the risks of the system were, as a matter of law, assumed, seems to be justifiable only on the hypothesis that the servant's comprehension of those risks was a peremptory inference either from the plaintiff's opportunities of acquainting himself with the manner in which his own employers carried on their business, or from the generality of the usage which prevails among railway companies to omit the inspection of foreign cars at receiving stations. The omission to advert to these special elements, and to determine their precise significance in relation to the evidence, is of itself a serious flaw in the reasoning of the court. But that reasoning is also deficient in a still more important respect,—that no attempt is made to determine how far the doctrine of assumption of risks ought to be allowed to qualify the operation of the theory of nondelegable duties. As already remarked, that theory has been worked out in Massachusetts in a form somewhat different from that which it has taken in other states. But, under any form which it can take it seems to be essentially incompatible with the acceptance of a doctrine which declares that the servant's knowledge of the gen-

eral system adopted for the conduct of a department of the business disables him from maintaining damages for an injury caused by some particular defect in the instrumentalities, which is not discovered owing to that system. To hold that the servant assumes the risks of the various abnormal sporadic conditions which may by possibility be superadded temporarily to his environment owing to the known imperfections of the employer's arrangements, is a doctrine which is not only extremely harsh, but which would tend to nullify completely the theory of absolute duties in its relation to perils, in the face of which the servant is unusually helpless, and against which he is therefore in fairness entitled to the fullest measure of protection which the law can afford.

In *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273, *supra*, the court argued thus: "The work done is to be done at all hours and at every place where there are railroad connections with other roads. It is not a duty of management or general supervision, but a task for which nothing is required but fidelity, and mechanical knowledge of a comparatively limited kind. It is such work as would seldom be delegated to an officer of extensive responsibility who has other interests to look after. But, whatever be its quality, it was in this case not claimed to have been placed in wrong hands. Nothing more could be asked of the employer. There is no difference, in the nature of the danger, or in the quality of the inspector's employment, between the case of shifting cars belonging to other roads and cars belonging to the same road. Defects in both lead to the same results, and the methods of examining both are identical. Where a car has been damaged by some injury which has escaped notice, it cannot fairly be said that employers ignorant of it, who have taken all the usual and reasonable precautions against it, are any more to blame in the one case than in the other."

This decision was subsequently explained as having been based on the ground that the delinquent's duty was not one of management or general supervision as in the case before the court. *Van Dusen v. Letellier* (1889) 78 Mich. 492, 44 N. W. 572 (dock in mill yard not repaired).

In *Cincinnati, T. & D. R. Co. v. McMullen* (1889) 117 Ind. 439, 20 N. E. 287, the court inclined to the view that inspectors of foreign cars were fellow servants of the brakeman, the view being taken that "it is not the duty of the company to furnish appliances and instrumentalities, but to make proper inspection and give notice of defects if any are found, and that this duty is performed by the employment of a sufficient number of competent and skilful inspectors who are subjected to proper rules and instructions." The defective car in this case belonged to the defendant, and the suggestion as to foreign cars was definitely determined not to embody the true rule in *Louisville, N. A. & C. R. Co. v. Bates* (1897) 146 Ind. 564, 45 N. E. 108.

In an intermediate case it was held that a mining company fulfils its duty to its servants as to inspection of cars furnished it for temporary use, by supplying competent and skilful inspectors subjected to proper instructions; and the negligence of noninspection in such case is not that of vice principals. *Neutz v. Jackson Hill Coal & Coke Co.* (1894) 139 Ind. 411, 38 N. E. 324, Rehearing denied in (1894) 139 Ind. 418, 39 N. E. 147. The court said: "In the present case the inspectors and the appellant occupied a relation to the appellee in all respects identical with that occupied by the inspectors and brakemen of railway companies handling cars of other companies in the course of the master's business. The cars came, not as in-

struments of the service supplied by the master, but as incidents of its business, and from the dependence of the master upon those not in any manner connected with such business or subject to the master's control. If the defects had been in the original construction of the cars it could not be said that such defects were chargeable to the negligence of the appellee, nor can it be said with greater reason that the ill repair was from the fault of the appellee, or that a duty rested upon the appellee to make the repairs. The extent of the appellee's control over the cars was in the use of them for loading coal, and it was not responsible to the appellant, or anyone else, for their sufficiency as a means of transportation. The failure to inspect, to set brakes, or to block the wheels when the first car was removed was negligence in the use, and not in the supplying, of instrumentalities. One line of distinction between vice principals and co-employees is in the duty, in one instance, to supply or maintain instrumentalities of the service, and in the other of using the instrumentalities supplied. Negligence in the first, though that of a servant, is the master's negligence, while in the second the negligence is that of a fellow servant. This distinction keeps in view the proposition that where the master himself participates in the use, and the negligence is his own, he may not be said to be a fellow servant." This decision was explained in *Louisville, N. A. & C. R. Co. v. Bates* (1897) 146 Ind. 564, 45 N. E. 108, *supra*, as being based on the theory that, as the defective car had been merely delivered to a coal company to be loaded with coal, the liability of the bailee was essentially different from that of railway companies which receive foreign cars to be forwarded.

4. Inspection and repair of other kinds of machinery.

A servant cannot recover who is injured while cleaning a cordage machine by the pushing in of a movable board which was insecurely fastened, the nut which held the button not being tightened. *Smith v. Lowell Mfg. Co.* (1878) 124 Mass. 114.

A servant employed on a slubber machine in a cotton-mill, whose duty it was to see that the machine was kept running, to take off the full hobbins and put on others, to notify the overseer if she knew that there was anything wrong about the machine, and to see that it was kept clean, and the person whose business it was to keep the machine in repair, were fellow servants. *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101.

The mending of a belt used in transmitting power to machinery, and which is frequently broken, is not the duty of the master. *Rozelle v. Rose* (1896) 3 App. Div. 132, 39 N. Y. Supp. 363.

An employer is not liable for the death of an employee caused by the breaking of a belt on a machine in charge of a fellow servant to whom the employer delegated the duty of inspection, and to whom other belts were supplied,—especially if the deceased knew that the belt in use was unsafe. *Headifen v. Cooper* (1893) 6 Misc. 263, 26 N. Y. Supp. 763.

Where the cover of a steam chest was loose because the nuts were not tightly screwed on the bolts, and steam thereby escaped, causing an accident to plaintiff, a brakeman engaged in coupling the engine with a car, and the engineer had all the tools necessary to tighten the bolts, plaintiff cannot recover. *Keegan v. New York C. & H. R. R. Co.* (1899) 45 App. Div. 629, 64 N. Y. Supp. 595.

A warehouseman is not liable for the death of a fireman in his employ, caused by the fall-

ure to test hydrostatically a tubular boiler after removing and replacing the caps, where it is part of the ordinary duty of the engineer to make such test. *Beil v. Consolidated Gas, Electric Light, H. & P. Co.* (1899) 86 App. Div. 242, 56 N. Y. Supp. 780.

4. Inspection incidental to the details of blasting work.

The danger from "missed shots" being temporary and incident to the work of drilling in a mine, which plaintiff was employed to perform, it is not the duty of the employer to make inspections for missed shots after each explosion. *Browne v. King* (1900) 40 C. C. A. 545, 100 Fed. 561.

The failure of a foreman to inspect cartridge holes to ascertain whether any charges remain unexploded is that of a mere co-servant. *Mancuso v. Cataract Constr. Co.* (1895) 87 Hun, 519, 34 N. Y. Supp. 278.

5. Inspection of loads on railway cars.

The inspection of a railway car by a station agent or other employee, with a view to seeing that the load is properly arranged and adjusted, is, as regards the trainmen, the act of a fellow servant merely. In *Byrnes v. New York, L. E. & W. R. Co.* (1889) 113 N. Y. 251, 4 L. R. A. 151, 21 N. E. 50, the court said: "We think the defendant had fulfilled its duty to the servants in its employ when it furnished a perfectly safe car and appliances, and when it also provided a system of inspection of cars and proper persons to inspect them after they were loaded and before they were to be taken away. The failure to inspect, or, if inspection were made, the failure to rectify the improper loading by which the brake was rendered useless, was not the failure of the master to fulfil his duty to his servant, but it was the negligence of a co-servant in carrying out the orders of the master. The master is not an insurer that all his servants shall perform their duty, and he performs his duty to the servant in this regard in providing a system of inspection and intrusting its performance to competent hands. If, thereafter, such servants are guilty of negligence the master is not responsible therefor to a co-servant. We do not see that the question is in any way altered by the fact that the car was loaded by the servants of the owner of the lumber which was placed upon it. Whoever loaded it, the master had provided for an inspection of the car before it was to be taken away, and if the inspection were neglected, it was still the same neglect of a servant of a defendant to do that which he ought to have done, and such neglect was not that of the master in fulfilling any of the duties which he owed as master to his servants. It cannot, we think, be properly contended that the master fails to provide a car which is a safe and proper one, or that he fails to provide one with proper appliances, because through the negligent manner in which the car is loaded the appliance is, on that account only, made useless for the purpose for which it was intended." *Ruger, Ch. J., and Andrews and Danforth, JJ., dissented, the latter on the ground that when the car was furnished to deceased it was a loaded, not an empty car, and at that moment the movement of the brake was obstructed, and therefore the car was imperfect and unfit for use.*

This case was followed in *Ford v. Lake Shore & M. S. R. Co.* (1889) 117 N. Y. 638, 22 N. E. 946, where the employees who had loaded cars were held to be fellow servants of a switchman, who was injured by a piece of timber which fell from one of them, owing to the failure to secure the load with the side stakes furnished. *Dan-* 54 L. R. A.

forth, J., dissented on the ground that the evidence showed that there were no brackets provided for the reception of stakes, and that the defect was therefore structural. Ruger, Ch. J., and Andrews, J., concurred in this view.

On a subsequent appeal ([1891] 124 N. Y. 493, 12 L. R. A. 454, 28 N. E. 1101), the plaintiff was permitted to recover on the ground that it had not established proper rules prescribing the manner in which cars should be loaded with lumber—a theory not discussed at the first trial. To the same effect, see *Bailey v. Delaware & H. Canal Co.* (1898) 27 App. Div. 305, 50 N. Y. Supp. 87; *Jarman v. Chicago & G. T. R. Co.* (1893) 98 Mich. 135, 57 N. W. 32 (fireman of another train injured by a projecting limb of a tree on a flat car); *Leillis v. Michigan C. R. Co.* (1900) 124 Mich. 37, 82 N. W. 828 (piece of timber fell off and injured a switchman); *Dewey v. Detroit, G. H. & M. R. Co.* (1893) 97 Mich. 329, 22 L. R. A. 292, 56 N. W. 756, *Reversing on rehearing* (1893) 97 Mich. 343, 16 L. R. A. 342, 52 N. W. 942 (McGrath, J., dissenting). At the first hearing of the last-mentioned case the majority had taken the ground that the duty of inspection went to the extent contended for by the plaintiff, and that *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273, *supra*, holding that a car inspector and a brakeman were fellow servants, had been overruled by *Irvine v. Flint & P. M. R. Co.* (1891) 89 Mich. 419, 50 N. W. 1008, where it was held that it was as much the duty of a railway company to see that the cars are so loaded that brakemen will have reasonably safe access to the brakes as it is to see that proper appliances are provided. The further statement that an inspector, provided in pursuance of the obligation, would be a fellow servant, was thought to be erroneous. Other cases relied upon by the majority of the judges were *Van Dusen v. Le-tellier* (1889) 78 Mich. 492, 44 N. W. 572, *supra*, and *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, 46 N. W. 111, where the duty to inspect the parts of cases was held to be non-assignable. The minority drew a distinction between the duty of furnishing a safe place and safe machinery and the duty of seeing that the appliances are properly used, and considered that the duty of seeing that a car is properly loaded came under the latter head. The injury, said *Montgomery, J.* (see p. 347 of the report), resulted, not from any fault in the appliances used, but because, in making use of suitable cars and machinery, a fellow servant neglected his duty. The view of the minority prevailed upon the subsequent hearing of the case. The court said (see p. 333 of the report): "The real point in controversy here is whether the duty of a master is to be extended so that he may be made liable for the neglect of a car inspector in not observing that a car is improperly loaded when it is to be put into the train for transportation. There is no complaint here about the car itself. It was proper in construction, and a safe car for use in that service. Upon the first argument of the case in this court the real point in controversy was not so fully pointed out and considered as upon the reargument, and the case was regarded as very similar in principle to *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273, which Mr. Justice McGrath considered as virtually overruled by the later cases cited above. There is, however, a broad distinction between *Smith v. Potter* and the present case. In the former case, the injury complained of was received by reason of a defect in the frame work of the car itself, while here the accident is attributable to improper loading. In the later decisions the doctrine of *Smith v. Potter* has been doubted, and the rule broadly stated that

the master must furnish to the servant a safe place to work, and safe appliances to work with.

But, in regard to the proper loading of cars, quite a different rule must necessarily prevail. The master must undoubtedly exercise care in the selection of inspectors to see that cars are not improperly loaded or overburdened, so that they are dangerous to employees, but, after this has been done, it cannot be claimed that the master is to be held responsible for the faithful performance of the inspectors' duty. Any other rule than this would make railroad companies insurers of the lives and limbs of employees. In the present case the projection of the lumber over the end of the car was as apparent to the brakeman, if he had taken the precaution to make observation, as to an inspector. It requires no special skill or training to ascertain the fact. The duties of a brakeman are known to be dangerous, and when one enters such service he must be held to have assumed the risks of the employment. He must exercise care himself in going between moving cars to make couplings." The opinion at the first hearing, which was thus reversed, was written by McGrath, J., who also composed an elaborate dissenting opinion after the second hearing. Some extracts from the latter may with advantage be given to indicate the arguments adduced to support the view which was finally rejected. The learned judge said: "The duty of inspecting the car itself, and that of the inspection of its condition with its load upon it, have a common origin. Both spring from the duty of protection which the master owes to the servant. There is no ground for saying that one of these duties may be delegated so as to relieve the master from all liability, and that the other may not; nor is there reason in saying that the person who inspects the car itself, its appliances, and instrumentalities with reference to the safety of those engaged in its transportation, is not a fellow servant, while he who inspects the loaded car for a like purpose, and to see whether it affords proper facilities for the performance of the duties which must necessarily be performed in its transportation, is a fellow servant. In the present case both duties were delegated to the same person, both are performed with reference to the same end, and the person to whom delegated must be held in the performance of each to occupy the same relation to plaintiff and defendant. It certainly cannot be said that, with reference to stationed machinery, belting, shafting, and gearing, the master must, at his peril, provide the necessary guards and coverings, and arrange the surroundings so as to render the place reasonably safe, yet, as to a train of cars, between which a brakeman is required in the ordinary discharge of his duties to go while one section is being driven against a standing section or car so loaded as to render the position of the brakeman one of greatly increased hazard to life or limb, the master may, in case of injury, escape liability. The employment is at best a dangerous one. It is as essential to the protection of the brakeman that these spaces be kept clear as that the spaces be provided. This danger can be guarded against. As is said by Mr. Justice Long in *Palmer v. Michigan C. R. Co.* (1891) 87 Mich. 290, 49 N. W. 618: 'In all cases where the danger can be readily guarded against, the employer is in duty bound to protect the employee at his peril.'"

Where a hand car as originally furnished is in proper condition for use, an accident happening afterwards because of its defective condition must be due to the negligence of the workmen using the car, and these are the fellow servants of their foremen. *Reynolds v. Kneeland* (1892) 63 Hun, 283, 17 N. Y. Supp. 895. 54 L. R. A.

c. Master liable where the delinquent servant was engaged in a different class of work.

One material limitation to which the doctrine thus laid down is subject is that where the duty of inspecting and repairing appliances is cast upon an employee not actually engaged in the work which the plaintiff is doing, such employee is a vice principal. *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten* (1894) 57 N. J. L. 400. 81 Atl. 619; *Judson v. Olean* (1889) 116 N. Y. 655, 22 N. E. 565.

In *Woods v. Long Island R. Co.* (1896) 11 App. Div. 16, 42 N. Y. Supp. 140, the court, after citing several cases, said: "Tested by these authorities, I think that the controlling consideration in the solution of the question before us must be the method in which the operation and business of the railroad was conducted. If it were part of the duty of the train hands to make the adjustment of the brake rods, then I should say that the car furnished in this case was not defective, and that the failure to properly adjust the rod was the negligence of a fellow servant in the conduct of the work. But if the duty of the train hands was only to operate the brakes, and the duty of adjusting them was imposed on another department, which repaired them and constructed or repaired the appliances of the road generally, then I should say that the car, as furnished, was a defective appliance. If it was the course of business that the car should be furnished with brakes in condition for use by the train hands, I cannot see why the improper adjustment of the parts would not make the appliance defective in the same sense and to the same extent as if some part of the appliance was defective in character or was wanting. In the case before us the evidence as to the operation of the railroad in these respects is meagre. But there was no evidence given on the trial, nor was there any claim made on the argument, that the train hands had any duty with regard to the adjustment of the brake rods. The rules of the company would seem to negative such a claim, for the rules require the conductors to report at their trains, and inspect the signals and brakes to see that they are in proper order, but no duty is devolved upon them of remedying any defects. It further appears that it is the duty of the inspectors in the yards to inspect these appliances and to see that they are repaired or put in proper order. We are therefore of the opinion that the character of the car, as an appliance, must be determined as of the time when it was furnished to the train hands, and that any failure on the part of mechanics or employees up to that time must be deemed neglect in the master's duty of furnishing a safe appliance, and not as that of a fellow servant in the conduct of the work."

The improper adjustment of a brake rod constitutes a defective appliance, and not a mere neglect or failure in detail, within the rule relating to the liability of the master for defects in appliance, where it was the duty of inspectors, and not of the train employees, to make the adjustment. *Woods v. Long Island R. Co.* (1896) 11 App. Div. 16, 42 N. Y. Supp. 140. See also *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690, cited in III. 2, *supra*.

d. Negligence in failing to replace an unsound by a sound appliance; when master not liable for.

The result of the general principles discussed in IV. 2, V. 2, *supra*, is that the master cannot be held liable where the substitution of a sound for an unsound appliance is susceptible of being effected by merely selecting another instrumentality from a stock furnished by the master. In other words, the quality of the operation

through which the substitution is carried out determines the quality of the whole transaction, as being the discharge of the functions of a mere servant.

A master employing a servant to keep tools in repair, or replace them with others, is not liable for injury to a coservant through using a tool after it had become dull on account of the neglect of the servant to replace it with another. *Webber v. Piper* (1888) 109 N. Y. 496, 17 N. E. 216. The court said: "The master's duty was performed when he furnished suitable saws and the means and conveniences for keeping them sharp and properly set. The saw, though dull, was not defective in any legal sense, and the negligence, if any, was that of Myers, whose duty in sharpening and setting the saws was that of a fellow servant. A contrary rule might carry us to the extent of saying that, where the master furnished sufficient and adequate machinery, but its running became dangerous to the operative, unless well oiled, . . . he was liable for the neglect or omission of that servant. There are many matters of detail in the management of safe and adequate machinery, which must be intrusted to the operatives, and as to which the master owes no duty except the employment of competent workmen, and we deem this a case of that character. The line of division between the duty of the master to furnish and maintain safe and adequate machinery, and that of the operative to manage and handle it with prudence and care, is difficult to define by any general description but it is quite obvious when each case, as it arises, comes under consideration. In the one before us the neglect, if any, was in a detail of the management of the machinery. A master builder might furnish proper tools to his workmen, but it would not be his duty to sharpen every chisel as it became dull, or set every saw when that need arose. The appellant relies upon the case of *Kain v. Smith* (1882) 89 N. Y. 375. If, in that case, the master had furnished another jigger, perfect in all respects, and safe and adequate for use, and the neglect had been that the foreman used the old one, which had become unsafe, when he might have used the new one, a very different case would have been presented. Here the master supplied saws enough and the means of sharpening and resetting, and if the servants neglected to avail themselves of the means of safety provided, the master was not in fault, for the saw was not defective, but merely dull from use. Its ordinary efficiency was impaired, but it had not thereby become a defective or dangerous machine."

In *Cregan v. Marston* (1891) 126 N. Y. 568, 27 N. E. 952, *Reversing* (1890) 32 N. Y. S. R. 913, 10 N. Y. Supp. 681, it was held that a master was not liable for the failure of an engineer in charge of hoisting machinery to replace old ropes with new ones out of a stock which was kept on hand.

An employer is not liable for an injury sustained by an employee while working near a derrick managed by a fellow servant because of the breaking of a rope, where a new rope was there ready for use if the workmen chose to use it, and also a tackle which could have been used instead of the single rope, if desired. *McKinnon v. Norcross* (1889) 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183. The court said: "Properly to use pulleys, blocks, ropes, and other ordinary tools and appliances which have been furnished by a master to the workmen employed upon a derrick is a part of the duty of the workmen. It is incidental to the management and use of the derrick." To the same effect, see *Conway v. New York C. & H. R. R. Co.* (1895) 13 Misc. 53, 34 N. Y. Supp. 113, *Reversing* (1890) 11 54 L. R. A.

Misc. 641, 32 N. Y. Supp. 921; *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690; *Johnson v. Boston Tow-Boat Co.* (1888) 135 Mass. 209, 46 Am. Rep. 458,—in all of which a sufficient stock of rope was kept on hand by the master, and a new one might have been obtained at any time. In the last-mentioned of these cases *W. Allen, J.*, thus attempts to reconcile the decision with the doctrine laid down in *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598: "It was incidental to the use of the apparatus—a part of its contemplated use—that the rope should be occasionally renewed; and when the defendant had furnished the means for that renewal, and employed Moore to make the renewal whenever needed, it employed him as a servant, and not as an agent or deputy. When a master has furnished suitable structures, means, and appliances for the prosecution of a business, all persons employed by him in carrying on the business by use of the means furnished, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants in the general employment and business. One employed in the care, supervision, and keeping in ordinary repair of the means and appliances used in a business is engaged in the common service."

An employer is not liable for an injury to an employee as for failure to furnish safe tools and appliances, because the bar used when one of the employees was injured was more liable to turn than that generally used, where the accident was due to the use of it without blocks, which were available at any time. *Hathaway v. Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 651.

There can be no recovery where a fellow servant selected a defective wheel for the purpose of replacing one which formed part of an appliance for conveying loads along an overhead wire. *Byrne v. Eastmans Co.* (1898) 27 App. Div. 270, 50 N. Y. Supp. 457.

The failure of an engineer, who, by the rules of the company, is required to keep his engine, including the head lamp, in order, to replace a short wick by one of suitable length from a supply furnished by the company at a convenient place, is not negligence which is imputable to the master. *Simpson v. Central Vermont R. Co.* (1896) 5 App. Div. 614, 39 N. Y. Supp. 464.

e. All employees engaged in repairing regarded as coservants of each other.

In the cases so far reviewed the injured servant himself had nothing to do with the work of repairing. Another principle equally fatal to an injured servant's right to maintain the action comes into play where both he and the delinquent coservant were engaged in the work of repairing. Under such circumstances it is held that, being engaged in the same kind of work, they assume the risks of one another's negligence.

In *Murphy v. Boston & A. R. Co.* (1882) 88 N. Y. 146, 42 Am. Rep. 240, it was held that a railway company was not liable for the death of a mechanic in its repair shop, where the cause of the disaster was the explosion of a boiler due to the negligent failure of his coemployees at the last stage of the repairs to discover and repair defects in the boiler which had been overlooked at a previous stage of the repairs by other employees. The court said: "We think this case is not within the principle which holds the master responsible for unsafe machinery furnished for the use of the servant. The case

of *Fuller v. Jewett* (1880) 80 N. Y. 46, 86 Am. Rep. 575, is a distinct authority for the proposition that, if this locomotive had been sent out from the shop, and afterwards exploded while in use on the defendant's road, injuring the engineer or other servants of the defendant, the company would have been responsible. The negligence of the boiler makers in the case supposed would be regarded as the negligence of the master. The risk of the negligence of the repairers and machinists would not be considered one of the risks which a servant in whose hands the machine was subsequently placed for use, had assumed. The placing of the locomotive on the road for use would be an assurance that it was fit and safe; and an engineer, or other servant employed on the train, could not be supposed to have known the condition of the locomotive, or whether the men employed to make repairs were competent, or the manner in which the work had been done. In this case *Murphy* was not, we think, a servant, in whose hands the locomotive was placed by the defendant for use, within the principle of *Fuller v. Jewett*, and like cases. The locomotive was sent to the repair shop in order that it might be made fit for use. The mechanics in the repair shop, including the intestate, were employed for the purpose of repairing defective locomotives. The intestate and his collaborators in the shop were engaged in the same department of service, worked under the same control, and in the case in question the boiler makers and the other mechanics were employed to effect the same object, *viz.*: the reparation of the 'Sacramento.' It is true that the work was done in successive stages, and different parts of the work were intrusted to different persons. The refitting of the valve and its adjustment to the required pressure were the last things to be done. This work was, however, as necessary in fitting the locomotive for use as the work of the boiler makers or machinists. The intestate had an opportunity to inform himself of the competency of his co-servants in the shop. He doubtless supposed that the boiler makers had performed their duty; unfortunately they had neglected it. But we think the risk of their negligence was one of the risks he assumed, as incident to his employment in the common service. It would be too close a construction to hold that the repairs were completed when his work commenced, and that the setting of the valve was an independent and disconnected service in respect to a machine put into his hands by the company for use. This claim of the plaintiff's counsel would make the master responsible to each successive employee engaged on the repairs for any negligence of a coemployee whose work was prior in point of time, although done in effecting the common purpose in which all were engaged. This would, we think, be extending the liability of the master further than is warranted by the adjudged cases."

To the same effect are the following cases:

A servant in a shop who had repaired a chain used in raising locomotive driving wheels, and another servant, who, in so using the chain, is injured by its breaking at the link which had been repaired, are fellow servants. *Rogers Locomotive & Mach. Works v. Hand* (1888) 50 N. J. L. 464, 14 Atl. 766.

Plaintiff's intestate, a timekeeper at defendant's paper mill, was killed by the bursting of a tee in a steam pipe, occasioned by the action of the superintendent of the mill in opening a valve while testing some new steam pipes. The superintendent was a mill wright, and had general charge of defendant's machinery. It was held that the act of the superintendent in opening the valve was, as matter of law, the act of a co-servant, and not of the defendant. *Meeker* 54 L. R. A.

v. C. R. Remington & Son Co. (1900) 53 App. Div. 592, 85 N. Y. Supp. 1116 (injuries inflicted while the work of inspection is in progress were distinguished from those due to conditions resulting from a faulty inspection).

The wife of a section man cannot recover from a railroad company for the death of her husband who was swept from defendant's tracks into a river by a landslide, where the slide was caused by the failure of the crew, of which her husband was a member, to properly drain a bluff overhanging the track, where such duty was imposed on them by the rules of the company, as such failure is the negligence of fellow servants. *Slavens v. Northern P. R. Co.* (1899) 38 C. C. A. 151, 97 Fed. 255.

That all servants engaged in repairing a railroad track are in a common employment, see also *Wellman v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pac. 625.

A railway brakeman, a part of whose duty it is to inspect the brakes which he is to operate, at every station where the train stops, is a fellow servant of a car inspector whose duty it is to inspect the brakes before the train leaves its starting point, and cannot recover for an injury due to a defect in the brake which the latter negligently failed to discover. *Eaton v. New York C. & H. R. Co.* (1897) 14 App. Div. 20, 43 N. Y. Supp. 666. The court remarked that, upon the general question whether car inspectors and brakemen are fellow servants, the authorities do not agree; but that, at all events, they did not reach the case at bar, as in none of them did it appear that inspection was a duty imposed on the brakemen as well as the inspectors.

A foreman of a gang of car repairers in assisting in making repairs acts as their fellow servant. *Holts v. Great Northern R. Co.* (1897) 69 Minn. 524, 72 N. W. 805. See also *Atchison, T. & S. F. R. Co. v. Meyers* (1896) 22 C. C. A. 268, 46 U. S. App. 226, 76 Fed. 443, the effect of which is stated in *V. o. 1, supra*.

A switchman employed to shift cars in a railroad yard according to directions upon a card furnished him by the yard despatcher, whose duty it is to order all cars marked by the car inspector as out of repair sent to the repair shop, is a fellow servant of such inspector. *Gibson v. Northern C. R. Co.* (1880) 22 Hun, 289. The court relied upon the principle that the two servants were "engaged in a common enterprise." But the decision is of doubtful correctness, as the plaintiff had nothing to do with the work of inspection, and his action should apparently have been sustained under the theory embodied in *Fuller v. Jewett*, as explained in *Murphy v. Boston & A. R. Co.* (1882) 88 N. Y. 140, 42 Am. Rep. 240, *supra*.

VIII. *Doctrine as to the details of work not a protection to the master when his own negligence or that of a vice principal was an efficient cause of the injury.*

a. *Master liable where he or his vice principal directed the details of the work.*

It is evident that there is no room for the application of the doctrine explained in the last four subtitles, if the details of the work were superintended by the master himself, or one of those employees who are deemed to be vice principals by virtue of their rank. That superintendence is an official act of a vice principal, see note to *O'Neil v. Great Northern R. Co.* (1900) 51 L. R. A. pp. 590 *et seq.* Under such circumstances his negligence must, at all events, be one of the efficient causes, and,

in most cases, will probably be the sole efficient cause, of the injury.

An employer who fails to furnish safe and suitable lumber for the construction of a staging by the employees for use in their work, and who especially directs the use of a stringer in a specified place, is liable for an injury to an employee caused by the breaking of such stringer. *Stanwick v. Butler-Ryan Co.* (1896) 98 Wis. 430, 67 N. W. 723.

An employer is liable, where he instructs his employees to build horses, for a scaffold to be used by the workmen in the house he is constructing, from certain particular material, of which there is just enough for that purpose, and an employee is injured by the breaking of a horse made of defective material, the defect not being apparent to an ordinary observer. *Brown v. Todd* (1900) 46 App. Div. 546, 61 N. Y. Supp. 963. The theory of the case was that the selection of the material was not left to the servants themselves, and that the express direction by the master as to the material to be used cast the responsibility upon him.

That a railway company would be liable if a heap of sand which caused an injury had been deposited beside its track by its direct order was conceded, in *Robinson v. Houston & T. C. R. Co.* (1877) 46 Tex. 540.

A specific direction by the master or a vice principal to place a gas pipe in a position where it may be dangerous to a servant will render the master liable for an injury caused by it. But a general order which merely mentions the points between which the pipe is to run will not affect him with liability for the negligence of the servants who carry out the order in placing it so that another servant receives an injury by coming into collision with it. *New York, L. E. & W. R. Co. v. Bell* (1886) 112 Pa. 400, 4 Atl. 50.

A railway company fails to discharge its duty to furnish a safe place to work where a foreman of car repairers places a car to be repaired so near the switch leading to the repair track that it is liable to be struck by moving cars on the adjoining track. *St. Louis, A. & T. H. R. Co. v. Holman* (1895) 155 Ill. 21, 39 N. E. 573.

A master is responsible for the safety of a framework constructed under his own supervision for the purpose of lowering a heavy article. *Bradbury v. Goodwin* (1886) 108 Ind. 258, 9 N. E. 302.

The point that a work train which injured a trackman owing to its being run without lights was run in accordance with the regulations of the company, and that the injury was therefore the act of the company, cannot be taken on appeal, unless it was suggested to the trial court. *Coon v. Syracuse & U. R. Co.* (1851) 5 N. Y. 492.

In many cases where recovery has been denied, the fact that there was no authority to do the particular act which caused the injury is mentioned as one of the grounds of the decision. See, for example, *Cowan v. Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 340; *Karl v. Mallard* (1858) 3 Bosw. 591. Compare, also, the cases in which the delinquency consists in using the instrumentalities in a manner not contemplated by the master (*V. k. supra*), or in disobeying his express orders (*VI. a. supra*).

b. Master liable where his own negligence interferes as a proximate cause between a delinquent coservant's negligence and the injury.

It is also manifest, both on principle and authority, that this doctrine is no protection to the master, where he might, by the exercise of reasonable care, have secured the plaintiff from exposure to the dangerous conditions created by 54 L. R. A.

the delinquent coservant's negligence. That is to say, his own subsequent breach of duty is, in law, regarded as the proximate cause of the injury, if he had actual or constructive notice of the abnormal peril introduced into the plaintiff's environment by the careless performance of the details of the work, and failed to take such steps as a prudent man would have taken, —whether by warning the persons whose safety was affected by the existence of peril (*Stourbridge v. Brooklyn City R. Co.* [1896] 9 App. Div. 129, 41 N. Y. Supp. 128), or by so altering the physical conditions as to remove the peril.

If a part of the road should become unsafe because of the neglect of such employee to make repairs, and should so continue for a length of time sufficient to induce the presumption that the company knew of it, or ought to have known of it, then it is negligent and careless, and is liable to other employees for injuries resulting therefrom. *Howd v. Mississippi C. R. Co.* (1874) 50 Miss. 178.

Where it appears that an employee, having general charge of the tracks of a railroad company, had notice that an accident had previously occurred where the plaintiff, a brakeman, was injured, it is error to give instructions implying that the company is not liable on the ground that the neglect to repair the track was that of the section foreman, a fellow servant of the plaintiff. Such an instruction fails to take into account the possibility of the injury being due to the company's breach of its nonassignable duties of inspecting its track, and repairing it after notice that it is defective. *Anderson v. Michigan C. R. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585.

A railway company is liable if it has improperly suffered a deposit of sand to remain near the track, if the fact of its being there was, or ought to have been, known to the corporate agents. *Robinson v. Houston & T. C. R. Co.* (1877) 46 Tex. 540 (conceded).

The fact that it was the plaintiff's fellow servants who erected a derrick so close to a railway track as to produce a dangerous obstruction if it fell, will not excuse the company for injuries due to its falling, if it has suffered the apparatus to remain standing for an unreasonable length of time. *Holden v. Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 843.

A railway company may be held liable if a pile of ashes has been left on the track so long that the higher officials are chargeable with knowledge of the conditions. *Hughes v. Winona & St. P. R. Co.* (1880) 27 Minn. 137, 6 N. W. 553 (evidence held not to justify inference of knowledge).

A railway company which ought to have known of the defective condition of a plank crossing is not excused by the fact that it had furnished the section foreman with materials, and instructed him to make repairs. *Fuhrer v. Lake Shore & M. S. R. Co.* (1899) 121 Mich. 212, 80 N. W. 23.

A railway company is liable for injuries caused by defects in a bridge which it failed to repair after being notified of their existence. *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185, 36 Am. Rep. 662.

The fact that the improper adjustment of a brake-rod, after loading a car, was due to the negligence of a coservant, will not excuse the company where there was afterwards an ample opportunity for inspection. *Galveston, H. & S. A. R. Co. v. Templeton* (1894) 87 Tex. 42, 26 S. W. 1066.

A laborer injured by the fall of a steel ingot from a mass of such ingots, carelessly piled by his coservants, can recover of the employer if the master or his agents knew of the danger-

ous condition of the pile. *Nash v. Nashua Iron & Steel Co.* (1882) 82 N. H. 406.

An employer whose duty to an employee engaged in dressing stone in his stone yard requires him to place the stone on a solid and steady surface, secure and safe to work upon and about, cannot escape liability for an injury to the employee, caused by the falling upon him of a stone next to that upon which he is working, negligently set upon its edge, on the ground that the omission occurred through the fault of a fellow servant. *Blondin v. Oolitic Quarry Co.* (1894) 11 Ind. App. 395, 37 N. E. 812. It was considered that "the stone which was shown to have been insecurely placed, and negligently suffered to remain in that condition, in close proximity to where the appellant was at work, was as much a part of the place where such work was being done as would have been a dangerous pitfall of which the appellant had not been apprised."

In *The Frank and Willie* (1891) 45 Fed. 494, the evidence showed that the mate, after notice of the dangerous condition of a pile of lumber, which his own unskillfulness or negligence had brought about, and after complaint made at least an hour before the accident, refused to take the usual precautions to make the pile safe, and, in effect, required the libellant to continue work in this dangerous situation. The court said: "This was breach of a duty owed by the ship and owners to the seaman, for which the ship and owners are liable. . . . The master was absent and the mate was not only temporarily in command, but, as mate, he was the officer having charge in unloading the cargo,—the representative of the ship and owners in the supervision of that work. His attention was specially called to the dangerous situation, its correction was requested, and the libellant was practically helpless. I do not hold the ship liable for the mate's mere negligence as a fellow workman in producing the dangerous situation, but for his refusal to remedy it when complaint was made, and the danger pointed out to him."

The negligence of a fellow servant in using insufficient material for, or in putting up, a scaffold, from the falling of which a carpenter sustained injury, will not defeat a recovery, if the employer or his superior servant having charge of the construction of the scaffold was informed that it was not safe. *Davies v. Griffith* (1892) 27 Ohio L. J. 180.

In *Neveu v. Sears* (1892) 155 Mass. 303, 29 N. E. 472, it was held that one sued for personal injuries to a stone mason in his employ, caused by the explosion of dynamite left unexploded in a block of stone which plaintiff was dressing, is chargeable with knowledge of those facts as to the use of dynamite at his quarry which he either knew or ought to have known. His employment of competent quarrymen, and his furnishing them with proper means of preventing any dangers consequent on the use of dynamite, would not, it was said, justify him in relying on his actual want of knowledge that there had been carelessness at the quarry as an excuse for furnishing a dangerous stone for the plaintiff's use, if, knowing all that had happened at the quarry, he would then have had reason to believe that unexploded cartridges might remain in the blocks removed therefrom. An instruction was therefore held correct which left the jury to say whether, considering the knowledge which the master had, or ought to have had, of what occurred at the quarry, each block should have been examined for dynamite when it was transported from the quarry or first appropriated for the work on which the plaintiff was engaged.

In *Coates v. Boston & M. R. Co.* (1891) 153 54 L. R. A.

Mass. 297, 10 L. R. A. 769, 26 N. E. 864, there was evidence that a jaw strap had been gone for some time, from which it might be inferred that the company knew of its absence, an inference which would justify a finding that the company ordered the plaintiff into a place where there was a concealed danger known to the company, and not known to the plaintiff or to the superior servant giving the order, and of which the plaintiff received no warning. The court said: "We do not put our decision on the identification of master and servant, and a union of the knowledge of the corporation and the command of the conductor in one person, by a fiction. But we think the jury might have found, at least, this negligence on the part of the corporation;—that, knowing the condition of the car, it put a conductor there with men under him having reasonable ground to anticipate that such orders would be given as were given without warning either to him or the men."

The fact that the floor in a mill has been in a dangerous condition for three hours, by reason of grease left thereon by employees in the mill, is insufficient to charge the master with notice of the defect, so as to render him liable for failure to furnish safe premises. *Burke v. National India Rubber Co.* (1899) 21 R. I. 446, 44 Atl. 307.

The owners of a brewery are liable for an injury to an employee caused by the fall of a beer keg through a run in which the kegs were lowered into the cellar, resulting from the rivet holes in the rods and brackets of the run becoming enlarged by use and rust, where the defect could have been discovered by a proper examination, and the employee was free from contributory negligence. *Mayer v. Liebmann* (1897) 16 App. Div. 54, 44 N. Y. Supp. 1067. (The defendant's contention was that the defect was one arising in the daily use of the run.)

A mining company is not relieved from liability for an injury to one of its employees, caused by its negligence in failing to keep the roof of the mine in a reasonably safe condition, although the negligence of a fellow servant to perform the duties assigned to him in that regard contributed to the injury. *Island Coal Co. v. Risher* (1895) 13 Ind. App. 98, 40 N. E. 158, declaring that, in view of a finding that both the defendant and a mine boss had long known that the roof was unsafe, the question whether the boss was a vice principal or a mere fellow servant was immaterial. See also *Rogers v. Leyden* (1890) 127 Ind. 50, 26 N. E. 210 (failure after notice of conditions to secure the roof of a mine, the unsafety of which was due to the negligence of the mine boss); *Lehigh Valley Coal Co. v. Warrek* (1898) 28 C. C. A. 540, 55 U. S. App. 437, 34 Fed. 866; *Miller v. Chicago & G. T. R. Co.* (1892) 90 Mich. 230, 51 N. W. 370; *Dodge v. Boston & A. R. Co.* (1892) 155 Mass. 448, 29 N. E. 1086; *Adasken v. Gilbert* (1896) 165 Mass. 443, 43 N. E. 199; *White v. Eldlits* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184; *Cowan v. Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 340.

In *Bryant v. New York C. & H. R. R. Co.* (1894) 81 Hun, 164, 30 N. Y. Supp. 737, the material elements discussed were the engineer's violation of rule as to speed at switches and the company's knowledge of habitual violation of such rule, and failure to take appropriate precautions. The actual decision was that the company was not negligent.

A nonsuit is erroneous where plaintiff offered to prove that defendant knew of the insecurity of the place of work caused by the coservant's negligence. *Mullin v. California Horseshoe Co.* (1894) 105 Cal. 77, 38 Pac. 585. See, generally, the note to *Walkowski v. Penokee & G. Consol. Mines* (1898; Mich.) 41 L. R. A. 83.

c. Master liable where his own antecedent negligence and a subsequent delinquency of a co-servant are both efficient causes of the injury.

The rule exemplified in a third class of cases is that, in order to enable the master to defeat a servant's action on the ground that the injurious negligence was committed in carrying out the details of the work, it must appear that no antecedent breach of duty on his part contributed as a proximate cause to the injury.

Where an employee is injured while engaged in an unusually dangerous service (here the repairing of cars), there is always a preliminary question to be settled, *viz.*, whether the master has used "all reasonable and necessary means to protect him against any superadded danger that might be reasonably expected to arise from extrinsic causes." *Missouri P. R. Co. v. Watts* (1885) 63 Tex. 549.

In many of the cases cited in the preceding subtitles this rule is adverted to under what may be called its negative aspect, the courts merely stating in the course of their arguments that the evidence did not show any such ground of liability. For instances of this incidental recognition of the rule with respect to the hiring of competent servants, see *Hall v. Johnson* (1865) 3 Hurst. & C. 589, 34 N. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 18 Week. Rep. 411; *McCarthy v. Bristol Shipowners' Co.* (1883) 1r. L. R. 10 C. L. 384; *Colton v. Richards* (1878) 123 Mass. 484; *Durst v. Carnegie Steel Co.* (1896) 173 Pa. 162, 38 Atl. 1102; *Crawford v. Stewart* (1887; Pa.) 6 Cent. Rep. 140, 8 Atl. 5; *Benn v. Null* (1884) 65 Iowa, 407, 21 N. W. 700; *Brady v. Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

The fact that he did not fail to supply a sufficient amount of materials for the preparation of the instrumentalities, supposing this to be the limit of his obligation, is referred to in *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860; *McCone v. Gallagher* (1897) 16 App. Div. 272, 33 N. Y. Supp. 697; *Crawford v. Stewart* 1887; Pa.) 6 Cent. Rep. 140, 8 Atl. 5; *Kelley v. Norcross* (1877) 121 Mass. 508; *Brady v. Norcross* (1899) 172 Mass. 331, 52 N. E. 528; *Donnelly v. Brown* (1887) 43 Hun, 470.

In *Ross v. Walker* (1891) 189 Pa. 42, 21 Atl. 157, 159, the court said: "It was the duty of Walker, as employer or principal, to provide the men employed to build this bridge with suitable machinery and appliances; to furnish materials sufficient in quantity and suitable in character; to employ men who were reasonably competent to do the work for which they were wanted, and to give them the benefit of the services of a reasonably competent foreman. All this, as we understand the evidence, was done. If so, the employer had filled the measure of his legal liability to his workmen."

In its positive form the rule has been enunciated in various ways. The following subjoined statements will serve as sufficient examples of the phraseology employed:

If the negligence of the master contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defense that another was likewise guilty of wrong. *Grand Trunk R. Co. v. Cummings* (1882) 108 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 498.

Negligence of a servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty. *Coppings v. New York C. & H. R. Co.* (1890) 122 N. Y. 557, 25 N. E. 915, *Affirming* (1888) 48 Hun, 292; *Cheaney v. Ocean S. S. Co.* (1893) 92 Ga. 732, 19 S. E. 33.

That a fellow servant may, by care and caution, operate a defective and dangerous machine

so as not to produce an injury to others, does not exempt the master from his liability for an omission to perform the duty which the law imposes upon him of exercising reasonable care and prudence in furnishing safe and suitable appliances for the use of his servants. The rule which excuses the master under such circumstances presupposes that he has performed the obligations which the law imposes upon him, and that the injury occurs through the negligence of the employees. *Stringham v. Stewart* (1885) 100 N. Y. 516, 3 N. E. 575.

Where the injury to the servant has been occasioned by the default of a fellow servant, concurring with the negligence of the master, the latter is liable as though he only were at fault. *Norfolk & W. R. Co. v. Nuckolls* (1895) 91 Va. 193, 21 S. E. 342.

We are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest, or the positive rules of law require, he is not to be responsible for an injury resulting from such use, because the negligence of one of his servants may have contributed to the result, or because the vigilance of the servant might have prevented the injury. *Cayser v. Taylor* (1857) 10 Gray, 274, 69 Am. Dec. 317.

Contributory negligence of a fellow servant does not preclude recovery for an injury to an employee of which the proximate cause was the failure of the employer to furnish a suitable appliance. *Atchison, T. & S. F. R. Co. v. Lannigan* (1895) 58 Kan. 109, 42 Pac. 343.

A master is not relieved from liability for injury to a servant by the mere fact that the injury was partly caused by the negligence of a fellow servant, if it clearly appears that the accident would not have happened had not the master himself been negligent. *Northern P. R. Co. v. Poirier* (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881.

A master, to be exempt from liability to a servant for negligence of fellow servants, must himself have been free from negligence. *Baltimore & O. R. Co. v. McKensie* (1895) 81 Va. 71.

Where the negligence of the master is an efficient cause of the servant's injury, it is not material how many others are also in fault. *McMahon v. Davidson* (1867) 12 Minn. 357, Gil. 232.

The rule that a servant takes the risk of the service, including the negligence of the co-servants, presupposes that the master has procured proper servants and proper machinery for the conduct of the work; and if the master is negligent in these respects, and injury results to a servant from such neglect, the master is liable, although the immediate negligence is that of the fellow servant. *Craig v. Chicago & A. R. Co.* (1898) 54 Mo. App. 523.

The general principle of which we have here a special application is that "it is no defense in an action for a negligent injury that the negligence of a third person, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was the efficient cause of the injury." *The Joseph B. Thomas* (1897) 81 Fed. 578. In this case it was expressly decided that the rule is the same in the admiralty as it is at the common law. Compare, also, the statement that "one is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence." *St. Louis, I. M. & S. R. Co. v. Needham* (1895) 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823.

Wherever, therefore, the evidence suggests that the injury may have been caused by the negligence of the master, as well as by that of

the delinquent coemployee, the proper course is to submit the question of the master's liability to the jury under proper instructions. *Stringham v. Stewart* (1885) 100 N. Y. 516, 3 N. E. 575. Reversing on this ground (1882) 64 How. Pr. 5.

In *Grand Trunk R. Co. v. Cummings* (1882) 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493, an instruction was upheld which in effect declared that if the negligence of the defendant company contributed to—that is to say, had a share in producing—the injury, the company was liable, even though the negligence of a fellow servant of the plaintiff was contributory also.

It is error to refuse an instruction embodying the principle that the master is liable where his own negligence contributed to the injury of the servant, if the evidence is susceptible of the construction that there was concurrent negligence. *Maupin v. Texas & P. R. Co.* (1900) 40 C. C. A. 284, 99 Fed. 49.

When it is alleged in the declaration that the plaintiff was injured by reason of a defective switch, and one of the defenses was that he was himself in fault in that he was violating the rules of the company by running at higher speed than he was directed to when passing a switch, it is error to charge the jury that if this increased speed was caused by the fault of other employees of the company, they should find for the plaintiff. Such a charge puts the case wholly on the question as to who was at fault for the speed with which the cars approached the switch, and, leaving out of view altogether the other question, whether the master was at fault as to the switch, tells the jury to find for the plaintiff if the increased speed was the fault of other employees than the plaintiff's husband. *Georgia R. & Bkg. Co. v. Oaks* (1874) 52 Ga. 410.

On the other hand, it is not error to refuse an instruction disregarding the rule stated above, where the facts are such that it may render the master liable. *Union Show Case Co. v. Blindauer* (1898) 75 Ill. App. 358; *International & G. N. R. Co. v. Zapp* (1899; Tex. Civ. App.) 49 S. W. 678; *Dodd v. Bell* (1897) 15 App. Div. 258, 44 N. Y. Supp. 198.

Where an accident is partly caused by the fact that an appliance was defective, and partly by the negligence of the plaintiff's fellow servants, an instruction that plaintiff cannot recover for any act of theirs is properly refused. *Ohio & M. R. Co. v. Stein* (1894) 140 Ind. 61, 89 N. E. 246; *Morrissey v. Hughes* (1893) 65 Vt. 553, 27 Atl. 205.

An instruction to the effect that if the excessive speed of the train contributed to cause an accident the plaintiff could not recover is rightly refused where the essential cause of the accident was a defective wheel. *Houston & T. C. R. Co. v. Kelly* (1896; Tex. Civ. App.) 35 S. W. 878.

Where the plaintiff avers that he was injured through the negligence of railroad receivers in failing to maintain a safe track, and adduces evidence in support of his averment, it is not error to refuse an instruction to the effect that he cannot recover "if his injury was caused by the negligence of the engineer." The word "solely" should be inserted before "caused" to make such a charge proper. *Missouri, K. & T. R. Co. v. Woods* (1894; Tex. Civ. App.) 25 S. W. 741.

There is no error in a charge to the effect that the plaintiff, a fireman, is entitled to recover for injuries caused by the derailment of his engine, "if one of the proximate causes of the accident, without which it would not have happened," was the unsafe condition of a wheel or a brake, "notwithstanding the negligence of

the engineer or brakeman may have contributed to the accident." Such a charge does not amount to a direction to find for the plaintiff under the supposed circumstances, "although the negligence of the fellow servants may have caused the injury." *St. Louis & S. F. R. Co. v. McClain* (1891) 80 Tex. 85, 15 S. W. 789.

An instruction that a brakeman injured while coupling could not recover if his injury was caused by the negligence of the engineer, and that no liability attached unless the "defendant alone was negligent," and "its negligence produced the injury," is sufficiently favorable to the defendant. *Wright v. Southern P. R. Co.* (1896) 14 Utah, 383, 46 Pac. 874.

Any complaint is good against demurrer if it alleges facts reasonably susceptible of the construction that the injury was caused by the combined negligence of the master and a fellow servant. *Young v. Shickle, H. & H. Iron Co.* (1890) 103 Mo. 324, 15 S. W. 771 (complaint held sufficient which showed that a platform was not protected by railing—that a fellow servant ran against plaintiff and knocked him off).

A complaint which alleges, in substance, that a following train struck and splintered the car in which the plaintiff, a brakeman, was traveling, and that such car was improperly constructed,—as that it had no doors or windows at the end, or cupola on the top, through which approaching danger could be seen,—is demurrable, since it fails to show in what way the construction of the car, as well as the negligence of the servants on the following train, was an efficient cause of the injury. For aught that appears from the averments, such an accident might have happened if the company had furnished the kind of car suggested by the plaintiff. *Lutz v. Atlantic & P. R. Co.* (1892) 6 N. M. 496, 16 L. R. A. 819, 30 Pac. 912 (two judges dissented).

In order to establish a right to recover upon this theory, the servant must show that the accident would not have occurred unless the master had been negligent. (*Whittaker v. Delaware & H. Canal Co.* [1888] 49 Hun, 400, 3 N. Y. Supp. 576); and the jury should be so instructed. *McCabe v. Brainard* (1897) 17 App. Div. 45, 44 N. Y. Supp. 964.

Any charge the effect of which is to induce in the minds of the jury the belief that if the master was guilty of any negligence whatever he is liable, even though the accident would have occurred without such negligence, is erroneous. *Hall v. Cooperstown & S. V. R. Co.* (1888) 49 Hun, 376, 3 N. Y. Supp. 584. In this case the court sustained an exception to a charge which was substantially to this effect: That if the jury found that there was negligence on the part of the delinquent coemployee, and also negligence on the part of the defendant, then the defendant was liable for the reason that if the injury was the result partially of the negligence of a coemployee, and partially of the omission of the defendant in not taking the necessary or proper precautions to protect the servant, then the negligence of the coemployee would not relieve the defendant.

d. Illustrative cases as to concurrent negligence.

The cases cited below in which the principles explained in the last subdivision were applied, are classified under headings indicative of the nature of the antecedent breach of duty by the master. The character of the fellow servant's delinquency is also stated. Where nothing is said expressly as to the result of the decisions, it is to be understood that the servant was held to be entitled to recover.

1. In respect to an order or other official act of a vice principal by virtue of his rank.

See, generally, note to *O'Neil v. Great Northern R. Co.* (1900: Minn.) 51 L. R. A. 584, as to distinction between official and nonofficial acts.

Negligence of a fellow servant, combined with a negligent order of the employer to produce an injury to an employee, will not relieve the employer from liability. *Lago v. Walsh* (1898) 98 Wis. 348, 74 N. W. 212; *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 37 Ohio St. 549 (by special order of the superintendent, which was unreasonable, a construction train was allowed to stand on the track, and, through the negligence of a flagman sent to give warning of the approach of other trains, was run into to the injury of a trainman).

A conductor's ordering a train to run by a station where a section foreman is waiting to give information of a defective bridge, after knowledge that there are disastrous floods and washouts upon the road, is the proximate cause of the breaking of the train through such bridge, notwithstanding the engineer fails to see a danger signal near the bridge and himself stop the train at the bridge, where the engineer may have inferred, or does infer, that the conductor learned there was no more danger ahead, and no need to stop and inquire. *Union P. R. Co. v. Callaghan* (1898) 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988. The court said: "The negligence of the engineer was not an intervening cause that interrupted or turned aside the natural sequence of events, or prevented the natural and probable effect of the conductor's negligence. It simply failed to interpose the engineer's care to prevent this probable result, and left the natural sequence of events to flow on undisturbed to the fatal effect. It may be true that if the engineer had obeyed the danger signal on the track, or had seen the damage to the bridge, and had stopped the train, the accident would not have happened; but his failure was but the concurring or succeeding negligence of a servant, which permitted the conductor's breach of duty to work out undisturbed the disastrous result of which it was the primary and efficient cause."

A special finding that an injury was caused by the carelessness of a coemployee in assisting the plaintiff to carry out an order involving danger will not justify a court in entering judgment for the defendant in the face of a general verdict for the plaintiff. "It is not the law that if a master wrongfully puts his servant in danger, to co-operate with another servant, that the carelessness of the latter, co-operating with the danger, discharges the master from responsibility." *Gall v. Beckstein* (1896) 66 Ill. App. 478.

As a conductor has full control of his train, and is able to stop it if the engineer undertakes to run past a certain station in violation of the time-card rules, a collision which results from such negligence is deemed to be in part attributable to the conductor's breach of duty. *Illinois C. R. Co. v. Spence* (1893) 93 Tenn. 173, 28 S. W. 211.

A railroad company is liable for an injury to an engine hostler caused by the negligence of the yard master in sending him forward with the engine on a track upon which he has thrown some box cars in charge of a brakeman, although the negligence of such brakeman in bringing the cars too close to a switch on which such hostler is directed to take his engine contributes to the injury. *Norfolk & W. R. Co. v. Phelps* (1894) 90 Va. 665, 19 S. E. 652.

A railroad company is not liable for injuries sustained by a brakeman ordered by his superior to make a coupling, if the accident was occasioned by the negligence of the engineer or fire-

man in failing to heed signals; but if their negligence concurred with that of the superior, who had promised to stop the car in time to avoid harm to the brakeman, then the company is liable. *Louisiana Extension R. Co. v. Carstens* (1898) 19 Tex. Civ. App. 190, 47 S. W. 36.

An employee ruptured while attempting to support one end of a switch point being unloaded from a car may recover therefor, although the negligence of fellow servants in lifting too quickly contributed thereto, when the negligence of the foreman (a vice principal under the statute), who failed to give assistance as he had been doing, was a concurrent cause of the injury. *Missouri, K. & T. R. Co. v. Hannig* (1899) 20 Tex. Civ. App. 649, 49 S. W. 116.

See also *Augusta v. Owens* (1900) 111 Ga. 464, 86 S. E. 830 (superintendent negligently ordered plaintiff's fellow servant to do certain work, and the injury was caused immediately by the negligence of that fellow servant); *Davidson v. Cornell* (1890) 31 N. Y. S. R. 982, 10 N. Y. Supp. 521, *Reversed* in (1892) 132 N. Y. 228, 80 N. E. 573, but not on this point (unsafe method of constructing scaffold prescribed—work negligently carried out by servants); *Norris v. Illinois C. R. Co.* (1900) 88 Ill. App. 614 (negligent order of a vice principal co-operated with a nonofficial act—failure to put out a signal light to warn incoming trains that track was obstructed); *Houston & T. C. R. Co. v. White* (1900) 23 Tex. Civ. App. 280, 56 S. W. 204 (foreman of switching crew a vice principal under Texas statute—signaled to pull a derailed car in the direction of plaintiff—negligence was that of a switchman).

2. In regard to the nonperformance of a statutory duty.

The following extract from the opinion in *Cayser v. Taylor* (1857) 10 Gray, 274, 69 Am. Dec. 817, is self-explanatory: "The very object and purpose of a safeguard like the fusible plug are protection against the occasional carelessness and negligence of the engineer. It is intended to be in some degree a substitute for his vigilance—to keep watch if he nods. To say that the master should not be responsible for an injury which would not have happened had a safeguard required by law been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it." See also *Morris v. Stanfield* (1898) 81 Ill. App. 264 (boy employed under the statutory age was pulled by a fellow servant into the position where he was injured).

3. In respect to a defective roadbed on railways.

Franklin v. Winona & St. P. R. Co. (1887) 37 Minn. 409, 34 N. W. 898 (negligence of railway company in not covering an open culvert where couplings had to be made concurred with negligence of conductor in requiring coupling to be made at that place); *Gulf, C. & S. F. R. Co. v. Pettis* (1888) 69 Tex. 689, 7 S. W. 93 (railroad company not excused for its breach of duty in allowing rotten ties to remain in its track by the fact that the trackmen were negligent in failing to notify it in time to avert an accident from the defect. It seems to have been assumed, though the point was not discussed, that the company had constructive knowledge of the defects); *Missouri, K. & T. R. Co. v. Woods* (1894; Tex. Civ. App.) 25 S. W. 741 (defective roadbed—disregard of signals by engineer); *Houston & T. C. R. Co. v. Kelly* (1896; Tex. Civ. App.) 35 S. W. 878 (derailment due to defective wheel and track combined with

fast running of train); *Trinity & S. R. Co. v. Brown* (1898) 46 S. W. 926 (sand allowed to accumulate on the track—train run at a reckless rate of speed); *Clyde v. Richmond & D. R. Co.* (1894) 59 Fed. 394 (defective rail—undue speed of train); *Smith v. Memphis & L. R. Co.* (1883) 18 Fed. 304 (similar facts); *Stetler v. Chicago & N. W. R. Co.* (1879) 46 Wis. 497, 1 N. W. 112 (1880) 49 Wis. 609, 6 N. W. 303 (similar facts); *Morrisey v. Hughes* (1893) 65 Vt. 563, 27 Atl. 205 (blocking of rails at the top of an incline was defective—truck running on those rails was run negligently).

A railroad company is liable for injuries to a brakeman while performing his duty of keeping a passenger off the step, by being struck by a train upon another track at a curve where the tracks were too close together for the safe passage of trains, although the engineer of one of the trains was negligent in undertaking to pass at that point. *Mulvaney v. Brooklyn City R. Co.* (1892) 1 Misc. 425, 21 N. Y. Supp. 427.

In *Torlian v. Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339, a section master was regarded as vice principal in respect to the repair of the track and as a mere servant in respect to signaling trains to slacken speed where the repairs were going on. This is the theory of the cases as explained in *Norfolk & W. R. Co. v. Nuckolls* (1895) 91 Va. 195, 21 S. E. 342.

4. In respect to defective switches.

St. Louis, I. M. & S. R. Co. v. Needham (1895) 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823 (injury caused by neglect of a railroad company to maintain a target upon a switch negligently left open by fellow servants); *Bennett v. Long Island R. Co.* (1897) 21 App. Div. 25, 47 N. Y. Supp. 258 (train operated at excessive speed was run into an open switch not provided with a target); *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342 (fellow servant allowed car to run onto siding through a defective switch and hurt a car repairer who had not received any warning as to the risks arising from the condition of the switch); *Georgia R. & Bkg. Co. v. Oaks* (1874) 52 Ga. 410 (defective switch—negligent management of train); *Chicago & A. R. Co. v. House* (1898) 172 Ill. 601, 50 N. E. 151, Affirming (1896) 71 Ill. App. 147 (switch not provided with signal light was left open by coservant, and run into by train moving at an unlawful rate of speed); *Ellingson v. Chicago & A. R. Co.* (1895) 80 Mo. App. 679 (switch light was not provided—negligence of brakeman in misplacing switch and signaling for train to come on caused collision); *Monmouth Min. & Mfg. Co. v. Erling* (1892) 45 Ill. App. 411 (brakeman injured by the want of a lamp on a switchstand—engineer knew of defect, but failed to impart his knowledge to the plaintiff).

5. In respect to dangerous objects close to railway tracks.

Howe v. St. Clair (1894) 8 Tex. Civ. App. 101, 27 S. W. 800 (dangerous objects not removed—train negligently operated); *North Chicago Street R. Co. v. Dudgeon* (1899) 83 Ill. App. 528, Affirmed in (1900) 184 Ill. 477, 56 N. E. 796 (pile of stones left near track—gripman started car before plaintiff had got a proper footing thereon).

The fact that a track walker has failed to do his duty in giving notice of a possible danger to trains from the falling of a rock near the track will not excuse the company if it does actually fall. The company being bound to remove such a danger, a breach of its duty in this respect is not to be condoned because the servant de-

puted to look out for the danger has also failed in his duty. *Bean v. Western N. C. R. Co.* (1890) 107 N. C. 731, 12 S. E. 600. Compare last case cited in preceding subdivision, and *Gulf, C. & S. F. R. Co. v. Pettis* (1888) 69 Tex. 689, 7 S. W. 93, VIII. d, 2, *supra*.

6. In respect to defective bridges.

Elmer v. Locke (1883) 135 Mass. 575 (defective trestle gave way under train allowed to escape from control); *Carney v. Caragnet R. Co.* (1890) 29 N. B. 425 (roadmaster ordering train to be taken over a defective bridge).

7. In respect to the improper making up of trains.

Moon v. Richmond & A. R. Co. (1884) 78 Va. 745, 49 Am. Rep. 401 (train run at undue speed). This is the theory of the cases as explained in *Norfolk & W. R. Co. v. Nuckolls* (1895) 91 Va. 195, 21 S. E. 342. But the making up of trains is, by most of the authorities, deemed to be a mere detail of the work. See *V. o, 1, supra*.

8. In respect to the want of proper lighting of the place of work.

Irmer v. St. Louis Brewing Co. (1897) 69 Mo. App. 17 (no proper arrangements for lighting a passageway—the result being that the plaintiff fell through a trap door left open by a fellow servant, which he might have discovered but for the obscurity); *Swift & Co. v. O'Neill* (1899) 88 Ill. App. 162, Affirmed (1900) 187 Ill. 837, 58 N. E. 416 (plaintiff run down by a truck in an imperfectly lighted alley).

9. In respect to uncovered machinery.

Pullman's Palace Car Co. v. Harkins (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932 (fellow servant ordered plaintiff to work near an unguarded shaft).

10. In respect to defective scaffolds.

Drommie v. Hogan (1891) 153 Mass. 29, 26 N. E. 237 (dropping of stone subjected a defective staging to an increased strain); *Cole v. Warren Mfg. Co.* (1899) 63 N. J. L. 626, 44 Atl. 647 (coservant lowered himself down onto a defective scaffold, which gave way); *Bannon v. Sanden* (1896) 68 Ill. App. 164 (failure of master to discover defect in scaffold concurred with negligence of fellow servant in throwing down a load of stones on it in such a violent manner as to make it fall).

11. In respect to other abnormal dangers of the place of work.

Deweese v. Meramec Iron Min. Co. (1895) 128 Mo. 423, 31 S. W. 110 (plaintiff set to work in a place where stones were constantly falling—fellow servant failed to keep watch for them); *Hancock v. Keene* (1892) 5 Ind. App. 408, 32 N. E. 329 (coemployee's negligence in blasting caused injury to plaintiff required to work in an unsafe tunnel); *Crowell v. Thomas* (1895) 90 Hun, 193, 35 N. Y. Supp. 936 (explosion occurred where steam was incautiously let into a barrel used for heating water, the vent of which by the negligence of the defendant's manager had been left plugged); *Tetherton v. United States Talc Co.* (1899) 41 App. Div. 613, 58 N. Y. Supp. 55 (dangerous pillar brought down in a mine by an excessive blast put in by a coservant); *Lauter v. Duckworth* (1898) 19 Ind. App. 335, 48 N. E. 864 (steam negligently admitted into defective waste pipe); *Bagley v. Consolidated Gas Co.* (1895) 13 Misc. 6, 84 N. Y. Supp. 187 (negligence of foreman allowed a tank to move unsteadily while it was being

hoisted, the consequence being that it dislodged some planks from a scaffold and they fell on plaintiff—superincumbency of the plank held to be a concurring cause of the accident); *Psepka v. American Glucose Co.* (1895) 11 Misc. 131, 31 N. Y. Supp. 1019 (defective insulation of electric wires caused a fire—fellow servants were negligent in failing to put it out).

The continued flow of burning oil, which would have been at once checked except for the master's negligent failure to provide the usual facilities for cutting off the supply, is the proximate cause which will render him liable in case of injury resulting therefrom to a servant, although this would not have happened if a fellow servant had not also been negligent in failing to cut off the supply by the use of the less adequate facilities that did exist. *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285.

A master must respond in damages for an injury caused by a heavy object which was allowed to fall on the plaintiff by a coservant, where the plaintiff was set at work in a place where there was danger of the fall of such objects. *The Magdaline* (1898) 91 Fed. 798.

12. In respect to defective railway cars.

New Jersey & N. Y. R. Co. v. Yeung (1892) 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723, Affirming (1891) 46 Fed. 160 (car run at improper speed could not be stopped in time to avoid a collision owing to its brakes being defective); *Lilly v. New York C. & H. R. Co.* (1887) 107 N. Y. 566, 14 N. E. 508 (coservants negligently ran cars against a stationary one and so caused an injury which would not have been received if the stationary car had not moved a considerable distance on account of its brake being defective); *St. Louis & S. F. R. Co. v. McClain* (1891) 80 Tex. 85, 15 S. W. 789 (train with a defective wheel was run down a grade too fast); *Houston & T. C. R. Co. v. Kelly* (1896); *Tex. Civ. App.* 85 S. W. 878 (car with defective wheel run too fast); *Ransler v. Minneapolis & St. L. R. Co.* (1884) 32 Minn. 331, 20 N. W. 332 (use of defective brake by brakeman after discovering its condition caused a collision between sections of train which had separated on a descending grade); *Hollingsworth v. Long Island R. Co.* (1895) 91 Hun, 641, 36 N. Y. Supp. 1126 (car with defective brake negligently managed); *Missouri, K. & T. R. Co. v. Rains* (1897); *Tex. Civ. App.* 40 S. W. 635 (servants negligently set cars with defective brakes in motion on an excessively steep grade); *International & G. N. R. Co. v. Sipole* (1898); *Tex. Civ. App.* 29 S. W. 686 (injury caused partly by want of handhold and partly by leaving cars so close to the end or siding as to be dangerous to men on trains on the main track); *Southern P. R. Co. v. Leash* (1893) 2 Tex. Civ. App. 68, 21 S. W. 563 (plaintiff working as fireman of pile-driver engine was thrown off by a jolt received from a moving car, because there was nothing to hold onto when the shock came).

Failure to furnish suitable appliances for coupling cars, although the negligence of a fellow servant also contributes to produce the injury. *Norfolk & W. R. Co. v. Ampey* (1896) 93 Va. 108, 25 S. E. 226 (injury to brakeman caused both by defective couplings and by excessive speed with which cars were brought together); *Gulf, C. & S. F. R. Co. v. Kiziah* (1898) 86 Tex. 81, 28 S. W. 578, Reversing 4 Tex. Civ. App. 362, 22 S. W. 110, 26 S. W. 242 (defect in air brakes which allowed cars to start on a grade and roll against the car which plaintiff was repairing, combined with negligence of another car repairer or a brakeman in failing to secure the cars by hand brakes); *Donohue v. Brooklyn City R. Co.* (1891) 38 N. Y. 54 L. R. A.

X. S. R. 485, 14 N. Y. Supp. 639 (injury caused to coupler partly by defective buffers, and partly by backing of engine with undue speed).

An employee may recover for injuries sustained, notwithstanding the contributory negligence of a coemployee, if the negligence of the employer contributed to the injury. *International & G. N. R. Co. v. Bonats* (1898); *Tex. Civ. App.* 48 S. W. 767 (defective couplings—engine negligently backed); *International & G. N. R. Co. v. Zapp* (1899); *Tex. Civ. App.* 49 S. W. 673 (defective bumper beam—cars negligently managed); *Ellis v. New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546 (brakeman, trying to escape from an impending rear collision with a following train, might have succeeded if the buffers between his own and the next preceding car had not been so defective as to allow the cars to come together and crush him when the collision occurred; case held to be for jury); *McMahon v. Henning* (1880) 1 McCrary, 516, 3 Fed. 353 (cars with defective bumpers were run together with dangerous speed); *Delude v. St. Paul City R. Co.* (1893) 55 Minn. 63, 56 N. W. 461 (similar facts); *Chicago & N. W. R. Co. v. Gillison* (1898) 173 Ill. 264, 50 N. E. 657, Affirming (1887) 72 Ill. App. 207 (accident caused partly by mismanagement of engineer in stopping the forward section of a train after it had separated owing to defects in a draw-bar); *Galveston, H. & S. A. R. Co. v. Sweeney* (1896) 14 Tex. Civ. App. 216, 36 S. W. 800 (similar facts); *Richmond & D. R. Co. v. George* (1891) 88 Va. 223, 13 S. E. 429 (coupling was defective—engineer backed without a signal); *Terre Haute & I. R. Co. v. Mansberger* (1895) 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 196 (accident due partly to a defective coupling pin, and partly to the negligence of an engineer in backing cars down grade too rapidly); *Towns v. Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 630 (use of cars of such unequal height as to render their buffers useless concurred with negligence of engineer in backing cars for coupling, at an improper speed); *Browning v. Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, Affirmed in 27 S. W. 644 (vice principal allowed brake staffs to be removed, and left cars heavily loaded near the top of a heavy grade—negligence of fellow servant consisted in not seeing that the cars were all coupled before backing the engine against them, and in throwing the switch so that they ran onto the main line).

In *Louisville, N. A. & C. R. Co. v. Berkey* (1894) 136 Ind. 181, 35 N. E. 3, it was laid down that the negligence of a coemployee in failing to inspect the couplings on a train will not relieve a railroad company from liability for the death of a brakeman due to defective couplings, whose unfitness was known to the company, or could have been known with reasonable diligence. The opinion relies, without any clear differentiation, both upon the doctrine as to concurrent negligence, and upon the rule that the employee performing the duty of inspection is a vice principal.

13. In respect to defective locomotives.

Where a locomotive, the valves of which have been leaking for several months, to the knowledge both of the company's superintendent and of the engineer, is left unattended by the latter without his taking certain precautions which would, as he knew, have prevented the escape of steam into the cylinder, the company is liable for injuries received by a car repairer as a result of the locomotive being set in motion by such an escape of steam. *Cone v. Delaware, L. & W. R. Co.* (1880) 81 N. Y. 206, 37 Am. Rep. 491, Affirming (1878) 15 Hun, 172.

Where the plaintiff, while cleaning the ash pan of an engine, was injured through its sudden starting by reason of a leaking throttle, the mere fact that the accident would not have happened if a coservant had performed his duty of blocking the wheels will not prevent a recovery. *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149. See also *San Antonio & A. P. R. Co. v. Harding* (1896) 11 Tex. Civ. App. 497, 38 S. W. 373 (railroad company held to be liable for the death of an engineer caused in part by its negligence in failing to keep the headlight of the switch engine in good condition, so that its position on the track might be seen from an approaching train, although the yard hands may have been negligent in letting it stand upon the track); *Fowler v. Chicago & N. W. R. Co.* (1884) 61 Wis. 159, 21 N. W. 40 (accident caused partly by mismatched couplings and partly by negligence of engineer); *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. d12 (negligence of railway company in furnishing defective engine concurred with negligence of coservants in sending it out on the road); *Ohio & M. R. Co. v. Stein* (1894) 140 Ind. 61, 39 N. E. 246 (collision caused partly by defective condition of an engine and partly by mismanagement of the train); *Crutchfield v. Richmond & D. R. Co.* (1877) 76 N. C. 320 (negligence of master in having a defective engine concurred with that of the engineer in using it); *Louisville & N. R. Co. v. Kenley* (1893) 92 Tenn. 207, 21 S. W. 326 (cars of train suddenly jammed together by engineer without warning when brakeman was in the act of putting his foot upon a defective foot-rest).

The liability of a railway company should be submitted to the jury where an employee, while engaged in the performance of his duties, is injured by a rear collision, partly owing to the neglect of a fellow servant to place a tall light on the cars, and partly to the defective condition of the locomotive, which disturbed the time arrangements and rendered the shock of the collision when it came more severe. *Chandler v. Melbourne & H. B. R. Co.* (1871) 2 Vict. L. Rep. 71.

14. In respect to defective hand cars.

Northern P. R. Co. v. Charless (1896) 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848, *Affirming* (1892) 2 C. C. A. 350, 7 U. S. App. 359, 51 Fed. 562 (hand car with defective brake run at excessive speed—liability conceded, *arguendo*, supposing this combination of facts to be established); *Maupin v. Texas & P. R. Co.* (1900) 40 C. C. A. 234, 99 Fed. 49 (same facts); *International & G. N. R. Co. v. Williams* (1896; Tex. Civ. App.) 34 S. W. 161, (same facts); *Cowan v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 284, 50 N. W. 180 (section foreman was negligent in running hand car with a defective brake past a switch after hearing warning signals).

15. In regard to defective machinery of other kinds.

Dixon v. Pittsburg & G. Lumber Co. (1900) 52 La. Ann. 1109, 27 So. 654; *Mexican C. R. Co. v. Murray* (1900) 42 C. C. A. 334, 102 Fed. 264 (breaking of defective hoisting machinery was followed by contributory negligence of coservant); *Anderson v. The Ashebrooke* (1890) 44 Fed. 124 (fellow servants continued to operate defective tackling with knowledge of its condition); *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, 36 N. E. 117 (negligence in operating defective machinery for the proper repair of which the master had not supplied proper materials); *Atchison, T. & S. F. R. Co. v. Lannigan* (1896) 56 Kan. 109, 42 Pac. 343 54 L. R. A.

(brakeman injured while coupling, partly owing to his lantern furnishing insufficient light, and partly through the negligence of the engineer in bringing the cars together with excessive speed); *Myers v. Hudson Iron Co.* (1889) 150 Mass. 125, 22 N. E. 631 (engineer negligent in operating hoisting apparatus of which brake was defective); *Craig v. Chicago & A. R. Co.* (1893) 54 Mo. App. 523 (assurance of safety by fellow servant, machinery being inadequate for work to be done); *Stringham v. Stewart* (1885) 100 N. Y. 516, 3 N. E. 575 (defective elevator); *McCabe v. Brainard* (1897) 17 App. Div. 45, 44 N. Y. Supp. 964 (defect in step of wagon negligently driven); *Auld v. Manhattan L. Ins. Co.* (1898) 34 App. Div. 491, 54 N. Y. Supp. 222 (dangerous kind of door in elevator cage was negligently closed by operator and caught plaintiff); *Larkin v. Washington Mills Co.* (1899) 45 App. Div. 6, 61 N. Y. Supp. 93 (injury partly caused by the negligence of some third person in moving an elevator, and partly by defects in the elevator gate); *Strauss v. Haberman Mfg. Co.* (1898) 25 App. Div. 623, 48 N. Y. Supp. 1116 (defective part of press, being left untied by the foreman, fell on the plaintiff); *Kern v. De Castro & D. Sugar Ref. Co.* (1889) 24 N. Y. S. R. 748, 5 N. Y. Supp. 548 (failure to equip elevator with proper safety appliances, combined with negligence of engineer in pushing it off when it had caught); *Missouri, K. & T. R. Co. v. Ferch* (1898) 18 Tex. Civ. App. 46, 44 S. W. 817 (pile driver not properly inspected was operated with a leaky valve); *Williams v. New York, L. E. & W. R. Co.* (1892) 2 Misc. 30, 21 N. Y. Supp. 259 (coservant selected a defective tool from among a stock which comprised a good many which were known by the master to be defective); *Kaiser v. Flaccus* (1890) 138 Pa. 332, 22 Atl. 88 (shaft ran so loosely that the belt fell off and struck plaintiff—engineer was also negligent); *Dodd v. Bell* (1897) 15 App. Div. 258, 44 N. Y. Supp. 198 (defendant liable for injury caused by defective pulley on which belt ran, though coemployee may have been negligent in ordering plaintiff to work where such defect exposed him to danger); *Sherman v. Menominee River Lumber Co.* (1888) 72 Wis. 122, 1 L. R. A. 173, 30 N. W. 365 (edger-saw out of repair—feeder of machine careless in attempting to remove the plank which caused the injury).

16. In respect to the employment of suitable servants.

The negligence of a railway company in putting the delinquent servant in the position of extra man, who might be selected by the conductor to fill a vacancy, and not the negligence, if any, of the conductor in assigning him work, is the primary cause of an accident which results from his unfitness. *Mann v. Delaware & H. Canal Co.* (1883) 91 N. Y. 495 (negligence of the conductor said to be secondary and co-operative merely). See also *Coppins v. New York C. & H. R. Co.* (1888) 48 Hun. 298 (derailment due partly to switch being left open by switchman known to be careless in the performance of his work, and partly to negligence of engineer).

There is also considerable authority for bringing within the scope of the rule under discussion the cases in which the negligence shown is that of the incumbent servant himself. *Galveston, H. & S. A. R. Co. v. Arispe* (1891) 81 Tex. 517, 17 S. W. 47; *Handley v. Daly Min. Co.* (1897) 15 Utah, 176, 49 Pac. 295; *Craig v. Chicago & A. R. Co.* (1893) 54 Mo. App. 523; *O'Laughlin v. New York C. & H. R. Co.* (1887) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384 (incompetent engineer selected to run a disabled engine "wild-cat"); *Crew v. St. Louis, K.*

& N. W. R. Co. (1884) 20 Fed. 87 (negligence of master as regards hiring of servants and framing of rules concurred with the negligence of servants in operating train); Terrell v. Russell (1897) 16 Tex. Civ. App. 573, 42 S. W. 129 (negligent management of engine by incompetent engineer); Killien v. Hyde (1894) 63 Fed. 172 (injury caused by the negligence of the master in putting a deck hand at the wheel of a tug, the consequence being that his negligence caused a collision).

Logically speaking, this is not an impossible view; but it seems preferable to regard such an infringement of duty as being rather the sole efficient cause of the injury in the same sense as similar negligence in respect to the provision and maintenance of the inanimate agencies of work. This is the theory in a case where it was held that a brakeman may recover for injuries caused by the giving way of a defective brake wheel, the result being that he was thrown off the car, where the fall was due to the oscillation produced by the sudden application of the brake while the train was being run at an excessive rate of speed, by an engineer whom the company could have known to be reckless and of intemperate habits if it had instituted proper inquiries. Illinois C. R. Co. v. Jewell (1887) 46 Ill. 99, 92 Am. Dec. 240.

17. In respect to the failure to employ an adequate number of servants.

The negligence of an engineer in starting a train at the station where it is made up without seeing, as he is required by the rules to do, that the brakeman assigned to it, or a sufficient number, are aboard, will not absolve the company from the liability predicated upon its duty to see that the train does not start with an insufficient crew. Booth v. Boston & A. R. Co. (1878) 73 N. Y. 38, 29 Am. Rep. 97.

The fact that the employee who threw a bale into the hold of a ship was negligent in doing so when no hatch tender was there, without himself warning those in the hold, will not defeat the plaintiff's right to recover, if the defendant was negligent in failing to supply a hatch tender. Cheney v. Ocean S. S. Co. (1893) 92 Ga. 732, 19 S. E. 33. See also Swift & Co. v. Rutkowski (1898) 82 Ill. App. 108 (negligence of coservant in handling machinery concurred with negligence in failing to employ a sufficient number of servants); Craig v. Chicago & A. R. Co. (1893) 54 Mo. App. 523 (assurance of safety by fellow servant, where there were an insufficient number of men); Sincere v. Union Compress & Warehouse Co. (1897; Tex. Civ. App.) 40 S. W. 326 (insufficient number of men furnished to handle bales of cotton, one of which was allowed to fall on plaintiff while it was being hoisted); Wright v. Southern P. Co. (1896) 14 Utah, 383, 46 Pac. 374 (engineer operating a defective engine, upon which, though it required an unusual amount of attention to control its movements, the company had placed no fireman who could observe the signals of a brakeman engaged in coupling).

18. In respect to a defective system.

A railway employee's right of action for injuries caused by the running of a train at an illegal rate of speed is not defeated because he and those in charge of the train were fellow servants, where the train was run pursuant to a time card promulgated by the company employing him. Bluehorn v. Missouri P. R. Co. (1891) 108 Mo. 439, 18 S. W. 1103. See also Warn v. New York C. & H. R. R. Co. (1894) 80 Hun, 71, 29 N. Y. Supp. 397; Paulmier v. Erie R. Co. (1870) 34 N. J. L. 151 (injury caused partly by arrangements requiring trains to be run frequently to a point where a trestle too weak to support a locomotive began, and partly by the negligence of the engineer in disobeying orders not to take his engine beyond that point); Luebke v. Chicago, M. & St. P. R. Co. (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870 (want of proper system for protection of car repairer, concurring with negligence of foreman in setting plaintiff to work without seeing that he was protected); Faren v. Sellers (1887) 39 La. Ann. 1011, 3 So. 363 (negligence of coservant in carrying out a faulty method of taking down a building); Pool v. Southern P. Co. (1899) 20 Utah, 210, 58 Pac. 326 (no proper system for protecting car repairers—engineer negligently backed a car against one under repair).

19. *In respect to seeing that regulations are duly carried out.*

The master is liable where the injury complained of was caused partly by a coservant's disregard of rules, and partly by the negligence of the master himself, or of some employee for whose omissions of duty he is responsible. Louisville, N. A. & C. R. Co. v. Heck (1898) 151 Ind. 292, 50 N. E. 988 (collision due partly to the train despatcher's neglect of rules and partly to a coservant's disobedience of other rules). See also Northern P. R. Co. v. Poirier (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881 (collision caused by negligence of train despatcher and conductor of following train); Cincinnati, N. O. & T. P. R. Co. v. Clark (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125 (negligence of train despatcher in moving trains—negligence of engineer and conductor in running train too fast); Cincinnati, I. St. L. & C. R. Co. v. Lang (1889) 118 Ind. 679, 21 N. E. 317 (section hand killed by the negligence of those in charge of a "wild" train, of the danger of meeting which he had not been notified in any way when he received the special order, under which he was traveling on a hand car along the track when he met the train); Hunn v. Michigan C. R. Co. (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502 (negligence of train despatcher in failing to hold a train concurred with that of trainmen in running the train at undue speed); Texas & P. R. Co. v. Eberheart (1897; Tex. Civ. App.) 40 S. W. 1060, Affirmed in (1897) 91 Tex. 321, 43 S. W. 510 (negligence in regard to the enforcement of rules with regard to the protection of car repairers concurred with negligence of fellow servants in sending a moving car on the repair track).

20. In respect to the failure to notify as to abnormal dangers.

A superintendent who orders a trestle work above a dock to be torn down while men are at work under it, without notifying such men or their foremen that it is to be done, is guilty of negligence which will render the employer liable for injuries to one of such workmen from the tearing down of such trestle, notwithstanding the concurrent negligence of the foreman. Northwestern Fuel Co. v. Danielson (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915.

An engineer injured by the derailing of his train caused by a partly open switch may recover, notwithstanding the switch was unlocked either by a trespasser or a negligent fellow servant, where the negligence of the company in opening the switch for use after it had been abandoned for a long time, without any lights to warn the engineer of its presence or danger, was a concurrent cause of the accident. Town v. Michigan C. R. Co. (1890) 84 Mich. 214, 47 N. W. 685. "It is contended," said the court, "that the plaintiff cannot recover because the

absence of the lights was not the proximate cause of the accident; that if the switch had been locked the train would have passed safely by as it was, without any lights; and that the opening or unlocking of the switch was caused either by the intermeddling of some stranger or trespasser, or by the negligence of fellow servants of the plaintiff; that he could not recover in either event. But I do not so understand it. If the plaintiff's theory be true, the lights would have prevented any accident in the condition in which the switch was, as they would have warned the plaintiff in time to avoid the danger; so the negligence of the defendant in opening this closed switch for use, without any lights to warn plaintiff of the presence of the switch or its danger, was just as much the proximate cause of the injury as was the turning of the switch rails. And it certainly was a concurrent cause, and the injury in any event, under the plaintiff's theory and evidence, was occasioned partly through the negligence of the defendant as to the switch lights, and partly by the condition of the switch rails, in which case the defendant would be liable." See also *Jones v. Florence Min. Co.* (1886) 66 Wis. 268, 28 N. W. 207 (failure to instruct miner as to dangers of underground work in a mine. Carelessness of fellow servants in blasting injured such miner).

Other decisions recognising the doctrine are the following: *Young v. New Jersey & N. Y. R. Co.* (1891) 46 Fed. 160; *Flak v. Central P. R. Co.* (1887) 72 Cal. 38, 13 Pac. 144; *Boyce v. Fitzpatrick* (1881) 80 Ind. 526; *Griffin v. Boston & A. R. Co.* (1889) 148 Mass. 143, 1 L. R. A. 698, 19 N. E. 166; *Hogue v. Silgo Furnace Co.* (1895) 62 Mo. App. 491; *Flanigan v. Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762; *Ellis v. New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546; *Harvey v. New York C. & H. R. Co.* (1890) 32 N. Y. S. R. 817, 10 N. Y. Supp. 645; *Shields v. Robins* (1896) 3 App. Div. 582, 88 N. Y. Supp. 214; *Hollingsworth v. Long Island R. Co.* (1895) 91 Hun, 641, 36 N. Y. Supp. 1126; *Gulf, C. & S. F. R. Co. v. Johnson* (1892) 83 Tex. 629, 19 S. W. 151; *Gulf, C. & S. F. R. Co. v. Warner* (1896; Tex. Civ. App.) 86 S. W. 118.

a. Master's liability determined with reference to the question whether the servant's delinquency did or did not break the chain of causation.

In many instances where facts resembling those presented in the citations under the preceding subdivision are involved, the liability of the master has been considered, not with reference to the question whether the negligence of the master or his representative was a concurrent or co-operative cause of the injury, but with reference to the question whether the fellow servant's negligence was or was not an intervening agency in such a sense as to break the chain of causation between the negligence of the master himself and the injury. The decisions which appear to have been rendered from this standpoint are collected below.

1. No break in the chain of causation.

If there is no break in the chain of causation the master is held to be responsible. Here it is plainly immaterial whether we refer the conclusion to the theory of concurrent causes, or to the theory of a primary cause regarded as being legally connected with the injury in spite of a subsequent act of negligence on the part of a co-servant.

In *Ellis v. New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546, where the want of a buffer caused an injury to a brakeman while he was

trying to escape from a caboose when a collision was impending, the court, in holding the dismissal of the complaint to be erroneous, reasoned thus: "It was the duty of the defendant [a railway company] to provide a car properly fitted, not only with running apparatus, as wheels, stopping apparatus, as a brake, but with buffers of some kind to protect the car and its servants necessarily or lawfully thereon from the effect of a collision. Ordinary and usual care in the equipment and running of a road requires this last appliance, or some equivalent contrivance, as much as it does either of the others. There was in effect no buffer, nor anything to take its place, on the car upon which the intestate was employed. Upon the evidence it may be said that its absence was the proximate cause of the injury. It was literally the *causa causans*. The immediate effect of its absence was to put the car in such condition that in case of collision at the rear its body must inevitably be impelled against the preceding car with a force to which it could offer no resistance. The death of the decedent was therefore caused by the omission of the defendant to place buffers where they belonged. For any useful or usual purpose the ones in question might as well have been placed on the top or at the side of the car as where they were."

The causal connection between the negligence of a road master in removing the brake rods of several cars and leaving them heavily loaded with rails upon an inclined side track where they are liable to be struck by other cars and set in motion is not interrupted by the act of a conductor who, desiring to avert a derailment of the cars, opens a switch and allows them to get on the main line, where they come into collision with a train. *Browning v. Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, Affirmed in 27 S. W. 644.

In an action by a railroad brakeman against the company for injuries from coming in contact with the chain of a derrick allowed to swing across the track, proof that, upon the completion of the derrick, the mechanic who constructed it, and whose authority or relation to the company is not further shown, explained to the station agent, and others who expected to use it, the manner of its working and of fastening it when not in use, is not conclusive that the derrick was thereby placed by the company in the care of the station agent, so as to relieve the company from liability on the ground that the injury was caused by the negligence of a fellow servant. *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907. See also *Finley v. Richmond & D. R. Co.* (1893) 59 Fed. 419 (defects in engine brake and reversing lever caused injury to brakeman while coupling; the engineer might have controlled the movements of his engine by means of the tender brake, but was held to be justified in acting on the assumption that by using caution he might make the defective appliances work properly).

A master is liable for an injury sustained by an employee because of the incompetence of a foreman, who negligently directed machinery to be set in motion, although the accident was due to the direct act of a workman who started the machinery in obedience to the foreman's command. *O'Donnell v. American Sugar Ref. Co.* (1899) 41 App. Div. 307, 58 N. Y. Supp. 640.

The act of an engineer (in a state where the railway company is responsible for his negligence), who left an engine in a dangerous position in charge of an inexperienced fireman, may justifiably be found by a jury to be the proximate cause, both of an act of the fireman in putting the engine in motion and of an injury to a conductor who was thrown off while endeavoring to stop the train. *Mexican Nat. R. Co. v.*

Musette (1893) 7 Tex. Civ. App. 169, 24 S. W. 520, Affirmed in (1894) 86 Tex. 708, 24 L. R. A. 642, 26 S. W. 1075.

Placing heavy iron beams near an open hole in the floor, and leaving them there for two or three days in such a position that, on being pushed by a person desiring to pass, one of them toppled over and fell into the hole, is such evidence of negligence on the part of the master as will sustain a verdict in favor of a servant who was injured by the falling beam. *McCauley v. Norcross* (1892) 155 Mass. 584, 80 N. E. 464. The court said: "If the beams were so left that one of them would be liable, as a natural consequence, from some intervening cause or agency, to be so moved that it might fall through the floor, the fact that an intervening act or agency occurred which directly produced the injurious result would not necessarily exonerate the defendants from responsibility. Superintendence is necessary in order to guard against injuries from such intervening and inadvertent acts of careless persons as are likely to happen and ought to be guarded against. The question is whether the moving of a beam was so likely to occur that it ought to have been provided against by the superintendent. It might be found that the beams were negligently left near the hole in the floor, where they were likely or liable to be toppled over so that one of them might fall through the hole, and thus injure someone below, and that this was the proximate cause of the plaintiff's injury, although some careless person came along and toppled them over."

Where a switchman, while running to a switch, was run over by cars making a "flying switch" on a dark night, and the evidence is that only one of them was provided with a brake in good working order, that there was no light on the front car, and that the company had promulgated no rules regarding "flying switches," the inference is that the company's omissions of duty in these respects, and not the negligence of the trainmen, were the proximate cause of the accident. *Chicago & N. W. R. Co. v. Taylor* (1878) 69 Ill. 469 (holding that the doctrine of common employment was not applicable to the facts).

Where an inexperienced workman, who attempts, in obedience to orders, to start an engine which has caught upon the centre by prying it off with an iron bar, is injured by the engine starting quickly under great pressure of steam, catching him on the bar and throwing him into the gearing, the proximate cause of the injury is his obedience to the order and direction of such person, and not the action of another workman who had previously opened the throttle valve so as to give the full force of steam. *Gartside Coal Co. v. Turk* (1898) 147 Ill. 120, 35 N. E. 467, Affirming 47 Ill. App. 332.

The premature loading of the second platform of a freight elevator under the direction of the master's representative, and not the giving of a signal by some coservant to start the elevator while the loading was in progress, is the proximate cause of an injury caused by the dropping of a part of the load upon a workman who had been set to repair the guides of the elevator. *Wells v. Bourdages* (1899) 88 Ill. App. 473.

The act of the superintendent of a mill in starting machinery while an employee is engaged in oiling it is the proximate cause of the injury to such employee, rather than the starting by another employee of an independent portion of the machinery, which would not interfere with the oiling. *Hughlett v. Ozark Lumber Co.* (1898) 53 Mo. App. 87.

The proximate cause of an injury sustained by the fall of a beam is the negligence of the foreman, who removed the props, and sent the

injured employee into a position of danger, instead of the carelessness of a fellow servant, who accidentally stepped on the beam and caused it to fall. *Kansas City Car & Foundry Co. v. Secrist* (1898) 59 Kan. 778, Appx., 54 Pac. 688.

The fact that a fireman jumps from an engine in order to avoid the effects of a collision which he sees to be impending with an obstruction on the track does not break the chain of causation between the injury and the negligence to which the obstruction was due. *McGraw v. Texas & P. R. Co.* (1898) 50 La. Ann. 466, 23 So. 461.

A master is not relieved from responsibility by the mere fact that a coservant knew of the abnormal condition, and did not report it. *Illinois C. R. Co. v. Swisher* (1895) 61 Ill. App. 611; *Mexican Nat. R. Co. v. Musette* (1894) 7 Tex. Civ. App. 169, 24 S. W. 520.

Where, merely as a matter of evidence, it appears that the subsequent act of negligence of the coservant on which the master relies was not committed, there is, of course, no reason why the servant should not be allowed to recover. *Perry v. Ricketts* (1870) 55 Ill. 234; *Louisville, N. A. & C. R. Co. v. Heck* (1898) 151 Ind. 292, 50 N. E. 988.

2. Chain of causation deemed to have been broken.

The general principle applied in another class of cases is that the fact that an appliance furnished by an employer was defective will not entitle an injured employee to recover, where the injury was not the result of the defect, but of the negligence of a cosmployee in the use or handling of the appliance. *Harvey v. New York C. & H. R. Co.* (1890) 57 Hun, 589, 10 N. Y. Supp. 645.

Or, as the same principle may also be formulated, a servant cannot recover on the theory that the appliances were defective, if the direct promoting cause of the injury was the negligence of a fellow servant. *Trewatha v. Buchanan Gold Min. & Mill. Co.* (1892) 96 Cal. 495, 28 Pac. 751, 31 Pac. 561 (disapproving change).

By an independent wrongful act which operates so as to break the chain of causation, is meant one which was not induced by the act of the master, or one which did not so operate on the conditions created by the master as to cause them to produce the injury. *New York C. & St. L. R. Co. v. Perriguy* (1894) 138 Ind. 414, 34 N. E. 233, 87 N. E. 976.

A negligent act of a master, which does not cause an injury to a servant, or concur with the wrongful act of a fellow servant as a cause of the injury, cannot be coupled with such wrongful act, so as to be made the basis of a recovery. *Ibid.*

From a logical standpoint this principle is readily susceptible of differentiation from the one considered in the last two subdivisions. But it will be observed that in a good many of the cases noted in the ensuing paragraphs, where it was denied that the master was responsible, the circumstances were such as to render it extremely difficult to reconcile them with those referred to in the last subdivision. The courts, in fact, sometimes seem to have proceeded on the hypothesis that an action can never be maintained where a coservant's dereliction of duty operates upon, and renders actively mischievous, the physical conditions previously created by the master's antecedent breach of his obligations.

a. *Legal cause of the injury held not to be an official act of negligence on the part of a vice principal.*

The manner in which the fellow servants of

a laborer engaged in construction work lifted the rail which injured him, and not the order of the superintendent, is the proximate cause of the injury, although, after the men had lifted the rail, and had carried it forward to a car, and while there holding it, awaiting the word of command to lift it further and throw it on the car, the superintendent failed to give the word of command in such a way as to produce concert of action in the men, but, on the contrary, ordered them to get the rail on the car in any way they could, and hurried the men and used oaths, whereby they became confused and failed to act in concert. *Coyne v. Union P. R. Co.* (1890) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382.

In *Northern P. R. Co. v. Polier* (1897) 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741, Reversing (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881, it was held that the negligence of a conductor of a "wild train" in violating rules regulating the running of trains, and not the negligence of the train despatcher, was the proximate cause of the collision. The court considered that it would be mere conjecture to deduce from the fact that the train was wild the inference that the conductor was acting under the control of the train despatcher.

Where a train despatcher has issued instructions as to the operation of a train, which, if they had been observed by the conductor and engineer, would have prevented a collision with another train, the employees on the latter train cannot recover damages for injuries resulting from disobedience of those instructions. *Chicago, St. L. & N. O. R. Co. v. Doyle* (1883) 60 *Mia.* 977.

If the coemployees of a conductor killed by the collision of his train with another, in consequence of the negligence of an agent of the railway company for whose acts it must answer, are also negligent, no action will lie against the company in favor of his representatives. *Chicago & N. W. R. Co. v. Snyder* (1886) 117 *Ill.* 376, 7 N. E. 604 (instruction disapproved which left it open to the jury to infer that proof of the negligence of the company's agent, and the conductor's freedom from negligence, would alone justify a verdict against the company).

The negligence of an engineer in responding to a yardmaster's signal to back some cars, without first ascertaining whether a switchman, who had just undertaken to couple two of the cars which were to be moved, was clear of the cars, breaks the causal connection between the signal and an injury received by the switchman, by his being crushed between the cars when they came together a second time upon the trains being backed. *Chicago, R. I. & P. R. Co. v. Touhy* (1887) 26 *Ill.* App. 99.

b. Defects in structures or other dangers of the place of work.

In *Allen v. New Gas Co.* (1876) L. R. 1 *Exch.* Div. 251, 45 L. J. *Exch.* N. S. 668, 34 L. T. N. S. 541, a company had on its premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. A workman in the employ of the company passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to show how this happened, nor any evidence that the manager and other persons employed by the company were incompetent. It was held that the company was not liable, as the negligence, if any, which caused the accident, was that of a fellow workman. "We think," said Huddleston, B., 54 L. R. A.

"that the mischief in this case arose from the conduct of the plaintiff's fellow workman as such, and not from the defendant's default [nor from the default of any manager or vice proprietor, and that, therefore, the defendants are not liable]. The gates were dangerous when shut, not dangerous when against the wall and wedged up. Now, either some workmen, as such, moved the gates, or the wind did so; and then the workmen ought to have replaced them. It was therefore by the improper moving of the gates by a workman, or by their being improperly left open by the workmen, that the mischief happened." The case is like this,—there is an unsafe ladder; it is shut up and not used; a workman takes it out and does not replace it, and then another workman uses it and is hurt. The master would not be liable.

In *Collyer v. Pennsylvania R. Co.* (1886) 49 N. J. L. 59, 6 *Atl.* 438, where the plaintiff's claim was based on the theory that a heavy door was defectively constructed, the court, without discussing the question of concurrent negligence, refused to allow recovery on the ground that a fellow servant was negligent in handling the door.

The negligence of an employee in allowing a large hole to remain under the track of a railway, and not providing any light for it, is not the proximate cause of an injury which a servant receives through being caught in the hole while coupling cars against which the engineer has pushed back his locomotive without warning. *Robertson v. Linlithgow Oil Co.* (1891) 18 *Ct. Sess. Cas.* 4th series, 1221.

Even on the assumption that an unduly rough roadbed on a half-finished railway betokens negligence,—which is denied,—the company is not liable for an injury to one of its servants employed on a construction train, occasioned by the running of the train by the engineer at a reckless rate of speed. *Evansville & R. B. Co. v. Henderson* (1893) 134 *Ind.* 636, 33 N. E. 1021.

Where a log is thrown off a car by an excessive jolting upon a rough roadbed, and the car is consequently derailed, the inference, from evidence that the jolting was aggravated by an undue rate of speed, is that the negligence of the engineer was the efficient cause of the wreck; and none of the other trainmen can recover for injuries resulting therefrom. *Conger v. Flint & P. M. R. Co.* (1891) 86 *Mich.* 76, 49 N. W. 695.

In *Sammon v. New York & H. R. Co.* (1875) 62 N. Y. 251, the defendant was held not to be liable for an accident which occurred owing to the fact that an ill-fitting pin fell out of the lever of a switch while a train was passing, and allowed two cars to run onto wrong tracks, the court holding that, as the switchman, when he had neither resorted to the use of a crowbar to move the rails, as he had been doing before the switch was put in, nor held the lever himself, nor signaled the train to stop, nor taken steps to have the hole enlarged, the accident was attributable to the switchman's negligence alone.

If the owner of a mine has negligently allowed fire-damp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp, instead of a safety lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the owner. *Berna v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 *Am. Rep.* 304.

Where an employee in a mine, a shaft of which was divided by a framework of posts into two departments, one of which was provided with a ladder for the use of the employees, was injured while ascending the ladder, by a timber negligently thrown into the shaft by a fellow employee, the mine owner is not liable, al-

though the partition between the compartments may have been defectively constructed, or insufficient in other particulars. *Kevern v. Providence Gold & Silver Min. Co.* (1886) 70 Cal. 392, 11 Pac. 740.

In *Hoffman v. Clough* (1889) 124 Pa. 505, 17 Atl. 19, the defendant asked the court to instruct the jury "that, if they believed that some coemployee of the plaintiff, without the knowledge of the defendant, had left the covering off the well and in a dangerous condition, and the plaintiff fell in, the defendant has not been guilty of negligence, and therefore the plaintiff cannot recover." The answer of the trial judge was as follows: "I decline to affirm that point, because I can easily conceive that while an employee may contribute to the injury, yet if there is negligence in the defendant he would be responsible." The court said: "There are two objections to this answer. In the first place, when taken as a whole it is not responsive to the point. Instead of declaring the law applicable to the facts assumed, it dealt with other facts which the learned judge regarded as conceivable, but which were not brought to his attention, and which were inconsistent with those embodied in the point. In the next place, if regard be had to that part of the answer which is responsive, it is clearly wrong. The general doctrine that an employee cannot look to his employer for an injury resulting from the negligence of a coemployee is well settled."

c. Defects in machinery.

Supposing the use of a car with an unusually short draw-bar to be negligence on the part of a railway,—(which is denied),—a brakeman who is injured while obeying the order of the conductor to detach the car cannot recover, since the order is the negligence of a coservant and the proximate cause of the injury. *Whitwam v. Wisconsin & M. R. Co.* (1888) 58 Wis. 408, 17 N. W. 124.

A defective coupling which causes the separation of a train is not the proximate cause of an injury afterwards received by a brakeman through the backing of the forward part of the train upon him while he is engaged in remedying the defect. *Course v. New York, L. E. & W. R. Co.* (1888) 17 N. Y. S. R. 715, 2 N. Y. Supp. 312.

A defective condition of a drawbar on a freight car, allowing the deadwoods to come together, will not render a railroad company liable to a switchman whose arm is crushed between the deadwoods, where just before the accident his arm was thrown between them as he stumbled upon a piece of coal left upon the track through the negligence of fellow servants. *Cincinnati, N. O. & T. P. R. Co. v. Mealer* (1802) 1 C. C. A. 633, 6 U. S. App. 88, 50 Fed. 725.

A railroad brakeman cannot recover from his employer on the ground that the cars he was ordered to couple were of unequal height, even if the use of such cars is negligence, where the proximate cause of his injury was the negligent movement of the train by a fellow servant while he was attempting to make the coupling. *Norfolk & W. R. Co. v. Brown* (1895) 91 Va. 668, 22 S. E. 496.

A railroad company is not liable to a fireman for injuries from a collision of trains caused by the engineer's disobedience to orders as to the speed at which a station should be approached, where, although one of the brakes was out of order, the evidence was that the train could have been stopped without the brakes on the cars if the engineer had shut off steam at the point at which he should have done. *Bull v. Mobile & M. R. Co.* (1880) 67 Ala. 206.

The negligence of section hands in placing a

water cask on the front end of a hand car in such a position that a jolt due to the car's being out of repair throws it off, in consequence of which the car is upset, is the negligence of fellow servants, and not of the section boss, where the latter gave mere general direction to prepare to return to the section house with the working tools and water cask. The want of repairs is not the efficient cause of such an accident, as it is due to the intervention of a new and distinct cause. *Rose v. Gulf, C. & S. F. R. Co.* (1891; Tex.) 17 S. W. 789.

On the ground that the master is not liable for the defective condition of instrumentalities which are harmless until they are rendered active for mischief by the independent wrongful act of a coservant of the injured person, it is held that the negligence of a railway company in not furnishing proper headlights is not the proximate cause of a collision caused by the recklessness of the engineer in moving the train from a siding out onto the main track, in violation of direct orders. *New York, C. & St. L. R. Co. v. Perriguy* (1894) 138 Ind. 414, 34 N. E. 283, 37 N. E. 976. The court said: "The movement of the train under the management of Ferris [the engineer] was the independent wrongful act of a responsible person. Such act of Ferris was not induced by the act of the appellant, nor did the act of Ferris so operate on the act of the appellant as to cause appellant's act to produce the injury. If it had so operated, according to the authority we have cited, responsibility would not attach to the appellant's act. The absence of the headlight was not the cause of the injury. Such absence was but an incident to the appellee's failure to avert the collision."

Where the cause of a workman's injury is the carelessness of the engineer in running certain machinery after a break which makes it dangerous, the workman has no cause of action against the common employer of both. *Philadelphia Iron & Steel Co. v. Davis* (1886) 111 Pa. 597, 56 Am. Rep. 805, 4 Atl. 513.

Where an engineer hoisted a bucket with plaintiff in it from a shaft with such speed as to throw it against the sheave, the court said that this was negligence irrespective of whether the bucket contained a man or not, and that it was therefore immaterial that the machinery for passing hoisting signals from the miners to the engineer was out of order and failed to work. *Trewatha v. Buchanan Gold Min. & Mill. Co.* (1892) 96 Cal. 495, 28 Pac. 571, 31 Pac. 561.

If an employee continues to use machinery after he knows it is unsafe, the master is relieved from responsibility for damages resulting to his fellow employees therefrom. *Philadelphia Iron & Steel Co. v. Davis* (1886) 111 Pa. 597, 56 Am. Rep. 305, 4 Atl. 513.

Where a foreman of a stevedore, having full charge of the loading and unloading of a vessel, called the attention of the mate of the ship to the unsafe character of a sling furnished by the vessel, and used in lowering cotton, the fact that the man at the gangway, whose duty it was to warn the men below when the cotton was on its way, failed to do so, is not, in admiralty, matter in discharge of the liability of the vessel, but only in mitigation of damages. *The Phoenix* (1888) 34 Fed. 760.

d. Unfitness of the delinquent coservant.

A coupler run over by cars which are being switched onto a siding cannot recover on the ground of the incompetency of his foreman where the evidence shows that the proximate cause of the injury was the carelessness of a fellow servant in prematurely cutting them off. *Central R. Co. v. Keegan* (1897) 27 C. C. A. 105, 51 U. S. App. 489, 52 Fed. 174.

An employer cannot be held liable for an injury to a servant, on the ground that it was due to the incompetency of a fellow servant, where the failure of such servant to start machinery is alleged to be the cause of the injury, and the evidence is that the foreman started it, and the servant was subsequently injured by having his arm caught in certain cog-wheels. *McQuerty v. Hale* (1894) 161 Mass. 51, 36 N. E. 682.

The negligence of a conductor in starting his train in violation of a rule requiring him to await orders at a station, and not his sickness, is the proximate cause of a collision which results from the starting of the train. *Johnston v. Pittsburgh & W. R. Co.* (1886) 114 Pa. 443, 7 Atl. 184.

A conductor's ignorance of the section of the road over which he was taking a train is not shown to have had any legal connection with an injury received by his fireman in a collision with cars which escaped from a siding, where the evidence is that they would not have done this if a fellow servant of the plaintiff had not violated a rule of the company in leaving them on the siding without setting the brakes. *Cooper v. New York, O. & W. R. Co.* (1898) 25 App. Div. 383, 49 N. Y. Supp. 481.

Upon familiar principles, it is also clear that the master's knowledge of the incompetency of the culpable servant is immaterial where the efficient cause of the injury is the negligence of the plaintiff himself in voluntarily and knowingly exposing himself to the dangers created by the act of the incompetent servant. *Sheets v. Chicago & I. Coal R. Co.* (1894) 139 Ind. 682, 39 N. E. 154, where a brakeman was killed in coupling cars which he knew to be moving at a dangerous rate of speed, and it was held that the master was not liable although he knew that the engineer was unfit for his position.

e. Inadequate number of servants.

The insufficiency of the number of men on a train will not render a railway company liable, where a brakeman is injured through the carelessness of another brakeman. *Hayes v. Western R. Corp.* (1849) 3 Cush. 270.

In *Harvey v. New York C. & H. R. R. Co.* (1882) 88 N. Y. 481, the court thus replied to the contention that the neglect of the delinquent servant was to be attributed to the multifarious and conflicting duties imposed upon him by the defendant: "This assumption is completely overthrown by his own evidence, for he testifies that he left the switch and went to the tele-

graph office, sat down on a box, and was sitting there engaged in a conversation with the operator, when the train on which the deceased was a fireman passed him. This proves that his failure to close the switch cannot be attributed to the fact that, at this instant of time, he was called to the discharge of some other and conflicting duty. Having sufficient time to properly adjust the switch, and knowing well how to operate it, he went away leaving it open."

That the failure of a railway company to have the usual number of brakemen on a train at the time plaintiff was injured while making a coupling, because a wagon was left too near the track, was the proximate cause of the injury, cannot be predicated of a case where it was in full view of the fireman, and he might, if he had chosen, have warned the plaintiff. *Connors v. Elmira, C. & N. R. Co.* (1895) 92 Hun, 339, 36 N. Y. Supp. 926.

A collision which would have been avoided if a conductor had been sent with the train will not render the company liable to a servant injured by the collision, where the immediate cause of the accident was the fact that the engineer attempted to run to a certain station contrary to instructions. *Gulf, C. & S. F. R. Co. v. Compton* (1890) 75 Tex. 667, 13 S. W. 667.

f. Defective regulations.

The failure of a railroad company to provide, in addition to the usual night signal of waving a lantern, a system of oral orders for starting trains, cannot be made a ground of action where the evidence is that such an order was in fact given, and was not understood by the negligent servant. *Feaslee v. Fitchburg R. Co.* (1890) 152 Mass. 155, 25 N. E. 71.

The death of a brakeman and baggage master by collision was caused by the negligence of the engineer, and not by an unsafe schedule or defective rules, where the engineer of the colliding train received an order to run two hours late, but the schedule of the train struck would interfere with such order, and the general rule requires following trains to run ten minutes behind the time of the train followed. The consideration relied upon was that it was the duty of the trainmen of the colliding train to look out for the train in advance, although there was no special order. *Kennelly v. Baltimore & O. R. Co.* (1895) 166 Pa. 60, 80 Atl. 1014.

C. B. L.

WASHINGTON SUPREME COURT.

Thomas S. GRIFFITH and Wife, *Respts.*,
v.

F. J. HOLMAN, *Appt.*

(23 Wash. 347.)

1. A private individual cannot abate a public nuisance consisting of a fence across a navigable stream, unless he has some special interest in the abatement different

from and greater than the interest of the community.

2. A stream 40 feet wide and 4 feet deep at high water lasting about three months of the year, and at other times from 6 inches to 2 feet deep, and which has never been used for purposes of navigation except by rowboats to a limited extent for pleasure, is not a navigable stream.

3. The right of fishing in fresh water non-navigable streams is in the riparian owners.

NOTE.—For earlier cases in this series as to right to private remedy for public nuisance or injury, see *South Carolina S. B. Co. v. South Carolina R. Co.* (S. C.) 4 L. R. A. 209, and note; *Swanson v. Mississippi & R. River Boom Co.* (Minn.) 7 L. R. A. 673, and note; *Wylie v. Elwood* (Ill.) 9 L. R. A. 726; *Kuehn v. Milwaukee* (Wis.) 18 L. R. A. 553; *Jacksonville*, 54 L. R. A.

T. & K. W. R. Co. v. Thompson (Fla.) 26 L. R. A. 410; *Farmers' Co-Operative Mfg. Co. v. Alberman & R. R. Co.* (N. C.) 29 L. R. A. 700; *South Carolina S. B. Co. v. Wilmington, C. & A. R. Co.* (S. C.) 38 L. R. A. 541; *Mahler v. Brumder* (Wis.) 31 L. R. A. 695; *Miller v. Hare* (W. Va.) 39 L. R. A. 491; and *Blagen v. Smith* (Or.) 44 L. R. A. 522.

4. The owner of the land on both sides of a non-navigable stream has a right to maintain a fence across it.

(December 3, 1900.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of plaintiffs in an action brought to recover damages for an alleged trespass by defendant on plaintiffs' property, cutting a fence, and taking fish from a stream thereon. *Affirmed*.

The facts are stated in the opinion.

Mr. R. L. Edmiston, for appellant:

The facts are sufficient to show that the river in question is a navigable stream.

Haines v. Hall, 17 Or. 165, 3 L. R. A. 609, 20 Pac. 831; *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250; *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Carl v. West Aberdeen Land & Improv. Co.* 13 Wash. 616, 43 Pac. 890; Gould, Waters, §§ 42, 107-110.

If the stream in question is a navigable stream the respondents had no right to put a fence of any kind across it, because the public at all times have a right to use it for all purposes for which nature made it applicable, and among those is the right to pass up and down said stream in a rowboat.

Ballinger, Anno. Codes & Statutes, § 7303.

Appellant was not a trespasser while in the boat fishing on the stream where it crosses respondents' land. The stream being navigable, the appellant had a perfect right to be upon it, and the right to go upon the stream carries with it the right to do all acts incident thereto, and among those is the right to catch fish from the waters of that stream.

Bodi v. Winous Point Shooting Club, 57 Ohio St. 226, 48 N. E. 844; *Brown v. De Groff*, 50 N. J. L. 409, 14 Atl. 219; *Morris v. Graham*, 16 Wash. 343, 47 Pac. 752; Gould, Waters, §§ 42, 47.

Mr. A. E. Gallagher, for respondents:

The stream in question is not navigable at common law, as by the common law navigable streams are confined to waters in which the tide ebbs and flows.

Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Gould, Waters, § 42; Wood, Nuisances, 2d ed. § 451.

The burden of showing the stream navigable is on appellant.

Wood, Nuisances, 2d ed. § 463; *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001.

A stream which can only be made navigable or floatable by artificial means is not a public highway.

East Hoquiam Boom & Logging Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001; *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250; *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609, 20 Pac. 831; *Roue v. Granite Bridge Corp.* 21 Pick. 344; *The Montello*, 24 Wall. 430, sub nom. *United States v. The Montello*, 22 L. ed. 54 L. R. A.

391; *Burroughs v. Whitcam*, 59 Mich. 279, 26 N. W. 491; *Wethersfield v. Humphrey*, 20 Conn. 218; *American River Water Co. v. Amaden*, 6 Cal. 443; Gould, Waters, § 107; *United States v. Rio Grande Dam & Irrig. Co.* 9 N. M. 292, 51 Pac. 674; *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308; 16 Am. & Eng. Enc. Law, pp. 243, 244.

There could be no pretense of right or excuse for appellant's trespassing upon respondent's land, and cutting the wire fence, or taking the fish in question.

Jones v. St. Paul, M. & M. R. Co. 16 Wash. 25, 47 Pac. 226; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Groat v. Moak*, 94 N. Y. 115; *Marini v. Graham*, 67 Cal. 130, 7 Pac. 442; *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756; *Stufflebeam v. Montgomery*, 2 Idaho, 763, 26 Pac. 125; *Hogan v. Central P. R. Co.* (Cal.) 11 Pac. 876, and note; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Platte & D. Ditch Co. v. Anderson*, 8 Colo. 131, 6 Pac. 515; *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813; Wood, Nuisances, 2d ed. §§ 646, 732, 733, 839, 840.

The appellant is liable for damages for removing the fence, even if it were a public nuisance, so long as he did not sustain special injury from it which gave him the right to abate it of his own motion.

Larson v. Furlong, 50 Wis. 681, 8 N. W. 1; *Godsell v. Fleming*, 59 Wis. 52, 17 N. W. 679; *Brown v. Perkins*, 12 Gray, 89; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242; *Ely v. Niagara County Supers.* 36 N. Y. 298; *Toledo, St. L. & K. O. R. Co. v. Loop*, 139 Ind. 542, 39 N. E. 306.

When the legislature defined the condition under which it became unlawful to obstruct a stream, the effect of that legislation was to make it lawful to obstruct a stream in all cases not coming under the prohibition.

Bogus v. Seattle, 19 Wash. 396, 53 Pac. 548; *Perkins v. Thornburgh*, 10 Cal. 189; *Sutherland*, Stat. Constr. §§ 325-328.

Appellant is liable to respondents for the value of the fish taken by him from the stream in question on the respondents' land.

St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *Ballinger, Anno. Codes & Statutes, § 4783*; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382; *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Atty. Gen. ex rel. Muskegon Boom Co. v. Ewart Boom Co.* 34 Mich. 463; *June v. Purcell*, 36 Ohio St. 396; *McFarlin v. Essex Co.* 10 Cush. 304; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642, 27 N. W. 606; *State v. Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599; *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569, 35 Atl. 323; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Beach v. Morgan*, 67 N. H. 529,

41 Atl. 340; *Brookhaven v. Strong*, 60 N. Y. 50; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Braxton v. Bressler*, 64 Ill. 488; *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718; 13 Am. & Eng. Enc. Law, 2d ed. p. 568; Cooley, Torts, 1st ed. p. 329; Gould, Waters, § 54; *Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 392, 10 S. E. 60; *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655; *Shaw v. Oswego Iron Co.* 10 Or. 371, 45 Am. Rep. 146; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Overman v. May*, 35 Iowa, 89; *West Point Water Power & Land Improv. Co. v. State ex rel. Moodie*, 49 Neb. 218, 66 N. W. 6.

The title of the fish is in the owner of the soil, and when respondents established that they were the owners of the soil they thereby established that they were the owners of the fish; and the taking and value being admitted, the appellant is liable to respondents therefor.

Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333; Gould, Waters, § 499.

Dunbar, Ch. J., delivered the opinion of the court:

This action is brought by the respondents to recover of appellant \$250 as damages which respondents sustained by reason of the appellant cutting a wire fence on the land of respondents in Spokane county, where such wire crossed the stream known as the "Little Spokane river," which flows through the land of respondents; and also to recover of the appellant the sum of \$250, the value of certain trout fish which appellant caught in said Little Spokane river while in a boat on said river on respondents' land where said river runs across the land of respondents, and which said fish appellant took and converted to his own use. A demurrer interposed to the amended complaint was overruled. Defendant (appellant) refusing to plead further, the court made findings of fact and conclusions of law in accordance with the allegations of the amended complaint, and gave judgment in favor of plaintiffs (respondents) and against defendant for \$500 and costs.

The findings of fact following substantially the allegations of the complaint, it is necessary to examine only the allegations of the complaint, under the first assignment of error, that the court erred in overruling the demurrer of defendant to the amended complaint, although assignments of error are based upon the conclusions of law. It is conceded by the appellant that only two propositions are involved, viz.: (1) Did the respondents have a legal right to place on their land the barbed-wire fence in question across the stream, so as to prevent the passage of rowboats? and (2) Did the appellant have a right to catch fish in the stream on respondents' land, he being in a rowboat, as alleged in the amended complaint? The complaint alleges in the usual manner the trespass and the catching of the fish, the

ownership of the land, and that said stream had never been meandered, and gives the following description of the stream: "That said Little Spokane river, where the same runs through, over, and across the premises described, and for 10 miles up said river from said premises, and down said river from said premises to the mouth of said Little Spokane river, during high water in said river, the water therein is of an average width of 40 feet, and on an average during said time of 4 feet in depth; that high water continues at various stages in height in said river for about three months during each year, and the water in said river at said premises and up and down said river from said premises for the distance above stated during the rest of each year for the last twenty years has been about 40 feet in width and 2 feet in depth; that the depth and width of the water in said river for the distance above mentioned varies at different places in said river at all seasons of the year, the water in said river at places becoming wider than as above stated, and at places as low as 6 inches in depth; that said river from a point about 10 miles above the premises above described to its mouth carries at all seasons of the year sufficient water in width and depth so as to permit the running of rowboats of the usual size up and down said river; that no part of said river has ever been used as a navigable stream or highway for any purpose whatever, except that said river has been used to a limited extent for the purpose of pleasure by the running of rowboats up and down said river by persons desiring to fish for pleasure in said river." It alleges the maintenance by the plaintiffs of the barbed-wire fence above mentioned, the catching of the fish by the defendant without any authority, and the appropriation of the same to defendant's use. It is contended by the appellant that the stream was a navigable stream, and that, therefore, the defendant had a right to navigate the stream, and to fish therein; and that the respondents had no right to put a fence of any kind across it which would interfere with the right of the public to use it for all purposes for which nature made it applicable,—citing in support of this contention § 7303, Ballinger, Anno. Codes & Statutes, which is a statute to prevent the obstruction of navigable waters in this state; and that, the fence being a public nuisance, the appellant had a right to abate it. But, even conceding, for the purpose of the discussion, that the stream was a navigable one, the principle of law is well established that a public nuisance can be abated only by a public officer, except where the party who desires to abate it has some special interest in the abatement which is different from and greater than the interest of the community. The cases which the appellant cites from this court to sustain his contention are squarely opposed to him. Thus, in *Carl v. West Aberdeen Land & Improv. Co.* 13 Wash. 616, 43 Pac. 890, the right to abate the nuisance was founded upon a special in-

terest; the court in that case saying: "Under this assignment of error it is further contended that the obstruction was a public one; but, even if it was, the plaintiffs showed that they were so situated that they had a special private interest in having it removed, so that they could pass their logs down the river, and for that reason were entitled to maintain their action for that purpose." Even this case was where there was an action to abate the nuisance, and not an attempt by the party to abate it himself. The citation from Gould, Waters, § 42, does not seem to us to affect the question in any way. That special damages must be shown, see *Jones v. St. Paul, M. & M. R. Co.* 16 Wash. 25, 47 Pac. 226; *Stufflebeam v. Montgomery*, 2 Idaho, 763, 26 Pac. 125; *Esson v. Wattier*, 25 Or. 7, 34 Pac. 766; Wood, Nuisances, 3d ed. § 646, and cases cited in note 4. But we are of the opinion from the allegations of the complaint that the river was non-navigable. Hence it becomes necessary to ascertain the rights of riparian owners. The title to the land under all the navigable waters of this state passed from the sovereignty of the United States to the sovereignty of the state upon the admission of the state to the Union; but, under the well-established law of the land, the title to the land under the non-navigable waters passes from the United States to the grantee of the upland bounding on such non-navigable waters as an incident to such grant; and, although at the common law the test of the navigability is the ebb and flow of the tide, yet, especially in this country, it is held that the rivers and streams above the ebb and flow of the tide, which have sufficient capacity for useful navigation, are public rivers, and subject to the same general rights which the public possesses in navigable waters. But we are clearly of the opinion that the stream under consideration is a non-navigable stream. Many of the authorities which we will cite in support of this contention support also the other propositions indicated above, and they will, therefore be cited indiscriminately.

"A stream is a public highway wherever it is suitable in its natural condition for general use in travel or in the transportation of property." Gould, Waters, § 107. "If the stream is not always navigable, it must be capable of floatage, as the result of natural causes, at periods ordinarily recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway. The mere possibility of occasional use during brief or extraordinary freshets does not give it a public character. A similar principle applies in the case of small tidal creeks, in which, although prima facie they are public and navigable, private property may be maintained. It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high tide which is deemed subject to public use, but, in order to have a public character, it must be navigable for some

purpose useful to business or pleasure." Id. § 109. "But, while the common law only regarded those streams in which the tide ebbed and flowed to the extent of such flow and reflux as navigable, yet there was another class of streams, called fresh-water streams, which, if susceptible of navigation by 'boats and lighters,' or, as it would seem, for any beneficial public purpose, and were navigable in fact, were regarded as highways over which the public had free access for the purposes of trade and commerce. The only real distinction between the two classes of streams arose from the distinction as to the ownership of the alveus of the stream, and the rights of riparian owners therein. In all salt-water streams subject to the action of the tides the King not only owned the alveus, but had exclusive title in and jurisdiction over the stream for all purposes not inconsistent with navigation; while in fresh-water streams the riparian owner had certain special privileges of which the King could not deprive him. He had the exclusive right of fishery, the benefit of alluvial deposits or accretion, the right to erect wharves which did not impede navigation, and to take tolls for the use of them; and, in fact, a right to make any use of the water or the bed of the stream that his tastes or interests dictated that did not interfere with the public right of passage. Therefore, when it is said that by the common law no stream is regarded as navigable except those in which the tide ebbs and flows, it is not meant that no other streams are burdened with a public easement of passage, but that in law, and irrespective of the question of fact, all such streams are navigable whether they are so in fact or not, and that the title thereto, with all privileges, vests in the King; and that all other streams navigable in fact are highways for the passage of boats, but the title to which, with all special privileges, outside of the public easement, vests in the owner of the banks." 1 Wood, Nuisances, 3d ed. § 452. So that it would seem in this case that, even conceding that the stream, which is a fresh-water stream, be a navigable or public river, yet the right of fishing remained in the owner of the banks, the public having only an easement over the land, and the taking of the fish therefrom would be a trespass for which the owner would be entitled to damages. It is true, the fact that a stream is not considered does not establish the fact that it is a non-navigable stream, but probably indicates that in the minds of the officers ordering the survey it was not a navigable stream. It is well established that, except in salt-water streams, the question of navigability is one of fact that must be established by those who seek to use it as such; and it is also well established that the stream must be navigable in its natural state, unaided by artificial means or devices. This proposition was announced by this court in *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001, where

It was said: "It is well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway;" citing many cases to sustain the proposition. In *Rouse v. Granite Bridge Corp.* 21 Pick. 344, Chief Justice Shaw, delivering the opinion of the court, said: "Nor is it every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable. But, in order to have this character, it must be navigable to some purpose useful to trade or agriculture." In *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250,—a case which is cited by appellant,—it is held that a stream or watercourse, in order to be navigable, must be of sufficient extent and capacity to enable the community at large to utilize it in the navigation of boats and other water craft thereon for the transportation of products and other merchandise, or for the purpose of floating logs and timber from forests to market. In the case of *The Montello*, 20 Wall. 430, *sub nom. United States v. The Montello*, 22 L. ed. 391, where the language of Chief Justice Shaw, *supra*, was repeated and indorsed, it was said that "the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use." It was held in *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609, 20 Pac. 831, that a stream which has floatable capacity at certain periods recurring with regularity, and continuing for a sufficient length of time to make it useful as a highway for floating logs, is navigable; but to be navigable in this sense it must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade and commerce. It was further said: "If its location is such, and its length and capacity so limited, that it will only accommodate but a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation." To the same effect is *Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491. The court, in *Wethersfield v. Humphrey*, 20 Conn. 218, in passing upon the question of whether certain waters were navigable, after reciting the fact that at times a fish boat, or skiff, or Indian canoe might have been pushed through the waters, said: "But this is not navigation. That only is such, and those only are navigable waters, where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations. There must be some commerce or navigation which is essentially valuable,"—citing Lord Hale's remarks in his treatise *De Jure Maris*: "There be some streams or rivers that are private, not only in property and ownership, but also in use; as little streams and rivers that are not a common passage for the King's property." To the same effect is 54 L. R. A.

American River Water Co. v. Amsden, 6 Cal. 443. In that case it was held: "A river beyond the ebb and flow of the tide may be navigable when it has sufficient depth and width to float a vessel used in the transportation of freight or passengers, and this has been extended to its capacity to float rafts of lumber. To go beyond this, and declare a stream navigable which can float a log, would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression." "It should be understood that, except in salt-water streams, so far as the tide ebbs and flows, the question of navigability is one of fact, and must be established by those who seek to use it as such; and also that the stream must be navigable in its natural state, unaided by artificial means or devices. If a stream is not susceptible of valuable use to the public as a navigable or floatable stream, without the erection of dams, it is not a navigable stream, even though it might be applied to that use after dams are erected." 1 Wood, Nuisances, 3d ed. § 463. There is no claim here that the stream under discussion was ever used as a floatable stream, or that any transportation has been carried on over it except in small boats, from which persons fished for pleasure.

The legislature of this state has provided that the common law, so far as it is not inconsistent with the laws of the United States, or of the state of Washington, or incompatible with the institutions and condition of society of this state, shall be the rule of decision in all the courts of this state. The common-law rule having been adopted, it must be held that the title to the beds of non-navigable streams is in the adjacent riparian proprietors to the center of the stream. This holding is not inconsistent nor incompatible with the institutions and condition of society in this state, nor with the Constitution and laws of the United States or of the state of Washington. It was held by this court in *Benton v. Johnson*, 17 Wash. 277, 39 L. R. A. 107, 49 Pac. 495, that the common-law doctrine declaratory of riparian rights is not inconsistent with the Constitution and laws of the United States or of this state, or incompatible with the conditions of society in this state, "unless," said the court, "it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition." The statute law and the decisions of this court, then, having made the common law the arbitrator of the rights of the riparian proprietors, the decisions of the courts declaring the rights of riparian proprietors under the common law become important. In *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249, it was said: "In the case of *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382, . . . we recognized the principles of the common law to be that in case of a private river—that is, where it is

a fresh-water river—in which the tide does not ebb and flow, and is not, therefore, an arm of the sea, he who owns the soil has, prima facie, the right of fishing; and, if the soil on both sides be owned by an individual, he has the sole and exclusive right." See also *Palmer v. Mulligan*, 3 Cal. 307, 2 Am. Dec. 270. In *Adams v. Pease*, 2 Conn. 481, it was held that "the owners of land adjoining Connecticut river above the flowing and ebbing of the tide have an exclusive right of fishery, opposite to their land, to the middle of the river; and the public have an easement in the river as a highway for passing and repassing with every kind of water craft." "The bed and banks of a fresh-water river, where the tide does not ebb and flow, are the property of the riparian proprietors, the public having an easement only for passage as on a public highway; and such proprietors may use the land or water of the river in any way not inconsistent with this easement." *Chenango Bridge Co. v. Paige*, 83 N. Y. 178 (Syl.), 38 Am. Rep. 407. In *Atty. Gen. ex rel. Muskegon Boom Co. v. Ewart Boom Co.* 34 Mich. 462, among other things it was said, in substance, by Judge Cooley, who rendered the decision of the court, that the Muskegon river was not a navigable stream, and the public had no rights whatever in the soil under it; that it was only a small stream, whose value to the public consisted in the use that could be made of it for the purpose of floating logs and lumber; and it was held that the property taken in such a case was private property, and the owner of the bank could maintain trespass or ejectment against the taker. See *June v. Purcell*, 36 Ohio St. 396. In *McFarlin v. Essex Co.* 10 Cush. 304, it was said by Chief Justice Shaw, speaking for the supreme court of Massachusetts, that it was well established as law of the commonwealth that in all waters not navigable in the common-law sense of the term the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of the soil is in the owner of the land bounding upon it; citing *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333, and *Com. v. Chapin*, 5 Pick. 199. In *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103, it was held by the supreme court of Michigan that the law was well settled that riparian proprietors upon fresh-water streams had the exclusive right of fishing in the water opposite their land; citing Gould, Waters, § 182, and cases cited in note 1; Angell, Watercourses, § 61; *Hart v. Hill*, 1 Whart. 124; *Beckman v. Kreamer*, 43 Ill. 447. The citation from Gould, Waters, § 182, is as follows: "Riparian proprietors upon the fresh-water streams have the exclusive right of fishing in the water opposite their lands, and this right extends to navigable fresh rivers as well as those which are unnavigable, where the soil of the former is held to be private property. Riparian proprietors upon all such streams, whose title

extends *ad flum aquæ*, can maintain an action of trespass against those who draw a seine between the center of the stream and the bank of his land." It is true that the legislature of the state has passed laws regulating fishing, has made close seasons, and provided a penalty for persons killing fish by use of dynamite or other explosives. It is also true that fish are *feræ naturæ*, and that their habitat is not entirely local; hence it might be thought that no property in fish could vest in the owner of the land. But it is ownership subject to the rights of the public, and must be exercised with due consideration for the nature of the property, and exercised only when the fish are upon the land of the owner. In accordance with this view, it was held in *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199, that, while the right of fishery in waters not navigable was limited to the riparian owner of the soil, and belonged exclusively to him, yet this right in the owner of the land must be regarded as qualified to a certain extent by the universal principle that all property is held subject to those general regulations which are necessary to the common good and general welfare, and to that extent it was subject to legislative control; that it is a well-established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public. Hence, while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the enjoyment of a right upon their lands upon the stream above and below. But, subject to these qualifications, the right of fishery to the riparian owner is absolute. To the same effect are *Beach v. Morgan*, 67 N. H. 529, 41 Atl. 349; *Brookhaven v. Strong*, 60 N. Y. 56; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Brown v. Bressler*, 64 Ill. 488; *Oobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718; *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569, 35 Atl. 323; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642, 27 N. W. 606.

It appearing from the record in the case that the river from which these fish were taken was non-navigable, that the owners had a right to maintain a fence over the same, and that they had the exclusive right of fishery in the waters flowing over the land, and no proper exceptions having been taken to the finding in relation to the amount of damages, *the judgment will be affirmed.*

Anders and Fullerton, JJ., concur. Reavis, J., concurs in result.

Edward ROBERTS, by Guardian *ad litem*,
Respt.,
v.

SPOKANE STREET-RAILWAY COM-
PANY, Appt.

(.....Wash.....)

1. Two and a half miles an hour cannot, as matter of law, be said not to be an excessive speed for an electric street car, when it meets, at a busy street crossing, another car on a parallel track, where its mechanism for controlling the current is defective.
2. The duty of a street-car company, in the exercise of ordinary care in respect to the management of a car approaching a person crossing its tracks, cannot be measured by the condition of the equipment and apparatus of the car at the time, without considering the effect of the fact that the appliances for stopping it were defective.
3. Failure to look and listen before crossing an electric street railway is not negligence *per se*.
4. The question of negligence in permitting electric cars to meet and pass at a street crossing is one of fact in the light of all the evidence in the case.
5. A street-railway company is negligent in operating an electric car with a defective controller handle, so that the car cannot be stopped with the same facility as if the appliance was sound.
6. The question whether or not a boy ten years old is guilty of negligence contributing to his injury is for the jury, where at a street crossing he attempts to ride a bicycle across the tracks, and in so doing passes behind one car and comes immediately in front of another approaching from the opposite direction, which, because of its defective condition, cannot be stopped in time to avoid collision with him.
7. If the negligence of a street-car company with respect to the condition or management of its car is the proximate cause of a collision with a traveler on the highway, it will be liable for the injury, although want of ordinary care on the part of the traveler is a condition of the accident.

(November 28, 1900.)

APPPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed*.

The facts are stated in the opinion.

NOTE.—For cases in this series as to negligence in running street cars over crossings generally, see *Wallace v. City & Suburban R. Co.* (Or.) 25 L. R. A. 663, and *note*; *Cincinnati Street R. Co. v. Snell* (Ohio) 32 L. R. A. 276; *State ex rel. Cape May, D. B. & S. P. R. Co. v. Cape May* (N. J. L.) 36 L. R. A. 657; and *Evansville Street R. Co. v. Gentry* (Ind.) 37 L. R. A. 378.

As to negligence in running street cars past each other at a crossing without stopping or giving signal, see *Chicago City R. Co. v. Robinson* (Ill.) 4 L. R. A. 126; *Consolidated Traction Co. v. Scott* (N. J. L.) 33 L. R. A. 122; and *Smith v. Union Trunk Line* (Wash.) 45 L. R. A. 169.

54 L. R. A.

Messrs. M. J. Gordon and Stephens & Bunn, for appellant on petition for rehearing:

This court has heretofore committed itself to the doctrine of contributory negligence, and, unless it reverses all former rules and holdings, cannot now adopt the rule of comparative negligence.

Oregon R. & Nav. Co. v. Egley, 2 Wash. 409, 26 Pac. 973; *Wcek v. Fremont Mill Co.* 3 Wash. 629, 29 Pac. 215; *Lewis v. Simpson*, 3 Wash. 641, 29 Pac. 207; *Lewis v. Puget Sound Shore R. Co.* 4 Wash. 188, 29 Pac. 1061; *Richardson v. Carbon Hill Coal Co.* 6 Wash. 52, 20 L. R. A. 338, 32 Pac. 1012; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Brennan v. Front Street Cable R. Co.* 8 Wash. 363, 36 Pac. 272; *Cooney v. Great Northern R. Co.* 9 Wash. 292, 37 Pac. 438; *De Graf v. Seattle & T. Nav. Co.* 10 Wash. 468, 38 Pac. 1006; *Woodan v. Seattle Electric R. & Power Co.* 5 Wash. 466, 32 Pac. 103; *Pugh v. Oregon Improv. Co.* 14 Wash. 331, 44 Pac. 547, 689; *Anderson v. Northern P. R. Co.* 19 Wash. 343, 53 Pac. 345; *Anderson v. Inland Teleph. & Teleg. Co.* 19 Wash. 575, 41 L. R. A. 410, 53 Pac. 657.

The doctrine of comparative negligence had its origin in the state of Illinois, but has been repudiated in that state.

Beach, Contrib. Neg. 3d ed. § 85a.

It has also been repudiated in the state of Kansas, where it was once applied.

Kansas P. R. Co. v. Peavy, 29 Kan. 169, 44 Am. Rep. 630; *Atchison, T. & S. F. R. Co. v. Henry*, 57 Kan. 154, 45 Pac. 576.

The general rule as to the operation of electric railways is that the company must exercise ordinary care, that is, such care as a reasonably prudent man would exercise, commensurate with the necessities of each case, having in view the instrument he is operating, the possibility of danger from its operation, and due regard for the rights of others, whether on foot or in vehicles.

Joyce, Electric Law, § 571; *Booth*, Street Railways, §§ 309, 311, 317; *Cogswell v. West Street & N. E. R. Co.* 5 Wash. 54, 31 Pac. 411.

Evidence of the motorman on the car was to the effect that he had the car under perfect control, and, consequently, the speed of the car was not high, dangerous, or excessive, and it should have been so determined by the court as a matter of law.

The controller handle was only provided for use in stopping the car under ordinary circumstances, and was not provided for emergency cases. The emergency lever was in perfect condition, so, also, were the brakes, and if there was any failure in this respect it was a mere condition before the accident, and not a contributing cause to the injury.

If respondent, without warning, and under circumstances which could not reasonably be expected, darted suddenly in front of, or against, or in close proximity to, the car, no recovery could be had, unless there was negligence after the discovery of his peril.

Kelly v. Louisville R. Co. 20 Ky. L. Rep. 471, 46 S. W. 688; *Rack v. Chicago City R. Co.* 173 Ill. 289, 44 L. R. A. 127, 50 N. E. 668; *Kessler v. Citizens' Street R. Co.* 20 Ind. App. 427, 50 N. E. 891; *Stabenau v. Atlantic Ave. R. Co.* 155 N. Y. 511, 50 N. E. 277; *Mullen v. Springfield Street R. Co.* 164 Mass. 450, 41 N. E. 664; *Perry v. Macon Consol. Street R. Co.* 101 Ga. 400, 29 S. E. 304.

It is negligence *per se* to fail to look and listen before crossing an electric street-railway track.

Christensen v. Union Trunk Line, 6 Wash. 77, 32 Pac. 1018; *Mitchell v. Tacoma R. & Motor Co.* 9 Wash. 131, 37 Pac. 341; *Beach, Contrib. Neg.* 3d ed. § 427; *Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334; *Oremer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490, 31 N. E. 391; *Mullen v. Springfield Street R. Co.* 164 Mass. 450, 41 N. E. 664; *Sewell v. New York, N. H. & H. R. Co.* 171 Mass. 302, 50 N. E. 541; *Kelly v. Wakefield & S. Street R. Co.* 175 Mass. 331, 56 N. E. 285; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L. R. A. 122, 34 Atl. 1094; *Jewett v. Paterson R. Co.* 62 N. J. L. 424, 41 Atl. 707; *Brady v. Consolidated Traction Co.* 63 N. J. L. 25, 42 Atl. 1054; *Fitzhenry v. Consolidated Traction Co.* 64 N. J. L. 674, 46 Atl. 698; *McHugh v. North Jersey Street R. Co.* (N. J. L.) 46 Atl. 782; *Shea v. St. Paul City R. Co.* 50 Minn. 395, 52 N. W. 902; *Hickey v. St. Paul City R. Co.* 60 Minn. 119, 61 N. W. 894; *Terien v. St. Paul City R. Co.* 70 Minn. 532, 73 N. W. 412; *Wosika v. St. Paul City R. Co.* 80 Minn. 364, 83 N. W. 386; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 403; *Greengard v. St. Paul City R. Co.* 72 Minn. 181, 75 N. W. 221; *Hafner v. St. Paul City R. Co.* 73 Minn. 252, 75 N. W. 1048; *Downs v. St. Paul City R. Co.* 75 Minn. 41, 77 N. W. 408; *Gagne v. Minneapolis Street R. Co.* 77 Minn. 171, 79 N. W. 671; *Morrissey v. Bridgeport Traction Co.* 68 Conn. 215, 35 Atl. 1126; *Joyce, Electric Law*, §§ 630, 632, 633, 650; *Young v. Citizens' Street R. Co.* 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; *Hoelzel v. Crescent City R. Co.* 49 La. Ann. 1302, 38 L. R. A. 708, 22 So. 332; *Snider v. New Orleans & O. R. Co.* 48 La. Ann. 1, 18 So. 695; *Schulte v. New Orleans City & Lake R. Co.* 44 La. Ann. 509, 10 So. 811; *Dieck v. New Orleans City & Lake R. Co.* 51 La. Ann. 262, 25 So. 71; *Hemingway v. New Orleans City & Lake R. Co.* 50 La. Ann. 1087, 23 So. 952; *O'Rourke v. New Orleans City & Lake R. Co.* 51 La. Ann. 755, 25 So. 323; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215, 36 Atl. 119; *Borschall v. Detroit R. Co.* 115 Mich. 473, 73 N. W. 552; *McKes v. Consolidated Street R. Co.* 102 Mich. 107, 26 L. R. A. 300, 60 N. W. 296; *Bennett v. Detroit Citizens' Street R. Co.* 123 Mich. 692, 82 N. W. 518; *Blakeslee v. Consolidated Street R. Co.* 105 Mich. 462, 63 N. W. 401; *Fritz v. Detroit Citizens' Street R. Co.* 105 Mich. 50, 62 N. W. 1007; *Henderson v. Detroit Citizens' Street R. Co.* 116 Mich. 368, 54 L. R. A.

74 N. W. 525; *Hine v. Bay Cities Consolidated R. Co.* 115 Mich. 204, 73 N. W. 116; *Doherty v. Detroit Citizens' Street R. Co.* 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; *McCarthy v. Detroit Citizens' Street R. Co.* 120 Mich. 400, 79 N. W. 631; *Lau v. Lake Shore & M. S. R. Co.* 120 Mich. 115, 79 N. W. 13; *Watson v. Mound City Street R. Co.* 133 Mo. 246, 34 S. W. 574; *Thompson v. Buffalo R. Co.* 145 N. Y. 196, 39 N. E. 709; *Lang v. Metropolitan Street R. Co.* 26 Misc. 754, 57 N. Y. Supp. 249; *Fenton v. Second Ave. R. Co.* 126 N. Y. 625, 26 N. E. 967; *Cardonner v. Metropolitan Street R. Co.* 38 App. Div. 597, 56 N. Y. Supp. 500; *Quinn v. Brooklyn City R. Co.* 40 App. Div. 608, 57 N. Y. Supp. 544; *Smith v. City & Suburban R. Co.* 29 Or. 539, 46 Pac. 136, 780; *Darwood v. Union Traction Co.* 189 Pa. 592, 42 Atl. 200; *Carson v. Federal Street & P. Valley R. Co.* 147 Pa. 219, 15 L. R. A. 257, 23 Atl. 369; *Kierzenkowski v. Philadelphia Traction Co.* 184 Pa. 459, 39 Atl. 220; *Gallary v. Easton Transit Co.* 185 Pa. 176, 39 Atl. 813; *Pletcher v. Scranton Traction Co.* 185 Pa. 147, 39 Atl. 837; *Funk v. Electric Traction Co.* 175 Pa. 559, 34 Atl. 861; *Gould v. Union Traction Co.* 190 Pa. 198, 42 Atl. 477; *Nugent v. Philadelphia Traction Co.* 181 Pa. 160, 37 Atl. 206; *Buzby v. Philadelphia Traction Co.* 128 Pa. 559, 17 Atl. 895; *Cawley v. La Crosse City R. Co.* 106 Wis. 239, 82 N. W. 198, 101 Wis. 145, 77 N. W. 180; *Helber v. Spokane Street R. Co.* 22 Wash. 319, 61 Pac. 40; *Blaney v. Electric Traction Co.* 184 Pa. 524, 39 Atl. 294.

Respondent was guilty of want of ordinary care in not looking before going upon the south track immediately in front of a moving car. He was likewise negligent in failing to wait for a temporary obstruction to pass out of the way so that he could see such car.

Stowell v. Erie R. Co. 39 C. C. A. 145, 98 Fed. 522; 3 Elliott, Railroads, § 1170; *Heaney v. Long Island R. Co.* 112 N. Y. 122, 19 N. E. 422; *Boerth v. West Side R. Co.* 87 Wis. 288, 58 N. W. 376; *Doherty v. Detroit Citizens' Street R. Co.* 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; *Blakeslee v. Consolidated Street R. Co.* 105 Mich. 462, 63 N. W. 401; *Greengard v. St. Paul City R. Co.* 72 Minn. 181, 75 N. W. 221; *Stowers v. Citizens' Street R. Co.* 21 Ind. App. 434, 52 N. E. 710; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215, 36 Atl. 119; *Thompson v. Buffalo R. Co.* 145 N. Y. 196, 39 N. E. 709; *Blaney v. Electric Traction Co.* 184 Pa. 524, 39 Atl. 294; *Darwood v. Union Traction Co.* 189 Pa. 592, 42 Atl. 290; *Nugent v. Philadelphia Traction Co.* 181 Pa. 160, 37 Atl. 206; *McCarthy v. Detroit Citizens' Street R. Co.* 120 Mich. 400, 79 N. W. 631.

Appellant did not put respondent in peril, and the latter would never have been in danger or peril had he exercised ordinary, or any, care.

No allowance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment.

Shearm. & Redf. Neg. ¶ 89; *Baltzer v. Chicago, M. & N. R. Co.* 83 Wis. 459, 53 N. W. 885; *Richfield v. Michigan C. R. Co.* 110 Mich. 406, 68 N. W. 218; *Schneider v. Second Ave. R. Co.* 133 N. Y. 583, 30 N. E. 753.

The defective controller handle cannot be deemed the proximate or immediate cause of the accident, unless prior want of care in that respect was the cause of the collision, accident, and injury.

The facts in the case at bar do not show knowledge of peril or wilful injury.

Contributory negligence is a complete defense to everything short of wilfulness or wantonness.

1 Shearm. & Redf. Neg. 5th ed. p. 64; *International & G. N. R. Co. v. Kuehn*, 11 Tex. Civ. App. 21, 31 S. W. 322; *Rowen v. New York, N. H. & H. R. Co.* 59 Conn. 364, 21 Atl. 1073; *Trouscclair v. Pacific Coast S. S. Co.* 80 Cal. 521, 22 Pac. 258; *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 289, 19 S. E. 863, 923.

Messrs. C. S. Voorhees, Reese H. Voorhees, and Albert Allen, for respondent:

The injury inflicted upon the respondent, for which no adequate compensation can ever be made, was solely attributable to the monstrous negligence of the appellant in sending out a car so illy equipped with appliances as to be a standing menace to the security of life and limb.

Roth v. Union Depot Co. 13 Wash. 525, 31 L. R. A. 855, 43 Pac. 641, 44 Pac. 253.

It was not negligence *per se* for the respondent to pass from behind the west-bound car for the purpose of crossing the south track.

Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 33 L. R. A. 122, 34 Atl. 1094.

The presence of the respondent upon appellant's track, immediately prior to the infliction of the injury, in view of the fact that the car could and would have been stopped in time to avert such injury but for the negligence of appellant in furnishing the car with the defective controller handle, if negligence at all, was "only a remote cause, or a mere condition" of the injury, and the appellant's negligence was the proximate cause thereof.

Redford v. Spokane Street R. Co. 15 Wash. 419, 46 Pac. 650; *Mitchell v. Tacoma R. & Motor Co.* 9 Wash. 120, 37 Pac. 341; *Thompson v. Salt Lake Rapid Transit Co.* 16 Utah, 281, 40 L. R. A. 172, 52 Pac. 92; *Costello v. Syracuse, B. & N. Y. R. Co.* 65 Barb. 92; *Maher v. Atlantic & P. R. Co.* 64 Mo. 276; *Hall v. Ogden City Street R. Co.* 13 Utah, 243, 44 Pac. 1046.

That the appellant, in the case at bar, knowingly permitted the operation of the defective car, is unerringly established by the evidence. The knowledge of the employees, whose duty it was to report defects to the company, was the knowledge of the company.

Denver v. Sherret, 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 234.

A person in time of imminent danger is not negligent because he does not take every 54 L. R. A.

precaution that a careful calculation afterward will show he might have taken.

Karr v. Parks, 40 Cal. 188; *Union P. R. Co. v. McDonald*, 152 U. S. 281, 38 L. ed. 442, 14 Sup. Ct. Rep. 619; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326.

In view of its defective condition, it was not "consistent with prudence" for appellant to operate car No. 18 upon the streets of a populous city like Spokane at all, and to operate such a car at any rate of speed whatever was equivalent to operating it at a "high and dangerous rate of speed."

Dickens v. New York C. R. Co. 13 How. Pr. 230; *Diamond Block Coal Co. v. Edmonson*, 14 Ind. App. 594, 43 N. E. 242.

Reavis, J., delivered the opinion of the court:

Plaintiff, by his guardian *ad litem*, commenced an action against defendant, a street-railway company of Spokane, for personal injuries sustained through negligence of the company, and alleged that Spokane was a city with a population of over 30,000; that Riverside avenue, where the injury occurred, was one of the principal thoroughfares and public streets of the city, on which a large amount of business was transacted, and across which all the people of the city were accustomed and had a right to travel; that, by reason of the public use of the street, it was the duty of the defendant to use great care and caution in keeping its cars and machinery in proper condition and repair, as well as great caution in the operation and running of the cars over its tracks on Riverside avenue; that for a long time prior to the injury of plaintiff the defendant carelessly and negligently used and operated a car upon Riverside avenue which was broken, defective, and out of repair, in that the controller handle thereon (being the handle used for the purpose of turning the current of electricity off and on and controlling the car) was broken, and on account of such defect the power of the motor-man operating the car, to control and regulate the current of electricity and to control the car in case of an emergency, was rendered uncertain; that by reason thereof it was dangerous to operate such defective car upon the street; that defendant was careless and negligent in operating such car in such dangerous and defective condition; that defendant at the time of the injury was running such car at a high and dangerous rate of speed along one of its tracks on Riverside avenue, meeting another car coming in the opposite direction on a parallel track, causing the two cars to meet and pass each other at a point where Riverside avenue is crossed by another public street, and which point of crossing was much frequented by public travel with teams, bicycles, and on foot; and that on the 8th of May, 1895, while plaintiff was lawfully traveling with a bicycle along, upon, and across Riverside avenue, at the crossing of the streets at the time of the meeting of the cars, he was caught, knocked down, and run over by the defective car and severely injured. Defend-

ant answered the complaint, denying its negligence, and setting up that the injury, if any, received by plaintiff was caused directly, proximately, and solely by his fault and negligence, and without any fault or negligence of defendant, and that the father and guardian *ad litem* and the mother of plaintiff were guilty of contributory negligence, causing the injury, in allowing the minor plaintiff to escape beyond their custody and control.

In mentioning the facts established at the trial, where the evidence is conflicting only those facts will be considered which are substantially shown from the evidence adduced by plaintiff. At the time the injury occurred the plaintiff was between ten years and ten years and nine months old. He was a boy of average capacity of that age, was accustomed to ride a bicycle in the streets of Spokane, and knew it was dangerous to collide with a street car in motion in the streets while riding his bicycle. Prior to the accident he was holding to the west-bound car, in riding his bicycle, until within about a block and a half of the place where the accident occurred. The east-bound car, which collided with plaintiff, was running at a speed of about 2½ miles per hour. If the plaintiff had looked before going on the track of the defendant in front of the east-bound car, he could not have seen the car in time to avoid the collision. The motorman on the east-bound car rang his bell to salute the passing west-bound car prior to the accident, but just how far distant does not appear. The motorman did not see the plaintiff on the bicycle in time to avoid the collision. The motorman had been in the employ of the defendant company for about two years and was shown to have experience and capacity. He testified, in substance, that the car had eight wheels, was about 32 feet long, with motors of the Thomson-Houston system, and that it was controlled by an upright controller in front, the reverse and controller lever resting on the same stand, but not on the same staff (that is, on the outside pipe); that there was one pipe for the controller part; that the center staff was the controlling staff, known as the "rheostat," which ran down to the bottom of the car on the front end to a sprocket, and down to the sprocket wheel, so as to control the connections underneath, known as the "rear connection," by a sliding contact; that on the same stand was the controller lever; that the controller lever had an upright handle; that there was a steel or wire spindle that went down from the lever that came out on the steel spindle; that each was worked by a loose handle, and, the handle being held tightly, it would turn on the spindle and connect the sliding contact that was on the rheostat, which was about a half circle, and connected with a cable and sprocket: that the purpose of the controller handle was to start and stop the car by the connection underneath; that the reverse lever was one that came out on the same plan as the controller lever only that it had

no upright handle to it; that there was an overhead switch above the motorman's head, known as a "cut-off," to either connect the electricity with the motors or disconnect it; that there were brakes on the car; that the controller or controller handle was the appliance ordinarily used for starting and stopping the car; that it had an upright handle of brass, and a steel or iron rod that went through and riveted underneath; that at the time the controller handle or upright grip that was used to turn on and off the electricity for the motors was wired on with a piece of baling wire, and that the rod of wire or steel that went down through the handle slipped from the staff; that the staff was brass, and there was a hole through the end of it, and the rod went through that hole and was ordinarily riveted underneath, but in this car the constant working of the hard metal on the brass had worn the hole so that it allowed the rod to pull through, and it had thus been wired in order to hold it on (that is, to hold the rod in the proper place). The motorman saw the plaintiff about halfway between the two tracks, a foot or two in advance of the front end of the car. He put his hand on the controller handle, released about a half turn of the controller staff to throw off the current, and at the same time put on the brake, but, in making the motion to throw off the current with the controller handle, the handle fell over and prevented him using the reverse lever. The reverse lever was nearly under the disabled controller handle. His next effort to throw off the electricity was by the overhead switch. The northeast corner of the car struck the boy's bicycle and knocked him forward 3 or 4 feet. He saw the boy fall, but could not specify at what distance he was from the car when he struck the ground. When the car was stopped, plaintiff was lying across the north rail, and his left leg under the drive wheel of the car. The track at the time was dry, and slightly inclined to be upgrade. The motorman stated that he made an immediate effort to stop the car when he saw the plaintiff. He says that as soon as he saw the plaintiff he made an effort to throw the current out of the car with the controller, and the handle broke,—pulled out of the socket,—because wired down. Then he made an effort for the reverse lever, and it came in contact with the disabled controller handle. He then threw the overhead switch, and disconnected the current from the trolley wire to the motors. At the time the plaintiff was struck, the front wheel of the car was on or near the west crosswalk or a little west of him. With the controller in good condition, the motorman stated, "the car could have been stopped under the circumstances, considering the place and rate of speed, very nearly instantly." He also said the disabled controller prevented his operating it, and prevented him from operating the reverse lever successfully. He also said that the plaintiff would not have gone under the front end of the car had the controller been in sound condition. The motorman was corroborated by

other railway employees of experience in his statement that if the controller had been in sound condition the car, under the circumstances, could have been stopped almost immediately; some of them stating 2 or 3 feet as the limit. It was also shown that the defect in the controller had existed for some time, and was known to the officers of the company. The plaintiff, in company with another boy, had been following the west-bound car, which was a box car, for some distance. He and his companion had been riding behind the box car on their bicycles, each having hold of the end of the car, until within about a block and a half of the crossing where the accident occurred. They had then ridden along the street some 6 feet north of the track, still following within a short distance of the west-bound car, until near the place of the accident, when the companion of plaintiff turned south and crossed the two parallel tracks, inviting plaintiff, by gesture or voice, to follow him. The plaintiff, a few feet behind the west bound car, turned, going south, diagonally. Plaintiff testified he was about 6 feet back of the west-bound car and 6 feet towards the north, when his companion left him, and he was about 3 feet behind the west-bound car when he crossed the track southward. When he got between the two parallel tracks he saw the east-bound car. He says he was then going diagonally southwest, and he immediately turned to the southeast to avoid the collision, when he was struck by the east-bound car, and knocked to the front of the car some little distance; that he was riding at an ordinary rate of speed upon his bicycle, and had slackened a little when he crossed the railway track, but attempted to ride more quickly, to cross ahead of the car. The jury found that the car, after the collision, stopped within 14 feet.

1. Counsel for defendant requested that the jury be instructed to find for the defendant. Of the several instructions requested by counsel for defendant which were refused by the court, mention will be made here of such as are deemed material. The court was requested to instruct that the allegations of the complaint confined the alleged negligent acts of the defendant to defective controller handle, excessive, dangerous, and high rate of speed, and cars passing at and on the intersection of the two streets, and that the evidence disclosed that the car was not running at a high, dangerous, or excessive rate of speed. The court, of its own motion, instructed as follows: "There are but three acts of negligence alleged which you are allowed to consider: First, the use and operation on Riverside avenue of a car with a defective controller handle; second, running said car with such controller handle at a high and dangerous rate of speed while meeting another car going in an opposite direction on a parallel track; . . . third, permitting the cars to pass at a street crossing." The refusal of defendant's instruction as tendered is not erroneous. The court could not, under all the circumstances sur-

rounding the accident, determine, as a matter of law, that the rate of speed was not excessive. "It is well settled that at crossings street cars and pedestrians have equal rights to the use of the streets and it has been held in that connection that what is proper care and caution on the part of those in charge of cars to prevent accidents is a question of fact in each case. *Schulman v. Houston, W. Street & P. Ferry R. Co.* 15 Misc. 30, 36 N. Y. Supp. 439. . . . The facts in the present case, to say the least, fairly raised a question for the jury, whether the defendant was in the exercise of due and reasonable caution when it permitted its south-bound car to pass the standing car at that public crossing, and at such a rate of speed, under the circumstances. In forming a judgment upon that question, there were subsidiary questions equally calling for consideration and judgment, such as, Was it the duty of the motorman, in the exercise of due and proper care, as he approached the standing car, which would obstruct his view of passengers or pedestrians who might be waiting to pass, to sound his bell or gong as a warning; and did he so sound his bell or gong; and should he have had his car under control at this crossing; and did he have it under such control when approaching the standing car? These facts, and the inferences to be fairly drawn from them, under the principle before alluded to, it seems to me, clearly were matters for the jury, exclusively." *Consolidated Traction Co. v. Scott*, 58 N. J. L. 632, 33 L. R. A. 122, 34 Atl. 1094. The evidence had disclosed defective appliances in the control of the car, so that it could not be so speedily stopped as where the machinery for operation was in sound condition. Safety in the rate of speed is nearly always relative. In *Penny v. Rochester R. Co.* 7 App. Div. 595, 40 N. Y. Supp. 172, it was held: "As it was the defendant's duty to have its cars under control at street crossings the jury had a right to consider the question whether the car could have been stopped more easily if the sand box, approved for use under such circumstances, had been filled with sand." Whether the collision between the infant plaintiff and the car was unavoidable or inevitable was properly submitted to the jury. Counsel also requested an instruction that if the evidence showed that the bells and gongs had been sounded, and the car was running at slow and moderate speed, and plaintiff, without warning, under circumstances which were not reasonably to be expected, darted suddenly in front of or against or in close proximity to the car, then the defendant would be liable only for the use of ordinary care after discovering the infant plaintiff, with such car, equipment, and apparatus as the defendant and its motorman then had for stopping the car, if the motorman did all he could with the car and equipment at that time, after discovering the position or danger of the infant plaintiff, then the verdict should be for defendant. The element of error in this proposed instruction is that the duty of the de-

fendant in the exercise of ordinary care was measured by the condition of the equipment and apparatus of the car at the time of the accident. It omits defective appliances for stopping the car. Counsel requested the charge that, if the plaintiff failed to stop, look, and listen, or take any reasonable precaution to ascertain whether a car was coming east, it was contributory negligence. The court gave the following instruction: "You are instructed that the plaintiff is required to use ordinary care,—that is, such care as an ordinarily prudent person would use under the facts and circumstances detailed in this case, taking into consideration the age, capacity, knowledge, and experience of the infant plaintiff; and he is required to use the same care as the average careful and prudent boy of his age, capacity, prudence, and knowledge. If you find that he possessed such knowledge, capacity, and experience, and knew it was dangerous to pass immediately in front of a moving street car, and that he attempted to do so without looking and listening, when, if he had done so, he would have discovered the car in time to have avoided the accident complained of, the presumption is that he was guilty of contributory negligence." It is not negligence *per se* if it is not shown that one looked and listened in crossing a street railway. The degree of care required in crossing a highway and steam railway in looking up and down the track, is not necessarily the test of care required in crossing the track of a street railway on a public street. Failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not exclusive right of way, is not negligence, as a matter of law. *Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L. R. A. 122, 34 Atl. 1094; *Shea v. St. Paul City R. Co.* 50 Minn. 395, 52 N. W. 902. Counsel for defendant also requested the instruction that if the plaintiff was guilty of an act of negligence which directly contributed to the injury, or of any lack of ordinary care on his part, or an omission to do what he ought to have done under the circumstances, which act or omission directly contributed to the accident, it would defeat a recovery. We think the instruction attempts to refine the rule of ordinary care which was imposed on the plaintiff. Defendant objects to the following instruction given: "That if you find from the evidence that the plaintiff was injured by one or more of defendant's cars, at or near a street crossing, at the time of the passing of another car, it is for the jury to determine from all the evidence, taking into consideration all of the circumstances of the case, whether it was negligence for the defendant motorman operating the car which did the injury to pass such other car at that place and at the time at which you find from the evidence he did that." As we have seen, the question of negligence in one car passing another at a street crossing is one of fact, in the light of all the evidence in the case.

2. The railway company was negligent in the operation of the car. The controller handle was defective and the car could not be stopped with the same facility as if the appliance had been sound. But the defendant alleges contributory negligence upon the part of the infant plaintiff,—that plaintiff placed himself in a dangerous position contributing to his injury. The question of the contributory negligence of plaintiff is one of fact, and for the jury, unless the undisputed facts are so clear that all reasonable inferences point to one conclusion. It was observed in *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L. R. A. 122, 34 Atl. 1094, which case, in its facts, is somewhat similar to the one at bar: "There is another element to be considered as affecting juridical action upon the question of contributory negligence in this case, and one that I think clearly makes it a question for the jury alone, and that is the fact that the plaintiff's intestate was a boy of tender years. He was described as a bright boy, but he was so young that naturally his powers of reason and judgment could be but partially developed. He had not passed far beyond the age of seven years. . . . Where there is a question whether the child is of sufficient age and discretion to be capable of some care for his own safety the question of his capacity and its degree is for the jury. . . . And when a child has reached the age of discretion and is considered *sui juris* as a matter of law, the degree of care and caution required of him will be no higher than such as is usually exercised by persons of similar age, judgment, and experience; and whether that degree of care and caution has been exercised by the child in a given case is usually, if not always, a question of fact for the jury. 4 Am. & Eng. Enc. Law, p. 46, and cases cited." It was said in *Redford v. Spokane Street R. Co.* 15 Wash. 419, 48 Pac. 650, that when the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause or a mere condition of it, the defendant is still liable. In *Mitchell v. Tacoma R. & Motor Co.* 9 Wash. 120, 37 Pac. 341, the following instruction of the superior court was approved: "In determining whether the plaintiff or defendant was guilty of negligence, if either of them was, you should take into consideration the age and intelligence of the plaintiff. The law does not require the same degree of caution from a child of tender years as would under like circumstances be required of an adult, but the degree of caution required is to be determined by the maturity and capacity of the child. So that what you might consider under the same or similar circumstances would be negligence on the part of a grown person would not necessarily be so considered by you in case of a child of tender years." It was also ruled in that case that there was sufficient evidence to refuse a nonsuit when the facts shown were that the gripman did not keep such a lookout as the circumstances demanded, nor give any warning of approach, and that af-

ter discovering the child on the track the car might have been stopped sooner if the brakes had been in proper condition; and it was observed: "The mere circumstance that the car ran an unusual distance before it was stopped was some evidence either of improper management or that it was out of repair, or that the brakes were defective." No negligence on the part of the parents was shown. The real question here arises upon the motion to instruct for the defendant upon the ground of contributory negligence by the infant plaintiff; and, conceding there was want of ordinary care in the plaintiff preceding the collision, did it contribute to the injury, or was it a mere condition before the accident? We conclude that the important inquiry determinative of this controversy is, Was the negligence of the defendant the proximate cause of the injury? The facts shown by the plaintiff have been given and do all the inferences arising from them show to all reasonable minds that want of ordinary care on the part of the plaintiff contributed to his injury? We have seen that it was not negligence *per se* for plaintiff to pass from behind the west-bound car for the purpose of crossing the south track. In the case of *Thompson v. Salt Lake Rapid Transit Co.* 16 Utah, 281, 40 L. R. A. 172, 52 Pac. 92, the facts are very similar to those in the case under consideration. There the defendant sent out a defective street car, and maintained that the plaintiff was negligent in crossing the track in front of the car and that in such case it was the duty of the defendant, after discovering the dangerous situation of the plaintiff, caused by his own negligence, only to exercise all reasonable care and diligence at his command at the time of the injury, and that when the motorman did all he could to stop the car, although its brakes were defective, the defendant could not be held liable. Of this the court observed: "The result of such a doctrine would be that under such circumstances, when the defendant discovered negligence in a plaintiff, it could legally excuse the exercise of its own want of reasonable care by showing that its appliances and brakes were in such a wretched condition at the time, on account of its previous and continued negligence, that it was incapacitated from preventing the injury complained of at the time by the use of reasonable care. . . . If such rules were applicable to contributory negligence, his [plaintiff's] safety in crossing a street where street cars were operated, with his right to recover damages in case of negligence, would largely depend upon the option of the company to keep its appliances in good repair." The question of contributory negligence, under all the circumstances in the case, was, we think, properly submitted to the jury, and its verdict must be conclusive.

Affirmed.

Fullerton, J., concurs.

Dunbar, Ch. J., concurring:

I concur in the result. I think the action
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of the respondent constituted contributory negligence as a matter of law, and that, if there had been no fault on the part of the appellant which was the proximate cause of the injury, the respondent could not recover. But whatever the fault of the appellant may be termed,—whether "comparative negligence" or "wilful negligence,"—companies employing dangerous agencies like electricity must be held to the highest degree of care, not only in operating their cars, but in what is of even more importance, *viz.*, in furnishing their servants with suitable equipment for properly operating the cars; for, without a compliance with this first and most important requisite, the skill and care of the operators would be of little avail. In this case, if the controller had been in perfect order, and the motorman had not been driven to the necessity of finally resorting to the over switch to throw off the electricity, thereby losing precious time, the injury would probably have been averted. The imperfect condition of the controller handle was known to the company, and the operation of the car with this glaring defect in an appliance so important, and upon which the safety of the traveling public so largely depends, placed the company in the attitude of operating its car in wilful disregard of the rights of the traveling public; and such acts should be held to be wilful negligence, in their application to the party injured.

Rehearing denied.

City of NEW WHATCOM, *Appt.*,

v.

FAIRHAVEN LAND COMPANY, *Respt.*

(24 Wash. 493.)

A municipal corporation owning land on a navigable lake and its non-navigable outlet cannot appropriate the waters of the lake for a municipal water supply, even under permission of the state, to the injury of a riparian owner whose rights vested before the adoption of the state Constitution, which asserted ownership in the state of the beds of all navigable lakes, but provided that it should not deprive any person from asserting his claim to vested rights.

(April 8, 1901.)

APPEAL by defendant from a judgment of the Superior Court for Whatcom County in favor of complainant in a suit to

NOTE.—For some cases in this series as to right of city or water company to take waters of ponds, lakes, or streams for water supply, see Haupt's Appeal (Pa.) 3 L. R. A. 536; Barre Water Co. v. Carnes (Vt.) 21 L. R. A. 769; Rigney v. Tacoma Light & Water Co. (Wash.) 26 L. R. A. 425; Tampa Waterworks Co. v. Cline (Fla.) 33 L. R. A. 376.

As to liability of city for draining underground sources of surface stream by pumping water from wells to supply city reservoir, see Smith v. Brooklyn (N. Y.) 45 L. R. A. 664, and Forell v. New York (N. Y.) 51 L. R. A. 695.

enjoin the diversion of water from a natural stream to the injury of the rights of the riparian owner. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. H. Hurlbut, T. E. Cade, and O. B. Barbo, for appellant:

The state is the sole and absolute owner of the bed, the shore to high water mark, and the waters of the lake.

Wash. Const. art. 17, § 1; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632, 26 Pac. 539; *Harbor Line Comrs. v. State ex rel. Yesler*, 2 Wash. 530, 27 Pac. 550.

The state can use or divert, or authorize the use or diversion of, the waters in the lake for any purpose it may see fit.

Harbor Line Comra. v. State ex rel. Yesler, 2 Wash. 530, 27 Pac. 550; *Eisenbach v. Hatfield*, 2 Wash. 252, 12 L. R. A. 632, 26 Pac. 539; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *McManus v. Carmichael*, 3 Iowa, 26; *The Genesee Chief v. Fitzhugh*, 12 How. 454, 13 L. ed. 1063; *Barney v. Keokuk*, 94 U. S. 336, 24 L. ed. 227; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The decisions from any of the states maintaining that navigable waters are either wholly or partially private property can in no sense be authority, or even of aid, in a state where, like our own, the state is the sole owner of said public waters.

Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 1 L. R. A. 469, 18 N. E. 465.

When the question arises between the United States, or the state, and the individual, in all the states where the navigable waters are owned wholly or partially by the riparian owner, the decisions, both Federal and state, uniformly hold that rights below high-water mark are not property within the constitutional prohibition against taking property without compensation.

Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 9; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 607, 47 N. E. 1096; *Wood, Nuisances*, 3d ed. § 458.

In public waters the public not only have the rights of navigation, but all other rights incident to ownership.

28 Am. & Eng. Enc. Law, p. 246; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 38; *Brooks v. Cedarbrook & S. C. River Improv. Co.* 82 Me. 17, 7 L. R. A. 460, 19 Atl. 87; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *People v. Tibbets*, 19 N. Y. 523; *Tomlin v. Dubuque, B. & M. R. Co.* 32 Iowa, 106, 7 Am. Rep. 176; *Ingraham v. Chicago, D. & M. R. Co.* 34 Iowa, 249; *Barney v. Keokuk*, 94 U. S. 325, 24 L. ed. 224; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9; *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485; *Hart v. Baton Rouge*, 10 La. Ann. 171; *Bowlby v. Shively*, 22 Or. 414, 30 Pac. 154.

A riparian proprietor upon a navigable stream cannot recover for any damages to his property by reason of an authorized dam or bridge across the river.

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Wood, Nuisances, 3d ed. § 458; *Pennsylvania R. Co. v. New York & L. B. R. Co.* 23 N. J. Eq. 157; *Matthiessen & W. Sugar Ref. Co. v. Jersey City*, 26 N. J. Eq. 247; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206; *Monongahela Nav. Co. v. Coon*, 6 Pa. 379, 47 Am. Dec. 474; *Philadelphia Port Wardens v. Philadelphia*, 42 Pa. 209; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 539; *Hawkins Point Light-House Case*, 39 Fed. 77; *Soranton v. Wheeler*, 113 Mich. 565, 71 N. W. 1091; *Hoboken v. Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643.

Plaintiff had no right of property below low-water mark, and no property in the flow of water.

Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, 29 Ct. Cl. 18; *Friend v. United States*, 30 Ct. Cl. 94; *Mills v. United States*, 12 L. R. A. 673, 46 Fed. 738; *Davidson v. Boston & M. R. Co.* 3 Cush. 105; *Rundle v. Delaware & R. Canal Co.* 14 How. 91, 14 L. ed. 339; *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 702, 43 L. ed. 1141, 19 Sup. Ct. Rep. 770; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Homochitto River Comra. v. Withers*, 29 Miss. 21, 64 Am. Dec. 127; *Cohn v. Wausau Boom Co.* 47 Wis. 314, 2 N. W. 546; *Black River Improv. Co. v. LaCrosse Boom & Transp. Co.* 54 Wis. 659, 11 N. W. 452; *Falls Mfg. Co. v. Oconto River Improv. Co.* 87 Wis. 134, 58 N. W. 259; *McKeen v. Delaware Division Canal Co.* 49 Pa. 424; *Monongahela Nav. Co. v. Coone*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9, 42 Am. Dec. 312; *Fulmer v. Williams*, 122 Pa. 191, 1 L. R. A. 603, 15 Atl. 726; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 334; *Brown v. Cunningham*, 82 Iowa, 512, 12 L. R. A. 584, 48 N. W. 1042; *Canal Appraisers v. People ex rel. Tibbits*, 17 Wend. 629; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461; *Crill v. Rome*, 47 How. Pr. 398; *Minneapolis Mill Co. v. St. Paul Water Comrs.* 56 Minn. 485, 58 N. W. 33; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 27; *Auburn v. Union Water Power Co.* 90 Me. 576, 38 L. R. A. 188, 38 Atl. 561.

To supply the inhabitants of the city with water is a public purpose, and is a paramount necessity superior to every other use.

Crill v. Rome, 47 How. Pr. 398; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 467, 18 N. E. 465; *Auburn v. Union Water Power Co.* 90 Me. 576, 38 L. R. A. 188, 38 Atl. 561; *Logansport v. Uhl*, 99 Ind. 531, 50 Am. Dec. 109; *Minneapolis Mill Co. v. St. Paul Water Comrs.* 56 Minn. 485, 58 N. W. 34; *Atty. Gen. v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *Gould, Waters*, 2d ed. § 205; *Philadelphia v. Collins*, 68 Pa. 115; *Gallagher v. Philadelphia*, 4 Pa. Super. Ct. 60; *Philadelphia v. Gilmartin*, 71 Pa. 140; *Philadelphia v. Spring Garden Comrs.* 7 Pa. 363; *Barre Water Co. v. Carnes*, 65 Vt. 626, 21 L. R. A.

769, 27 Atl. 609; *Falls Mfg. Co. v. Oconto River Improv. Co.* 87 Wis. 134, 58 N. W. 261; *Hallock v. Suitor*, 37 Or. 9, 60 Pac. 384.

This lake and its short outlet is one watercourse, the outlet being a dependent part of the lake, and the waters of the creek are the waters of the lake.

The state, by its Constitution, asserted ownership to all of the watercourse, and not alone to a subservient portion of it.

Minneapolis Mill Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461; *Scranton v. Wheeler*, 113 Mich. 565, 71 N. W. 1091; *Falls Mfg. Co. v. Oconto River Improv. Co.* 87 Wis. 134, 58 N. W. 261; *Hallock v. Suitor*, 37 Or. 9, 60 Pac. 384; *Cohn v. Wausau Boom Co.* 47 Wis. 314, 2 N. W. 546; *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 407, 18 N. E. 465; *Auburn v. Union Water Power Co.* 90 Me. 576, 38 L. R. A. 188, 38 Atl. 561; *Canal Appraisers v. People ex rel. Tibbits*, 17 Wend. 629.

The citizens and the city are riparian owners on the lake and on the creek above the respondent, and are entitled to the use of the waters of the lake and creek for all ordinary domestic purposes, and, in addition, a reasonable quantity for all extraordinary purposes.

Gould, Waters, 2d ed. § 205.

The city as the owners of the streets and public property adjoining the creek and lake are entitled to a reasonable use of the waters of the lake and creek for extraordinary purposes.

Norburg v. Kitchin, 7 L. T. N. S. 685; 28 Am. & Eng. Enc. Law, p. 954, note; *Barre Water Co. v. Carnes*, 65 Vt. 626, 21 L. R. A. 769, 27 Atl. 609; *Philadelphia v. Spring Garden Comrs.* 7 Pa. 363; *Philadelphia v. Collins*, 68 Pa. 115; *Gallagher v. Philadelphia*, 4 Pa. Super. Ct. 60; *Philadelphia v. Gilmartin*, 71 Pa. 140; *Auburn v. Union Water Power Co.* 90 Me. 576, 38 L. R. A. 188, 38 Atl. 561.

Messrs. Kerr & McCord, for respondent:

Any proprietor of lands on the bank of a river has naturally an equal right to the use of the waters which flow in the stream adjacent to his lands as it is wont to run, without diminution or alteration.

Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147; *Wintermute v. Tacoma Light & Water Co.* 3 Wash. 727, 29 Pac. 444.

The right to the uninterrupted flowage of the stream is itself property.

Lewis, Em. Dom. 61; *Hanford v. St. Paul & D. R. Co.* 43 Minn. 112, 7 L. R. A. 722, 44 N. W. 1144.

It would be a breach of trust for the state to permit the waters of navigable streams to be diverted to the injury of, and without compensation to, the riparian owner.

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Union Depot Street R. & Transfer Co. v. Brunswick, 31 Minn. 207, 17 N. W. 626; Gould, Waters, §§ 204, 205, 245; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Morris Canal & Bkg. Co. v. Jersey City*, 26 N. J. Eq. 294; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 70 Wis. 635, 36 N. W. 828, 75 Wis. 390, 44 N. W. 638; *Reading v. Althouse*, 93 Pa. 400; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Aquackanonk Water Co. v. Watson*, 20 N. J. Eq. 369; *Hall v. Ionia*, 38 Mich. 493; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Sweet v. Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 59, 53 N. W. 1066.

No matter whether the state or individuals own the bed of the lake, the waters cannot be diverted to the injury of the riparian owner on the outlet of such lake, without compensation.

Sweet v. Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; Lewis, Em. Dom. 73, 77-83; *Canal Fund Comrs. v. Kempshall*, 20 Wend. 404; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, 30 N. E. 654; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Gariood v. New York C. & H. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Meyers v. St. Louis*, 8 Mo. App. 266; *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 70 Wis. 635, 36 N. W. 828; 75 Wis. 390, 44 N. W. 638; Cooley, Const. Lim. 691; Gould, Waters, 204; Angell, Watercourses, chap. 11; *Walker v. Board of Public Works*, 16 Ohio, 540; *Saunders v. New York C. & H. R. Co.* 144 N. Y. 75, 26 L. R. A. 378, 38 N. E. 992; *Gilzinger v. Saugerties Water Co.* 66 Hun, 173, 21 N. Y. Supp. 121; *Chace v. Warsaw Water-Works Co.* 79 Hun, 151, 29 N. Y. Supp. 729; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 582, 26 L. R. A. 425, 38 Pac. 147; Pom. Riparian Rights, §§ 7, 9; *Irving v. Media*, 10 Pa. Super. Ct. 132; *Duesler v. Johnstown*, 24 App. Div. 608, 48 N. Y. Supp. 683; *Baxter v. Gilbert*, 125 Cal. 580, 58 Pac. 129, 374.

White, J., delivered the opinion of the court:

This action was originally instituted in the district court of the territory of Washington on the 8th day of August, 1889, by the Fairhaven Land Company, as plaintiff, against the Bellingham Bay Water Company, as defendant. The object of the action was to restrain and enjoin the Bellingham Bay Water Company, as a private corporation engaged in the business of supplying the inhabitants of the town of Whatcom with water for general domestic and municipal use, from diverting the waters of Whatcom creek from its natural bed for that purpose. Whatcom creek is the only outlet of Lake Whatcom, and flows from said lake, which is situated about 3 miles

to the southeastward of its outlet, in a fixed and well-defined channel, and has a fall from the lake of 318 feet, and is not in any sense a navigable stream. Lake Whatcom is the source of Whatcom creek, and is a large navigable, fresh-water lake, with an area of about 7½ miles, or about 5,000 acres, and is a meandered lake. Whatcom creek empties into Bellingham bay, a part of Puget sound. In the descent of the creek to Bellingham bay there is a series of falls, the last of which is about 25 feet in height, and the bottom of which is on a level with the tidal waters of Bellingham bay. This last waterfall is immediately below a mill-dam used by the plaintiff in propelling a sawmill. There is a constant flow of water through the channel of the creek, which varies with the seasons. The capacity of the mill is about 75,000 feet of lumber per day. The natural flowage of the creek, undiminished by any diversion, is insufficient during the dry season of each year to operate the mill all the time. During the rainy season the flow of water through the creek aggregates about 100,000,000 of gallons per day, and during the dry season the average flowage is from 5,000,000 to 8,000,000 gallons per day. To operate the sawmill and the water wheels connected therewith, about 2,500,000 gallons per hour is required. In 1853 one Russell V. Peabody entered, under what is known as the "Donation Act," a part of the N. W. ¼ of the S. W. ¼ of section 30, township 38 N., of range 3 E. The plaintiff's mill is situated on a tract of land at the mouth of Whatcom creek, which is a part of the Peabody donation claim. The plaintiff is the owner of the lands at the mouth of the creek, and is the lowest riparian owner thereon, and its lands include the bed of the creek for a distance of about ½ mile upward from where the creek empties into Bellingham bay. In the year 1854 Peabody and others associated with him erected on the tract now owned by the plaintiff a sawmill, and operated it by water power from Whatcom creek until 1874, when the mill was burned down. In 1882 or 1883 the mill, owned by the plaintiff at the time this action was commenced, was built on plaintiff's land about 50 yards below the old mill site; the office of the new mill being about where the old mill stood. By means of conveyances from the Peabody heirs and Peabody's associates and their grantees on the 8th day of May, 1889, the plaintiff became the owner of said mill and mill site, and has been the owner ever since. The mill built in 1882 is also propelled by water from Whatcom creek. Whatcom creek flows through the Peabody donation claim and said mill tract. Subsequent to the institution of this action the Bellingham Bay Water Company, for the purpose of supplying the people of New Whatcom with water for domestic and municipal purposes, laid its water pipes and mains upon the streets of Whatcom, and ran its mains up said Whatcom creek to a point about ½ mile from Lake Whatcom, and above the mill and lands of the plaintiff, and there connected

its intake pipes and mains with the channel of said creek, and diverted therefrom the water supply for said city of New Whatcom. The present population of New Whatcom is about 7,000, and it is one of the growing and important cities of Puget sound. In 1893, and at the time the Bellingham Bay Water Company's intake pipes were connected with and were in the channel of Whatcom creek, the city of New Whatcom purchased said water system from said water company; and thereafter the city of New Whatcom extended the water mains from where the intake pipes were located in said creek to and within Lake Whatcom proper, and located the intake pipes, which were 24 inches in diameter, about ¼ of a mile from the outlet of the lake, the head of Whatcom creek, placing such intake pipes about 6 feet below the bed of the creek at its source in the lake, and ever since has maintained said water system, and since such extension of the mains the water supply of New Whatcom has been taken directly from Lake Whatcom, and from no other source whatever. Said lake is the only practical source of water supply for the city of New Whatcom, and each year the necessities of the public and of the inhabitants of the city for supply of water are becoming more important and exacting. The city of New Whatcom has also entered into various contracts and leases with various of its citizens and inhabitants, by which it agreed to furnish and is furnishing such parties, through its water mains, water from Lake Whatcom for power purposes, to enable such parties to operate mills, printing presses, feed mills, electric-light plants, and various other machinery, and to supply docks, steamers, coal bunkers, etc. The water is also used by the city in operating public fountains and for public buildings, and in flushing sewers, etc. After New Whatcom purchased said system an amended complaint was filed in this action, and the city of New Whatcom was made a party defendant, and the action was discontinued against the Bellingham Bay Water Company, and the city of New Whatcom was substituted for the Bellingham Bay Water Company as the sole defendant. Neither the Bellingham Bay Water Company nor the city of New Whatcom at any time instituted any action to condemn, nor have they at any time condemned, plaintiff's property, nor have they taken any action to secure the right to divert the waters of said Whatcom creek or of said Lake Whatcom for public or private use or for any other purpose, nor have they in any manner settled or attempted to settle or adjust any damages that plaintiff has or may suffer by reason of the diversion of said water. The Bellingham Bay Water Company, by lease or otherwise, was the riparian owner of the bed of said creek near the source thereof above the lands and mill site of the plaintiff at the time it put in its water system, and continued so up to the date of the sale of its system to New Whatcom, and the city of New Whatcom

succeeded to whatever rights the water company had as such riparian owner; and the water company was a riparian owner on said creek above plaintiff prior to the date of the plaintiff's purchase of the mill and mill tract, and that fact was known to the plaintiff when it purchased. The city of New Whatcom has become the successor of the water company in supplying its inhabitants with water, and the value and use of the water system depend almost wholly upon a source of supply from said lake. If the supply was shut off the entire plant would be rendered valueless, and the people of the city would be greatly injured, and the public health might be endangered. The city of New Whatcom is situated on both sides of the creek, the full length of the creek from its source, taking in a part of Lake Whatcom and to its outlet. Streets and alleys are located and run across, parallel to, and upon the banks and bed of the creek; and the city of New Whatcom is the owner of property on the shores of the lake and in the bed of the creek at its source, and is a riparian owner on the lake and creek. By constructing a dam at the head of the creek at the foot of the lake the surplus water of the lake during the winter or wet seasons can be stored or retained until the dry weather approaches, and can be used during the summer to keep up and maintain the full natural flowage of the creek during the entire season. It is manifest from the evidence and findings in the case that by reason of the intake pipes of the water system being laid in Lake Whatcom, and the water drawn off thereby, the natural flowage of Whatcom creek is greatly diminished, and that by reason thereof there is not sufficient water at certain seasons of the year to operate the plaintiff's mill as the plaintiff might operate it but for the diversion of the water through the intake pipes of the defendant. The court below held that the diversion of any of the waters from Lake Whatcom, under the water system of the defendant, for the purpose of supplying water and power to the various light plants, wood yards, printing offices, etc., was in violation of the rights of the plaintiff, and that the plaintiff being the lowest riparian owner on the creek, and having appropriated the flowage thereof for mill purposes long prior to the attempted diversion of any of the waters of said creek, or of Lake Whatcom, the source of said creek, by the defendant or the water company, such diversion by the defendant was in violation of the rights of the plaintiff; and the court gave to the plaintiff a perpetual injunction against the city of New Whatcom, enjoining and restraining it from diverting any of the waters of said creek, or the waters of said lake, the source of said creek, for any purpose whatever, until such time as the said city should compensate the plaintiff for any damages accruing to it by reason of such diversion. From this decree the city appeals.

The principal contention of the appellant is that the state, under article 17, § 1, of 54 L. R. A.

the Constitution, is the sole and absolute owner of the bed, the shore to high-water mark, and the waters of Lake Whatcom; that the state can use or divert, or authorize the use or diversion of, the waters in the lake for any public purpose; that to supply the inhabitants of a city with water is a public purpose, and is a paramount necessity superior to every other use; that the state has authorized such use, and under such authorization the appellant is using the waters of the lake; and that the respondent has no interest in the waters of the lake.

The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers, within the realm of England, was by the common law deemed to be vested in the King, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse. The King, by virtue of his proprietary interest, could grant the soil so that it should become private property; but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right. Upon the American Revolution the title and dominion of the tide waters, and of the lands under them, vested in the several states of the Union within their respective borders, subject to the rights surrendered by the Constitution to the United States. The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606, 47 N. E. 1096. Fresh-water lakes in England are private property, and the Crown and public possessed no such rights in fresh-water lakes as they possessed in tide waters. In navigable fresh-water rivers above the flow of the tide the bed of the river belonged to the owners of the adjacent soil to the middle of the stream. In this country the doctrine of private ownership has been generally recognized as the rule of the common law, but it has been held to be inapplicable to the condition of many of those states in which the inland rivers and lakes are large. The provision of article 17, § 1, of the Constitution was evidently for the purpose of establishing the right of the state to the beds of all navigable waters in the state, whether lakes or rivers, or fresh or salt, to the same extent the Crown had in England in the sea, and in the arms and inlets thereof, and in the tidal rivers, and to eliminate the distinctions existing under the rule of the common law in this respect. Whatever rights the respondent possesses were acquired and became vested before the adoption of our state Constitution. This court has decided that these rights are to be determined by the rule of the common law, so far as not repugnant to or inconsistent with

the Constitution and laws of the United States, or the organic act or laws of Washington territory, or incompatible with the institutions and conditions of society in this state, and that the riparian owner is to be protected in the use and enjoyment of the water naturally flowing by or over his land, and, for the purpose of protecting the rights of a grantee of the government,—such as Russell V. Peabody and his grantees are in this case,—his title relates back to the first act necessary on his part in the proceedings to acquire title. *Benton v. Johnson*, 17 Wash. 277, 39 L. R. A. 107, 49 Pac. 495. Section 16, art. 1, of the Constitution expressly provides that “no private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner.” Section 1, art. 17, of the Constitution, under which the appellant claims that the state is the sole and absolute owner of the bed, the shore to high-water mark, and the waters of Lake Whatcom, and can dispose of such waters as it sees fit, expressly protects all persons in asserting their claims to vested rights. That section reads as follows: “The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.” Though this section has the effect, as has been held by this court in *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632, 26 Pac. 539, and *Harbor Line Comrs. v. State ex rel. Yeaser*, 2 Wash. 530, 27 Pac. 550, of vesting in the state the entire and exclusive ownership of the beds and shores of all navigable waters, it should not be construed as affecting the rights of riparian proprietors upon non-navigable water-courses, though their source is in navigable waters. The use of the water in such non-navigable streams is not inconsistent with the retention of the fee in the bed of navigable waters in the state. *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455. The provisions of § 16, art. 1, of the Constitution protect private property from confiscation for a public use; and the proviso to article 17, § 1, clearly indicates that so far as rights had become vested, notwithstanding the other provisions of the section the owner thereof should have the right to assert them in the courts; and, if this language means anything, it is that those rights should be protected and safeguarded by the courts. In *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28, this court quotes with approval from Gould, *Waters*, 2d ed. p. 396: “The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is inseparably annexed to the soil itself.” In *Bigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147, 54 L. R. A.

it is said: “The right to the use of water flowing over land is identified with the realty, and is a real and corporeal hereditament. . . . And this right is a substantial one, and may be the subject of sale or lease like the land itself.” In the two cases cited it is held that every riparian proprietor, in the absence of a grant, license, or prescription limiting his right, is entitled to have the stream which passes over or adjacent to his land flow as it is wont by nature, affected only in quantity or quality by the consequence of a reasonable use thereof by other proprietors, and that the riparian proprietor’s right to the flow of the water is inseparably annexed to the soil, and passes with it, as a part and parcel of it; that a riparian proprietor may divert the water from the stream as it passes through his own land, without license from the proprietors above him, if he does not obstruct the water from flowing as freely as it was wont, and without license from the lower proprietors, if he restores the water to its natural channel before it enters their land, and does not materially diminish its flow. The constitutional provision relied upon by the appellant does not in any way affect the rights of the respondent in the flowage of Whatcom creek as they existed in 1889, before the adoption of the Constitution, when this action was instituted. The mere fact that the state owns the bed of Lake Whatcom has little, if any, bearing on the diversion of the waters so that they cease to flow in Whatcom creek; for, as we have said, the flow of the water in the creek is not inconsistent with the retention by the state of the fee in the bed of the lake. The right of the state over the waters of Lake Whatcom is such as pertains to sovereignty alone. That is the right to use, regulate, and control these waters as a common highway for commerce, trade, and intercourse, and to grant the soil in the bed of the lake so that it might become private property, subject to the paramount right of public use for navigation. In short, that the rights of the state in the navigable waters thereof are the same rights as pertained to the sovereign at common law in the sea, its bays, arms, and inlets. But conceding that by article 17, § 1, of the Constitution absolute ownership is now in the state, so that the state can dispose of the waters as well as the soil, the vested rights of the respondent, notwithstanding, are preserved to it. That is the right to the use of the water in its natural flow as it existed before the adoption of the Constitution, when the United States granted to Russell V. Peabody, under the donation act, the land over which Whatcom creek flows, of which the lands of the respondent are a part. The Constitution having reserved to the respondent its vested rights, the legislature, except under the power of eminent domain, upon making compensation, could not divest it of that right, either directly or indirectly, for a public or private use. *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984. As was said by Justice Miller in the case last cited:

"This riparian right is property and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation." As was said by the Missouri court of appeals in *Meyers v. St. Louis*, 8 Mo. App. 266: "When it is settled that riparian rights are property,—and of this there seems to be no doubt,—the question as to the right to take them without compensation is at an end." In *Mohr v. Gault*, 10 Wis. 513, 78 Am. Dec. 687,—a case where one undertook to cut a new channel so as to carry off the waters of a small lake by another way than through the usual outlet, on which the complainant's mill was situated,—it was held that the owners along the natural outlet had a legal right to the natural and usual flow of the water of the lake through such outlet.

The legislature of the state of New York had given a grant to the city of Rochester authorizing it to enter upon, control, and use the waters of Hemlock and Canadice lakes for the purpose of procuring a water supply for said city. These were large, fresh-water, navigable lakes, connected by a small stream; and Honeoye creek was their outlet, upon which was located Smith's water mills. Under legislative authority the city of Rochester proceeded to extract and carry away a part of the waters of these lakes to the detriment of Smith. The city was enjoined, and the court of appeals held that the right to the usufructuary enjoyment of the undiminished and undisturbed flow which a riparian owner possesses in the case of non-navigable streams applies to fresh-water, navigable lakes, save that the public has an easement in such waters for the purposes of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable, and gives to the state the right to use, regulate, and control the waters for the purposes of navigation; and the right to divert the waters for other purposes than navigation. although public in their nature, can only be acquired under and by virtue of the sovereign right, or eminent domain, and upon making just compensation. *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393. Two lakes were the reservoirs from which a creek was fed. One sought to appropriate the waters of the lakes in such a manner that the quantity of the water flowing down the creek would be interfered with. Plaintiffs were riparian owners and appropriators of the creek. The supreme court of California says: "If the tapping of these lakes by appellants reduces the amount of water to which plaintiffs are entitled, or shortens the period of time in which they might otherwise secure water from the creek, then the acts of appellants, clearly, are a trespass upon plaintiffs' rights,—exactly the same kind of trespass 54 L. R. A.

as though the creek was tapped, and that amount of water directly taken therefrom, without any molestation of the lakes." *Baxter v. Gilbert*, 125 Cal. 580, 58 Pac. 129, 374. Plaintiff was the owner of certain mills built on his own land, on the banks of the Cottonwood river. The mills were propelled by water power obtained by means of a dam across the river. The city of Emporia constructed a system of waterworks for the purpose of supplying the citizens with water for domestic use, for extinguishing fires, and for manufacturing purposes. It purchased a tract of land on the banks of the pond above the plaintiff's dam, dug a well 25 feet in diameter and 26 feet in depth on its own land, and from 70 to 100 feet from the bank of the pond. This well drew its supply of water from the pond by percolation through a bed of gravel at the bottom of the well. It sank one pipe into the well, and another it extended directly into the pond; the latter to be used in case of fire. By means of engines and pumps it supplied the citizens from the well with water needed for ordinary purposes. The supply of water in the river at certain seasons of the year was inadequate for running the mills, and the plaintiff was forced to suspend work and allow his mills to stand idle. Justice Brewer, in delivering the opinion of the supreme court of Kansas on this state of facts said: "The amount of water now used by the city, and its present effect upon the plaintiff's business, do not determine the question of right or remedy. The continuance of the waterworks, as well as the growth of the city, will increase the demand; and, if the present abstraction can be sustained, there is no legal principle upon which the future and larger abstraction can be restrained. Now, that the flow of water in the natural channel of a surface stream is a property right of the riparian owner is unquestioned and familiar law. *Shamleffer v. Council Grove Peerless Mill Co.* 18 Kan. 24. If an individual should by digging a new channel a few hundred feet above Soden's dam, attempt to divert the flow of the stream, beyond doubt he would be restrained. And this restraint would be granted, not because of the mere fact of digging a channel, but because thereby the natural flow of the stream was prevented; not because of the manner, but because of the fact, of the diversion. The restraint would be granted as readily if the abstraction was by pipes and pumps as if by channel and a change of current. The principle is this: That whatever of benefit, whether of power or otherwise, comes from the flow of water in the channel of a natural stream, is a matter of property, and belongs to the riparian owner, and is protected in law just as fully as the land which he owns. It cannot be taken for private use except by his consent, and for public use only upon due compensation. With these general and conceded principles, let us now inquire as to the validity of the grounds upon which the action of the city is sought to be justified. The fact is obvious that by

means of the pipe running into the pond there will be, in case of fire, a direct abstraction of water, and the fact is found that by means of the well there is an indirect abstraction. The flow of water is, as heretofore stated, thus interfered with, and the power diminished. It is in evidence that while at certain seasons of the year the water supply is more than enough for all of plaintiff's present uses, and that during such seasons the consumption of water in the city would work no present injury, yet at other seasons the supply is insufficient, and some or all of his mills are compelled to stop running. Hence, naturally any subtraction of the water would tend to increase the time during which his mills must be idle, and therefore work present and positive injury,—an injury increasing with the increasing consumption by the city. Further, if plaintiff is entitled to this water power at all, he is entitled to all of it, and may increase the number of mills, or amount of machinery propelled by it, until his uses shall wholly exhaust it. So that matters of amount really fade out of sight, and the question is one of right and title." *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265. In the same case the city sought to justify the taking of the water as a riparian owner owning the lands above the plaintiffs. On this point Justice Brewer says: "While the undiminished flow of the stream is conceded to be the right of every riparian owner, yet this right has always been limited to this extent; that each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock. The city is a riparian owner, and, whether it uses little or much, it is simply taking for domestic purposes. Each individual citizen of Emporia may buy land on the banks of the river, and then take for domestic uses whatever amount of water he needs. What the individual separately may do, the city, representing all the individuals, has done. Does the manner in which the result was accomplished make any difference in the right? This argument is plausible, but not sound. A city cannot be considered a riparian owner, within the scope of the exception named. The amount of water which an individual living on the banks of a stream will use for domestic purposes is comparatively trifling. Such use may be tolerated upon the principle, *De minimis non curat lex*. It is a use which must always be anticipated, and may reasonably be considered as one of the benefits of the ownership of the banks of a natural stream. Everyone proposing to utilize the power of running water should reasonably expect that the stream is chargeable with such a slight burden. It is only a fair equalization of rights. But the taking of water for the supply of a populous and growing city stands upon an entirely different basis. No man can foresee this; and,

if it were tolerated, no one would dare to expend money in utilizing this power, for fear of its being soon taken from him without compensation, and with total loss to his investment. The city, as a corporation, may own land on the banks, and thus in one sense be a riparian owner. But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes. It is not an individual. It has no natural wants. It is not taking for its own use, but to supply a multitude of individuals. It takes to sell. Again, the statute under which the city is acting (Comp. Laws 1879, p. 997, § 1) authorizes the taking of water "for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires, and for manufacturing and other purposes." It would be strange if the city could destroy plaintiff's water power without compensation, and then sell it to other manufacturers, and thus build up rival establishments." *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265. See also *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Garwood v. New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452.

It is not disputed in this case that the effect of the appellant's intake pipes, as laid into the lake, is simply to afford an additional channel for the outflow of the lake, and that respondent's mill is deprived of the amount of water by the city actually diverted. Now, no one can do indirectly what the law will not permit him to do directly. On this point, in the case of *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265, the court says: "It is also a general proposition that a man may not do indirectly what he may not do directly. Unquestionably, a party may not run pipes into plaintiff's mill pond, or dig a channel to it, and thus divert the water. May he accomplish the same result by digging a well upon the very banks, and so near thereto that the water oozes out from the pond into the well, and be beyond the reach of law, so long as he keeps a wall of earth between the well and the pond? If this were recognized as law, protection to the owners of water power would rest on slender foundations. Often the banks of a stream are composed of very porous soil, or it may be there is, as in this case, a bed of gravel through which the water runs as through a sieve. Is the owner of the pond, then, at the mercy of anyone who, avoiding the more direct and public method of pipe or channel, resorts to the equally effective means of adjacent wells? And if a well on the very bank would be restrained, may the same result be accomplished by digging one a few feet off? It would seem as though but one answer could, in justice, be given,—that the owner of an established power is entitled to protection against any subtraction therefrom, whether sought to be accomplished by direct or indirect methods."

The intake pipes of the appellant, 24 inches in diameter, placed 6 feet below the bed of Whatcom creek, a quarter of a mile from the outlet of the lake, through which the appellant diverts the water that would otherwise flow down the bed of the creek, certainly cause an indirect diversion of the water from the bed of the creek to the extent of the capacity of the pipe; and this diversion is just as much a violation of the rights of the respondent as if the pipe was in the bed of the creek above the respondent's mill, where it was originally placed by the water company.

The Great Pond Cases from Massachusetts and Maine have no bearing upon this case; for, as the appellant says, the colonial ordinances of Massachusetts changed the common law as to great ponds in both those states. The cases from New York cited by appellant, on the Mohawk and Hudson rivers, grew out of the civil law prevailing in the Netherlands, under which titles were granted to the original settlers. *Smith v. Rochester*, 92 N. Y. 482, 44 Am. Rep. 393. The only case that the appellant has cited bearing upon the question here involved, and contrary to the authorities we have cited, and the views we have expressed, is from Minnesota,—the case of *Minneapolis Mill Co. v. St. Paul Water Comrs.* 56 Minn. 485, 58 N. W. 33. In that case the appellants were a corporation created by acts of the territorial legislature, and authorized to build and maintain dams in the Mississippi river, at the falls of St. Anthony, for the development of water power, and for the use and sale of such power. Dams were erected and maintained under this authority forming such power. After this the legislature authorized the city of St. Paul to purchase, and there was purchased, the property and franchises of a private corporation theretofore engaged in supplying said city with water. Under the provisions of law the city extended this system, and established a pumping station at Lake Baldwin, a body of water with an area less than a mile square, and by means of its pumps forced water through conduits to the city for public use. The outlet of this lake is Rice creek, and this creek empties into the Mississippi river a few miles above the dams built and maintained by appellants. The claim was that the result of this diversion was to greatly diminish the volume which came to the dam, and to materially affect and reduce the water power. The supreme court of Minnesota, in rendering their opinion, say: "The plaintiffs are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream and their rights under their charters are, equally with their rights as riparian owners, subordinate to these public uses. There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or

making compensation to riparian owners. The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them and supply water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. . . . Thus taking water from navigable streams or lakes for such ordinary public uses, the power of the state is not limited or controlled by the rules which obtain between riparian owners as to the diversion from and its return to its natural channels. Once conceding that the taking is for a public use, and the above proposition naturally follows." Not an authority is cited by that court to sustain these views. This case was appealed to the Supreme Court of the United States. That court held that the property rights of the plaintiff in error as riparian owners were to be measured by the rules and decisions of the state courts of Minnesota, and that none of the decisions of the state courts of Minnesota were inconsistent with the decision of the court in the case under review, and for that reason the Supreme Court of the United States affirmed the judgment. *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157. That case has little, if any, bearing on the one under consideration; for the supreme court of this state, in cases heretofore cited, has repeatedly held the rule to be otherwise than that laid down by the supreme court of Minnesota. It may be conceded that at the time this action was tried and judgment was entered, the city of New Whatcom, under the law approved March 14, 1899 (*Seas. Laws* 1899, p. 250), authorizing municipal ownership of certain public utilities, had the right to take and appropriate from Lake Whatcom an ample supply of water for all uses and purposes, public and private, and that it had the right to build dams or other works across the outlet of any lake or watercourse for the purpose of storing and retaining water therein up to and above high-water mark; provided, that such dam did not obstruct, impede, or interfere with navigation or other public use; and provided, further, that, if any private property should be necessary for such purposes, the same was to be condemned or purchased. In this case, however, no steps have been taken to condemn or purchase the property of the respondent in the flow of Whatcom creek, which the appellant has appropriated, and this is one of the very things the city was required to do when exercising the powers conferred on it by the act of 1889, Mr. Loggie, a lessee of the respondent's mill, with the permission of the appellant, but without permission or direction from the respondent, in 1899 (the year of the trial of this case) built a temporary

dam at the outlet of the lake for the purpose of storing the water for use during the dry season. There is testimony tending to show that by means of this dam a sufficient quantity of water was stored in the lake for the use of the appellant, and also the respondent's mill, during the dry season of that year. We are at a loss to know why this fact is urged against the correctness of the trial court's decree. The city of New Whatcom is a large and growing city, and it may need, under its water system, all of the outflow waters of Lake Whatcom both summer and winter. The question involved in this action is the right of the city to divert a part or all of these waters without compensating the respondent, the owner of this outflow at the mouth of the natural outlet.

We hold that the judgment and decree of the court below was correct, and is fully sustained by reason and the decisions of this and almost all other courts, and for that reason the judgment must be affirmed, subject to the modifications hereinafter indicated.

While it is no part of the office of the court to consider the ways and means by which the appellant may comply with the decree entered against it, yet, in this case, as a numerous population will be suddenly deprived of that which is essential to their health and existence if the decree is at once enforced, we modify the decree of the court below as follows: The said appellant shall have sixty days from the filing of this opinion to purchase from or otherwise arrange with the respondent for the use of said flowage, or, if such purchase or arrangement cannot be made, to commence proceedings in the superior court to condemn the property and rights of the respondent in Whatcom creek as indicated in this opinion. If condemnation proceedings are instituted within said time, then the injunction granted by the decree of the court below shall be stayed until the final determination of such condemnation proceedings; provided, such proceedings are prosecuted by the appellant with due diligence. The respondent to recover its costs in the court below and on this appeal.

Fullerton and Anders, JJ., concur. Reavis, Ch. J., concurs on the ground that respondent made the first appropriation and use for a beneficial purpose.

Dunbar, J.:

I concur in the affirmance of the judgment, but not in what is said in relation to the modification. The appellant can pursue its legal remedies, if it has any, like any other litigant; and the respondent is as much entitled to its legal remedy, unqualified by prescribed conditions, as though its adversary were an individual.

54 L. R. A.

E. H. WATKINS *et al.*, App'ts.,
v.

Thomas DORRIS, App't.,
and
William DORRIS, Resp't.

(24 Wash. 636.)

1. Error in continuing a temporary injunction until final hearing cannot be corrected on appeal from the final judgment, where the trial court itself dissolved the injunction at the final hearing.
2. A stream 100 feet wide and 3 feet deep, which, during annually recurring freshets for a period of twenty-five years, has been profitably used for floating logs to market, is a public highway for that purpose.
3. The provision of the Constitution reserving to the state the title to the beds of the navigable waters of the state does not apply to streams which are valuable only for floating logs to market during periods of annual freshets.
4. Neither an individual desiring to use a stream for floating logs to market, nor a corporation formed to take advantage of a statute authorizing the improvement of floatable streams, can interfere with the soil in the stream without the consent of the abutting owner or operation of law with due compensation made.
5. One attempting to float logs down a stream is liable to the abutting owner for injuries to his land by jams caused by the careless manner of driving the logs.

(April 18, 1901.)

CROSS-APPEALS by plaintiffs and defendant Thomas Dorris from a judgment of the Superior Court for Wahkiakum County in a suit to enjoin defendants from interfering with plaintiffs' breaking a log jam upon defendants' property; defendant Thomas appealing from so much as awarded a temporary injunction; and plaintiffs appealing from so much as awarded damages to defendants for the injury done to their land by the jam. *Affirmed*.

The facts are stated in the opinion.

Messrs. J. Bruce Polwarth and George Noland, for appellants Watkins *et al.*:

The beds of such streams as the Elocho-man do not belong to the riparian proprietor.

The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; *Carson v. Blazer*, 2 Binney, 475, 4 Am. Dec. 463; *The Daniel Ball*, 10 Wall. 557, *sub nom. The Daniel Ball v. United States*, 19 L. ed. 999; *The Montello*, 20 Wall. 430, *sub nom. United States v. The Montello*, 22 L. ed. 391; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

NOTE.—As to title of riparian owner to bed of non-navigable stream, or one navigable only for floating logs, see cases in note to *Goff v. Cough* (Mich.) 42 L. R. A. on page 171.

For some cases in this series as to liability to riparian owner for injuries caused by running logs in stream, see *Coyne v. Mississippi & R. R. Boom Co.* (Miss.) 41 L. R. A. 494, and note, and *Smith v. Atkins* (Ky.) 53 L. R. A. 790.

In this country all waters are deemed navigable which are really so.

Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *McManus v. Carmichael*, 3 Iowa, 30; *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.* 74 Wis. 652, 43 N. W. 660; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Moore v. Sandborne*, 2 Mich. 519, 59 Am. Dec. 209; *Felger v. Robinson*, 3 Or. 457; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655; *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.* 107 Cal. 221, 40 Pac. 531; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 607; *Martin v. Bliss*, 5 Blackf. 35, 32 Am. Dec. 62; *Cooley, Const. Lim.* 6th ed. p. 727; *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; 18 Am. & Eng. Enc. Law, pp. 239-244; *Falls Mfg. Co. v. Oconto River Improv. Co.* 87 Wis. 134, 58 N. W. 261.

With the rejection of the common-law doctrine as to navigability goes also the common-law doctrine of the ownership of the beds and shores.

Barney v. Keokuk, 94 U. S. 338, 24 L. ed. 228; *St. Clair County v. Lovingson*, 23 Wall. 64, 23 L. ed. 62; *Shively v. Bowlby*, 152 U. S. 38, 38 L. ed. 344, 14 Sup. Ct. Rep. 546; *Withers v. Buckley*, 20 How. 93, 15 L. ed. 820; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Menongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

The right of the United States to public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power on Congress to grant the shores or beds of navigable waters.

Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. ed. 220; *Eisenbach v. Hatfield*, 2 Wash. 242, 12 L. R. A. 632, 26 Pac. 539; *Johnson v. Knott*, 13 Or. 308, 10 Pac. 420; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The titles and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject to the rights granted by the Constitution to the United States.

Barney v. Keokuk, 94 U. S. 336, 24 L. ed. 227; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Shively v. Bowlby*, 152 U. S. 40, 38 L. ed. 346, 14 Sup. Ct. Rep. 548; *Hardin v. Jordan*, 140 U. S. 402, 35 L. ed. 440, 11 Sup. Ct. Rep. 808, 838.

Riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as incident to their estate.

Eisenbach v. Hatfield, 2 Wash. 253, 12 L. R. A. 632, 26 Pac. 539; *East Hoquiam Boom* 54 L. R. A.

& Lumber Co. v. Neeson, 20 Wash. 142, 54 Pac. 1002.

The stream being navigable and a public highway, both in fact and law, even were the state to grant the beds and shores thereof, yet that grant could not interfere with the public easement.

Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298; 3 Kent, Com. 2d ed. 492; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36.

The right of navigation in a navigable stream is superior and paramount to all other rights.

Field v. Apple River Log Driving Co. 67 Wis. 569, 31 N. W. 19; *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570; *Elliott, Roads & Streets*, p. 28.

A narrowing or contraction of a highway on land is a nuisance, and the same is true of waterways.

People v. Gold Run Ditch & Min. Co. 66 Cal. 138, 4 Pac. 1155; 16 Am. & Eng. Enc. Law, p. 263; *Angell, Highways*, 3d ed. § 229.

The public are entitled to use the streams from bank to bank.

State v. Berdett, 73 Ind. 185, 38 Am. Rep. 117; *Elliott, Roads & Streets*, p. 478; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 582; *McPheters v. Moose River Log Driving Co.* 78 Me. 329, 5 Atl. 270.

The duty imposed upon plaintiffs, by reason of their use of the river, is not an absolute duty, and hence ordinary care and prudence alone are required.

18 Am. & Eng. Enc. Law, p. 418.

Using the stream as a public highway for the transportation of saw logs to market, it was necessary for them to conduct their operations in an ordinarily careful and prudent manner.

Field v. Apple River Log Driving Co. 67 Wis. 569, 31 N. W. 19.

Land on navigable streams is subject to the danger incident to the right of navigation; and where logs are driven in a stream in an ordinarily careful and prudent manner, the owner is not liable for damages which may result to the riparian owner.

Ibid.; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36.

The right to navigate a stream also involves the right to go upon the banks for the purpose of reclaiming logs that may have been washed thereon.

Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 648; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Washh. Easements & Servitudes*, § 9, pp. 400, 403.

The test of navigability is the capacity of any given stream for profitable use.

Burke County Comrs. v. Catawba Lumber Co. 116 N. C. 731, 21 S. E. 943; *Hickok v. Hine*, 23 Ohio St. 523; 13 Am. Rep. 255; *Moore v. Sandborne*, 2 Mich. 519, 59 Am. Dec. 209; *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655; *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.* 74 Wis. 652, 43 N. W. 660.

Whether a river is navigable is a ques-

tion of fact that in no manner depends upon whether or not the legislature has declared the river navigable.

Martin v. Bliss, 5 Blackf. 35, 32 Am. Dec. 52; *McManus v. Carmichael*, 3 Iowa, 1; *Healy v. Joliet & C. R. Co.* 116 U. S. 191, 20 L. ed. 607, 6 Sup. Ct. Rep. 352; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 835; *Mendota Club v. Anderson*, 101 Wis. 479, 78 N. W. 189.

Where a stream is navigable for any purpose it is a nuisance to obstruct it.

Wood, Nuisances, § 464; 6 *Lawson, Rights, Rem. & Pr.* § 2930; *Elliott, Roads & Streets*, 491; *Burke County Comrs. v. Catawba Lumber Co.* 116 N. C. 731, 21 S. E. 941.

Mr. Sol. Smith, for Dorris:

Private property may not be taken for private use.

State ex rel. Commercial Electric Light & P. Co. v. Stalloup, 15 Wash. 263, 46 Pac. 252.

Whether the creek be navigable or not, plaintiffs have no right to use the adjacent lands.

Pollock v. Cleveland Ship Building Co. 56 Ohio St. 655, 47 N. E. 582; *Eisenbach v. Hatfield*, 2 Wash. 240, 12 L. R. A. 632, 26 Pac. 539.

If the stream is a public highway, plaintiffs have no right to blast the rock or use the premises of defendant to break the jam.

Haines v. Welch, 14 Or. 319, 12 Pac. 503; *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609, 20 Pac. 834; *State ex rel. Commercial Electric Light & P. Co. v. Stalloup*, 15 Wash. 263, 46 Pac. 252; *Jones v. St. Paul, M. & M. R. Co.* 16 Wash. 25, 47 Pac. 226.

The title is in the riparian proprietor.

Cooley, Torts, p. 377.

The state cannot make it public without compensation to him.

Const. art. 1, § 16; *Seanor v. Whatoom County Comrs.* 13 Wash. 48, 42 Pac. 552; *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98; *State v. Carpenter*, 68 Wis. 165, 31 N. W. 730; *Steinbuechel v. Lane*, 59 Kan. 7, 51 Pac. 887; *State ex rel. Commercial Electric Light & P. Co. v. Stalloup*, 15 Wash. 263, 46 Pac. 252; *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. 339; *Allison v. Davidson* (Tenn. Ch.) 39 S. W. 909; *Hood River Lumbering Co. v. Wasco County*, 35 Or. 498, 57 Pac. 1017.

Section 1, art. 17, state Const. vests the title to both water and soil of all unmeandered streams in the bank owner; and the legislature cannot establish a criterion making them navigable or highways without compensating him.

Scurry v. Jones, 4 Wash. 468, 30 Pac. 726; *Benton v. Johnson*, 17 Wash. 280, 39 L. R. A. 107, 49 Pac. 495; *Eisenbach v. Hatfield*, 2 Wash. 241, 12 L. R. A. 632, 26 Pac. 539; *Allison v. Davidson* (Tenn. Ch.) 39 S. W. 905; *Angell, Watercourses*, § 5; *State Const. art. 27*, § 2.
54 L. R. A.

None of the states claim title to the banks and beds of streams merely floatable.

Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; *Curtis v. Keester*, 14 Barb. 511; *Astoria Exch. Co. v. Shively*, 27 Or. 104, 39 Pac. 398, 40 Pac. 92; *Haines v. Welch*, 14 Or. 319, 12 Pac. 503.

Such a stream is not a public way in any state.

Cooley, Const. Lim. p. 727; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Morrison Bros. v. Coleman*, 87 Ala. 655, 5 L. R. A. 384, 6 So. 374; *Bayzer v. McMillan Mill Co.* 105 Ala. 395, 16 So. 923; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Allison v. Davidson* (Tenn. Ch.) 39 S. W. 905; *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609, 20 Pac. 831; *United States v. Rio Grande Dam & Irrig. Co.* 9 N. M. 292, 51 Pac. 674.

The modification of the common law has been to extend, by statutory enactment, public waterways so as to include those streams capable of being used, profitably by the public, in their natural condition, to float logs to market. Where these statutes have provided for compensation to riparian proprietors, they have generally been sustained by the courts as a proper exercise of the power of eminent domain. Where there has been no provision made for compensation for the use of such streams, they have generally been condemned by the courts as unconstitutional for taking private property for public use without compensation.

Allison v. Davidson (Tenn. Ch.) 39 S. W. 909; *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.* 107 Cal. 221, 40 Pac. 532; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98; *Irwin v. Brown* (Tenn.) 12 S. W. 340; *Bayzer v. McMillan Mill Co.* 105 Ala. 395, 16 So. 924; *Olive v. State*, 86 Ala. 88, 4 L. R. A. 33, 5 So. 653; *Haines v. Welch*, 14 Or. 319, 12 Pac. 503.

PER CURIAM:

This action was instituted by appellants, who compose a partnership doing a logging business under the firm name of the Elochoman Logging Company, in the county of Wahkiakum, state of Washington. Appellants are the owners of certain timber lands situate upon and adjacent to the stream named and designated as the "Elochoman River," or "Elochoman Creek," and have for some time been engaged in cutting and removing from said premises the merchantable spruce and fir timber thereon, and by means of said stream have been transporting the saw logs cut from said timber to tide water, for the purpose of booming and rafting the same there for transportation to the market. The action was brought against Thomas Dorris and William Dorris, respondents here; and said Thomas Dorris is also an appellant. Said Thomas Dorris is the owner of certain other lands lying upon both sides of said stream and below the lands of appellant, the Elochoman Logging Company. During the month of November, 1897, the said logging company, having

theretofore placed about 1,500 logs in said stream, undertook to run the same down the stream where it passes through the lands of said Thomas Dorris. At a point in said stream where it passes through the lands of said Thomas Dorris is a large rock, so situated and imbedded that, when said appellants' logs were carried down by a freshet then occurring, their passage was obstructed by said rock, a jam was formed, and the waters of the stream were thereby backed and caused to overflow the lands of said Thomas Dorris. The said appellants then sought to break said jam, and alleged in their complaint that the only way of approaching thereto was from the banks of said stream, over the lands of the respondents Dorris, and that said respondents prevented the appellants from making such approach and from entering upon said lands for said purpose, and had threatened appellants with personal violence if they should undertake to go upon said lands for said purpose. They further alleged that the force of the water at said point was insufficient to break said jam, and that it could only be done by men aided by steam or horse power operated upon the banks of said stream, on the lands of the said respondents. They also alleged that the value of the logs held by said jam was \$8,000, and that they had been damaged in the sum of \$2,000 by the conduct of the Dorries in preventing them from going upon said lands to break said jam, and prayed judgment for said sum, and also prayed for a temporary restraining order preventing the respondents from in any manner interfering with the appellants' entering upon the banks of said stream for the purpose of breaking said jam, and also preventing them from interfering with the removal of the rocks from the bed of the stream which were obstructions to the passage of said logs. Upon the showing made, the court granted the temporary restraining order, without notice, and fixed a date in the order when respondents should, after notice, show cause why a temporary injunction should not issue pending the final hearing of the cause. A hearing was had at said time, and the court continued the temporary injunction until the final hearing of the cause. Assignments of error are urged by the appellant Thomas Dorris as to the course of the court at the time of the hearing when the temporary injunction was continued, but, in view of the subsequent history of this case, we do not deem it necessary to discuss them here, as will appear later in the course of this opinion. Thereafter the respondents answered the complaint, and admitted the fact that the log jam existed, but alleged that the same was caused by the insufficient capacity of said stream to float logs, and by the mismanagement and unskilful manner of appellants in driving said logs, together with their gross negligence and want of care, and utter indifference to the injury resulting therefrom. They deny that said rock was in the bed of the stream, and aver that it was then, and for many

years theretofore had been, imbedded in and formed a part of the west bank of said stream, where it was a valuable protection to the bank of the stream, and also formed a portion of the fence inclosing the cultivated lands of said Thomas Dorris, and was situated upon his land, and formed a part thereof. The respondent Thomas Dorris alleges that he is the sole owner of said land; that said stream is not a meandered stream or a public highway, and is not navigable where it flows through the said lands; that the said stream was duly surveyed and disposed of by the United States, long before the state of Washington was admitted into the Union, under and by virtue of the land laws of the United States, and is a private stream, not of sufficient size and volume at any stage of the water, in its natural state, to be of public utility, or to float saw logs to market, when it flows through the lands of said Thomas Dorris, or above said lands, but is a short mountain creek, depending upon the rainfall for the volume of its waters. The reply puts in issue the material averments of the answer. At the trial of the cause a large number of witnesses were examined. The statement of facts filed in this court contains more than 400 pages of transcribed testimony. As an advisory matter, the court submitted to a jury the questions of fact propounded by the interrogatories hereinafter set forth, and after due deliberation the jury returned their answers thereto as severally set forth below. The said interrogatories and answers are, respectively, as follows, to wit:

(1) Is the Elochoman river, above the lands of Thomas Dorris, a highway suitable for the running of logs?

A. Yes.

(2) Have the lands of Thomas Dorris been injured by the jam of November, 1897?

A. Yes.

(3) Was that jam the result of the want of ordinary care and prudence on the part of the plaintiffs?

A. Yes.

(4) What amount of land was damaged, and what is the value thereof?

A. 2.624 acres; \$168.75.

(5) Did the defendant Thomas Dorris refuse at any time before the jam was broken to allow the plaintiffs or their agents to enter upon and break said jam, and, if so, what was the extent and value of the land damaged at the time of such refusal?

A. No.

Assignments of error as to the court's instructions to the jury are urged by counsel upon both sides, but we think the instructions substantially embody the law of the case. The court followed the findings of the jury upon the facts submitted to them, and thereafter, with other findings, entered the following findings of fact: "(3) That the Elochoman creek is about 18 miles in length, and empties into the Columbia river; that it has an average width of 100 feet

and a depth of about 3 feet; that in its normal capacity it cannot be used for the floating of logs, but that there are annually recurring freshets of sufficient duration and with a sufficient volume of water to render said creek capable of being used profitably for the floating of logs to the Columbia river to market; that said creek has been so profitably used for a period covering the last twenty-five years. (4) That the said Elochoman creek is an unmeandered stream, unaffected by the rise and fall of the tide, save only for a short distance above the point where it empties into the Columbia river, and below the lands of said Thomas Dorris. (5) That the lands of plaintiff hereinbefore described are chiefly valuable for their timber, and that there is no other outlet to market, except by means of said Elochoman creek, where the same flows through the lands of said Thomas Dorris. (6) That, in addition to the lands of plaintiffs, there are large bodies of timber adjacent to said Elochoman creek, which are heavily timbered, and that the timber thereon cannot be conveyed to market except by means of said creek. (7) That during the early part of November, 1897, the plaintiffs, having theretofore placed in said creek a large number of logs, to wit, to the number of about 1,500, undertook, during a freshet, to run said logs down said Elochoman creek, where the same passes through the lands of said Thomas Dorris. (8) That at the time the plaintiffs so undertook to run said logs there was upon the banks of said stream, adjacent to and forming a part of the bank of said stream where the same passes through the land of said Thomas Dorris, a large rock, which had theretofore been imbedded in the bank, but which during frequent freshets had partially washed out from the bank; that said rock was so situated at the time said logs were run that the accumulation there at any one time, during a freshet, of a great volume of logs, would result in a jam, and the consequent spreading out of the water upon the neighboring lands, with damage resulting therefrom; that the fact that the above-described rock was situated as aforesaid, and that the floating of a large number of logs thereupon would result in the formation of a jam, was well known to plaintiffs before the running of said logs aforesaid. (9) That during the early part of the said month of November, 1897, the said plaintiffs caused to be turned loose in said creek, at a point above the lands of said Thomas Dorris, about 1,500 saw logs, many of them of considerable size and length, which said logs were, by the freshet then occurring, carried down to the said rock situated on the lands of Thomas Dorris; that there a jam was formed, and the waters of said creek were backed and caused to overflow upon the lands of Thomas Dorris, occasioning damage thereto in the sum of \$166.75. (10) That the said damage as aforesaid resulted from the carelessness and negligence of the plaintiffs." Upon the facts as found, the following conclusions of law were entered: "(1) That the

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Elochoman creek, from the point where the same empties into the Columbia river, up to the lands of plaintiffs, is navigable for logs at sufficiently regularly recurring periods and for sufficient lengths of time to enable the same to be used profitably for the floating of saw logs to market. (2) That the public have a right to the use of said stream for the purpose of floating saw logs and other products of the forest to market, provided that said use be exercised with such reasonable care as will not endanger the property of the riparian proprietors. (3) That the plaintiffs are indebted to the defendant Thomas Dorris in the sum of \$166.75, his damages so as aforesaid sustained."

It is contended that some of the important findings are not justified by the evidence, but an examination of the evidence convinces us that there was evidence upon which to found the findings; and, since the trial court heard all the evidence, we believe he is better qualified than this court to pass upon its weight and credibility. We find no error in the conclusions of law. Decree was entered, in accordance with the findings and conclusions, that the Elochoman creek, from the point where it empties into the Columbia river up to and through the lands of Thomas Dorris, and up to and through the lands of plaintiffs, is navigable for logs and other products of the forest; that the public have a right to use said Elochoman creek for the purpose of floating saw logs and other products of the forest to market, provided that said use be exercised with such reasonable care as will not endanger the property of riparian proprietors. The said Thomas Dorris was awarded damages in the sum of \$166.75, together with his costs, and said William Dorris was awarded his costs. The temporary injunction theretofore issued against Thomas Dorris and William Dorris was dissolved.

The complaint of Thomas Dorris, on his appeal, that the court erred in the matter of granting and continuing the temporary injunction heretofore referred to in this opinion, we think, calls for no consideration here. If the court below committed error, this court cannot now reverse its proceedings in the matter of the temporary injunction, for the reason that any such error was corrected by the court itself when it dissolved the temporary injunction at the final hearing. If harm occurred by reason of the temporary injunction, the remedy is now by suit upon the injunction bond for wrongfully suing out the injunction.

The real question to be determined upon the merits is, What are the respective rights of the landowner and the log driver upon a stream of the character of Elochoman creek? The act of March 17, 1890 (Sess. Laws 1889-90, p. 470; Ballinger's Anno. Codes & Statutes, §§ 4378-4386, inclusive), defines the powers and duties of corporations organized for the purpose of building booms and catching logs and timber products therein. Section 9 of said act provides: "All meandered rivers, meandered

sloughs, and navigable waters in this state shall be deemed as public highways, and said corporations shall be declared public corporations for the purpose of this act; and the improvement of such streams, sloughs, and waters shall be deemed and declared a public use and benefit." Under this section all "meandered rivers and meandered sloughs" shall be deemed as public highways for the purposes specified in the act, viz., booming and floating logs and timber. Nothing further is needed to establish them as such public highways, when it is shown that they are meandered. The section further provides that all "navigable waters" shall be deemed as public highways for the same purpose. If the stream is not meandered, it must then be determined whether it is or is not navigable in fact for floating logs or timber. If navigable for such purpose, it is a public highway for that purpose. The court finds Elochoman creek to be a short stream, 18 miles in length, with an average width of 100 feet, and a depth of about 3 feet, and that the stream can, during annually recurring freshets, be used profitably for the floating of logs to the Columbia river to market, and that it has been so profitably used for the last twenty-five years. The stream must therefore be held to be a public highway for the purpose of floating logs and timber to market. Being a public highway for such purpose, what are the relations of the landowner to the stream? Thomas Dorris is the owner of the land on both sides of the stream. If such a stream as this is included in the provisions of § 1, art. 17, of the Constitution of Washington, then the state is the owner of the bed of the stream below ordinary high-water mark. We do not believe, however, that the said constitutional provision was intended to include streams of the character of this one, but only such as are navigable for general commercial purposes. This stream is of such a character that its use as a public highway is restricted to one purpose, viz., that of floating logs or timber, and we think a distinction must be drawn between such streams and those which are highways for general trade and commerce. The title to the bed of the stream, therefore, passed from the government to the landowner, but it is subject to the right of the public to use the stream for floating logs and timber. This right is further given by virtue of the act of 1890 aforesaid to corporations, under conditions therein contained. Again, the same right is continued with further provisions under the act of March 18, 1895 (Sess. Laws 1895, p. 128; Ballinger's Anno. Codes & Statutes, §§ 4387-4394). These provisions have been held constitutional by this court in *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001. With this right given to a corporation to use the stream as a public highway, there is no reason, in principle, why an individual or partnership, as in this case, may not use it as such. Indeed, if a corporation only could so use the stream, the act would be of

doubtful force, because of its discrimination. The statute provides how such corporations may improve the stream, by removing obstructions, and they may also become common carriers to drive all the logs delivered into their charge, and may collect toll therefor. But the right of individuals or partnerships to use the stream as a highway cannot be denied. But neither such corporation nor individuals can interfere with the soil in a stream of the character of Elochoman creek, the bed of which is owned by the landowner, without the landowner's consent or by operation of law with due compensation made. The same reasoning applies with even greater force to the use of the banks of the stream, as was sought to be done in this case. *Lovnsdale v. Gray's Harbor Boom Co.* 21 Wash. 542, 547, 58 Pac. 663. Appellants, therefore, have the right to drive their logs down the stream as long as they do so without damage to the landowner. But, if the use of the freehold or shore rights are acquired, they must acquire them, either as individuals, or by condemnation in a corporate capacity, as provided by the statutes above mentioned.

It having been found that the jam was caused by the appellants' careless manner of driving the logs, the consequent damage to the land is chargeable to them; and, since we find no substantial error in the record, *the judgment is affirmed.*

Rehearing denied.

Lillie M. TROWBRIDGE, *Appt.*,

v.

Fred M. SPINNING *et al.*, *Respts.*

(.....Wash.....)

1. Upon a question arising under the Federal laws requiring full faith and credit to be given in each state to the judicial proceedings of every other state, courts will take judicial notice of the local laws of the state from which the record comes.
2. Allegation of the fact of jurisdiction to grant a divorce in a court of another state, whose decree is sought to be enforced, is not necessary where it is alleged to be a court of general jurisdiction, and the local statutes empower it to pass such decrees.
3. The presumption of the regularity of the proceedings in the courts of another state resulting in a decree of divorce will dispense with an allegation, in a bill to enforce the decree, that the cross-complaint

NOTE.—For earlier cases in this series as to effect of divorce in other state, see *Cumington v. Belchertown* (Mass.) 4 L. R. A. 131, and note; *Thompson v. Thompson* (Ala.) 11 L. R. A. 444, and note; *Adams v. Adams* (Mass.) 13 L. R. A. 275; *Kelley v. Kelley* (Mass.) 25 L. R. A. 806; *Bullock v. Bullock* (N. J. Eq.) 27 L. R. A. 213; *Hilbish v. Hattel* (Ind.) 33 L. R. A. 783; *Dunham v. Dunham* (Ill.) 35 L. R. A. 70; *Atherton v. Atherton* (N. Y.) 40 L. R. A. 291; and *Felt v. Felt* (N. J. Eq.) 47 L. R. A. 546.

on which the decree was based was duly served.

4. That a judgment for alimony in a divorce proceeding is subject to alteration from time to time by the court which rendered it, as may seem proper upon new facts occurring after the trial does not prevent its being a final decree which may be enforced in the courts of another state.
5. A safe-deposit company having valuables of a debtor in its vaults is subject to garnishment therefor, although it has no access to the contents of the box in which they are kept, under a statute commanding a garnishee to answer as to the personal property or effects of the defendant in his possession or under his control.

(August 25, 1900.)

A PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendants in an action brought to enforce a judgment for alimony in which some of the defendants were summoned as garnishees. *Reversed.*

The facts are stated in the opinion.

Messrs. E. F. Blaine, Wilmon Tucker, and Ivan L. Hyland for appellant.

Messrs. John G. Gray and John N. Perkins, for respondent Spinning:

The authority of the circuit court of the city of St. Louis in proceedings for divorce and alimony is not shown or alleged in any of plaintiff's pleadings. This is a fatal defect.

Van Fleet, Collateral Attack, § 840; *Northcut v. Lemery*, 8 Or. 316; *Com. v. Blood*, 97 Mass. 538; *Kelley v. Kelley*, 161 Mass. 111, 25 L. R. A. 806, 36 N. E. 837.

Under the practice of this state a decree taken on a cross bill without notice would not be upheld.

Van Fleet, Collateral Attack, § 495.

Where there is a prayer in the petition for alimony, it cannot be granted upon the default of defendant, so as to render it available as a personal judgment, unless there is personal service.

Wade, Notice, § 1083.

No case can be found where greater effect is given to the judgment of any state in the courts of another than belongs to it in the state where it was rendered.

Snydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254; *Wood v. Watkinson*, 17 Conn. 500, 44 Am. Dec. 562; 2 Black, Judgm. § 861; *Rogers v. Coleman*, Hardin (Ky.) 413, 3 Am. Dec. 733; *Freeman, Judgm.* § 221.

Decrees granting divorces are not covered by the Constitution of the United States, which requires the state courts to give full faith and credit to the judgments of the courts of other states; hence each state must determine what credit they shall receive.

Van Fleet, Collateral Attack, § 649; 2 Bishop, Marr. Div. & Sep. § 847.

In Washington the decree for alimony or division of the property is a final one.

King v. Miller, 10 Wash. 274, 38 Pac. 1020; *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864; *Ballinger, Divorce & Alimony*, chap. 12.

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The Missouri policy came from one that looked to the reuniting of the divorced couple. So that there is, not only a conflict of the statute law of the two states and in every stage of its procedure, both in the trial court and in the appellate court, but the statutes come from different policies.

A court, in order to give effect to a foreign law, will not introduce in its own system a foreign remedy.

Wharton, Conflict of Laws, § 749; *Erickson v. Nesmith*, 15 Gray, 221; *Thompson v. Waters*, 25 Mich. 215, 12 Am. Rep. 243.

The husband's liability to pay alimony is not a debt in the sense that such writ may be issued upon it.

2 Bishop, Marr. Div. & Sep. § 836; *Re Anderson*, 97 Fed. 321.

Upon an alterable St. Louis decree, the courts of this state will not belabor one of its own citizens with an iron judgment upon which they can make no inquiry as to whether it may bring permanent ruin or financial despair.

Browne, Divorce, p. 246; *Batley v. Holbrook*, 11 Gray, 212; *Barber v. Barber*, 2 Pinney (Wis.) 297; *Van Buskirk v. Mullock*, 18 N. J. L. 184; *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21.

Mr. George E. De Steiguer, for the respondent bank:

Assuming that the defendant had anything subject to execution in the safe-deposit box, the contents of the box were not in the possession, or under the control, of this garnishee.

The bank has no possession for two reasons:

1. Possession "implies exclusive enjoyment." "It implies a present right to deal with the property at pleasure, and to exclude other persons from meddling with it."

18 Am. & Eng. Enc. Law, p. 840; *Sullivan v. Sullivan*, 66 N. Y. 37.

2. There is not that element of intent necessary to constitute possession in the bank.

See *Bouvier's Law Dict. Possession*.

If there were any doubt about the meaning of the words "possession" and "control," that doubt is resolved by the provisions of the garnishment law itself. The possession and control referred to in § 3 of the garnishment act (Laws 1893, p. 96) must be such as will enable the garnishee to comply with the obligations imposed upon him by other provisions of the law,—such possession and control as will enable him to respond to the writ.

Bank of Monroe v. Gifford, 79 Iowa, 300, 44 N. W. 558; *Gregg v. Hilson*, 8 Phila. 191; *Drake, Attachm.* 5th ed. § 451a; *Andrews v. Ludlow*, 5 Pick. 28; *Smalley v. Miller*, 71 Iowa, 90, 32 N. W. 187; *Drake v. Catlin*, 19 Wash. 316, 51 Pac. 396; *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 627, 40 Pac. 223.

There was no evidence that there was anything in the box subject to execution.

Bottom v. Clarke, 7 Cush. 487.

If there had been anything in the box

subject to execution, the statute provides no means of enforcing the writ; nor can it be enforced in any manner without interfering with certain undeniable rights of the defendant.

Drake v. Catlin, 18 Wash. 316, 51 Pac. 396; *Bottom v. Clarke*, 7 Cush. 487.

An alterable alimony decree is not a final judgment for a fixed sum, and faith and credit should not be given it.

Lynde v. Lynde, 162 N. Y. 405, 48 L. R. A. 679, 56 N. E. 979.

The Federal courts should guide this case.

White, J., delivered the opinion of the court:

The amended complaint in this action, omitting the formal parts, is as follows:

"That at all the times herein mentioned the circuit court of the city of St. Louis in the state of Missouri, was, and ever since has been, and now is, a court of general jurisdiction over matters in equity and law, duly organized and existing under and by virtue of the laws of said state. That on the 25th day of June, 1895, the defendant above named, Fred M. Spinning, commenced an action in said circuit court of the city of St. Louis, as plaintiff, against Lillie M. Spinning, she being the plaintiff here, who at that time was the wife of said Fred M. Spinning, and defendant, by filing his petition therein, which said action was entitled as follows, to wit: 'In the Circuit Court of the City of St. Louis, October, 1895, *Fred M. Spinning, Plaintiff, v. Lillie M. Spinning, Defendant.*' That upon the filing of said petition the clerk of said court, on the 25th day of June, 1895, duly issued a summons commanding the defendant therein, who is the plaintiff herein, to appear before the judges of said circuit court on the first day of the next term thereof to be held in the city of St. Louis, at the court house in said city, on the first Monday of October next following the day of the issuance thereof, then and there to answer the complaint of Fred M. Spinning as set forth, a copy of which was attached to said summons and said summons was duly sealed with the seal of said court and attested by the clerk on said day, and thereafter was duly served upon the defendant herein named, personally, at the city of St. Louis, in the state aforesaid, by the sheriff of said county, by delivering a copy thereof, with a copy of said petition, to said defendant personally, she being the plaintiff herein.

"That, after the service of process upon said defendant, the plaintiff herein, said Lillie M. Trowbridge, appeared by her attorney, Wm. McNamee, and in person, and thereafter such proceedings were had and done therein that said Lillie M. Trowbridge, then Lillie M. Spinning, filed her answer and cross complaint in said action against the said Fred M. Spinning, wherein she alleges that she was the injured person, praying, among other things, that she was entitled to a decree of divorce, and for her costs and alimony. That thereafter, and on the

29th day of January, 1896, such other and further proceedings were had in said action that a trial thereof was had on said day, wherein and whereby said court ordered, decreed, and rendered judgment therein against the said Fred M. Spinning, granting the defendant therein a complete decree of divorce, she being the plaintiff here, together with judgment against said Fred M. Spinning for the sum of \$5,000 as and for alimony in gross, and further ordered, adjudged, and decreed that said Fred M. Spinning pay the costs of said proceeding, and that execution issue therefor. And that said decree was duly made, entered, enrolled, and docketed in said court dissolving the bonds of matrimony and rendering judgment as aforesaid, and that no part of said judgment and decree has ever been paid.

"That under and by virtue of the provisions of the Revised Statutes of the state of Missouri, chap. 28, p. 360, of volume 1, for the year 1879, such judgment and decree rendered as aforesaid has the force and effect of a judgment at law for the payment of money. That such is the construction thereof, and the force and effect to be given to the same, as determined by the supreme court of said state of Missouri, and such is the law of said state. That by reason thereof plaintiff is advised and believes, and therefore alleges the fact to be, and that, under and by virtue of the Constitution of the United States (§ 1, art. 4), she has a good right to bring her cause of action as aforesaid in the courts of the state of Washington, and to have and recover of the said defendant the sum of \$5,000, awarded to her as aforesaid, and that the courts of the state of Washington will give the same force and effect to said decree as is given thereto in the state of Missouri.

"Plaintiff hereby refers to §§ 2179, 2180, 2184, and 2185 of volume 1 of the Revised Statutes of the state of Missouri of 1879, and attaches hereto full and complete copies of said sections aforesaid; the same being marked as Exhibit A, and made a part and parcel thereof to all intents and purposes as fully as though copied at length herein."

The sections of the Revised Statutes of the state of Missouri referred to in § 4 of the complaint are as follows:

"Sec. 2179. When a divorce shall be adjudged the court shall make such order touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children or any of them, as from the circumstances of the parties and the nature of the case shall be reasonable, and, when the wife is plaintiff, may order the defendant to give security for such alimony and maintenance; and upon his neglect to give the security required of him, or upon default of himself and his securities, if any there be, to pay or provide such alimony and maintenance, may award an execution for the collection thereof or enforce the performance of the judgment or order by sequestration of property or by such other lawful ways and means as is according to the practice of the court. The

court on the application of either party may make such alteration from time to time as to the allowance of alimony and maintenance as may be proper, and the court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the manner provided by law in other cases.

"Sec. 2180. Upon a decree of divorce in favor of the wife the court may, in its discretion, decree alimony in gross or from year to year. When alimony is decreed in gross such decree shall be a general lien on the realty of the party against whom the decree may be rendered as in the case of other judgments. When a decree is for alimony from year to year such decree shall not be a lien on the realty as aforesaid, but an execution in the hands of the proper officer, issued for the purpose of enforcing such decree, shall constitute a lien on the real and personal property of the defendant in such execution so long as the same shall lawfully remain in the possession of said officer unsatisfied."

"Sec. 2184. No final judgment or order rendered in cases arising under this chapter shall be reversed, annulled, or modified in the supreme or any other court by appeal or writ of error unless such appeal shall have been granted during the term of court at which the judgment or order appealed from was rendered, or unless such writ of error shall have been issued within sixty days after the order was made or judgment was rendered.

"Sec. 2185. No petition for review of any judgment for divorce rendered in any case arising under this chapter shall be allowed any law or statute to the contrary notwithstanding; but there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as in other cases."

The prayer of the complaint was for judgment against the defendant Fred M. Spinning for the sum of \$5,000, with interest thereon from the 26th day of January, 1896, at the rate of 6 per cent per annum, and for costs, etc. The respondent Spinning demurred to this complaint on the ground that the same did not state facts sufficient to constitute a cause of action against him. This demurrer, upon hearing, was sustained, and judgment was entered dismissing the action. On September 6, 1899, at the time the plaintiff filed her original complaint in the superior court of King county, state of Washington, a writ of garnishment was issued and served upon the Washington National Bank, First National Bank, National Bank of Commerce, Seattle Safe-Deposit Vaults, Incorporated,—all of the city of Seattle,—as garnishee defendants. All of the garnishee defendants appeared, and the Seattle Safe-Deposit Vaults, Incorporated, and the Washington National Bank denied generally, and these answers were controverted. The First National Bank admitted that it had on deposit the sum of \$266.19

to the credit of the respondent. The garnishee defendant the National Bank of Commerce answered stating: That the respondent had in its vaults a safe-deposit box, to which there was a private and a master's key, the private key being in the possession of the respondent, and the master's key in the possession of the garnishee defendant, and to open said box it is necessary—First, for the master's key to be used; second, for the private key to be used. That the contents of the box were unknown to the garnishee defendant. To the vault there was a vault door, locked by a time combination, which was under the exclusive charge of the garnishee defendant. Upon the issues formed by the answer of the garnishee defendant the National Bank of Commerce, proof was taken; and the court made findings of fact and conclusions of law, and discharged said garnishee defendant, and to said conclusions of law the appellant excepts. This order was made prior to the sustaining of the demurrer to the amended complaint. At the time of the sustaining of the demurrer to the amended complaint an order was made discharging all of the garnishee defendants. From said order and the sustaining of said demurrer to the amended complaint, and the judgment dismissing said action, this appeal is taken. The findings of fact and conclusions of law in relation to the garnishment against the National Bank of Commerce are as follows:

"That on the 14th day of October, 1898, said garnishee rented of said defendant, for one year, a compartment and box in the safety-deposit vaults of the said garnishee, and at the time of said renting gave to said defendant a receipt of which the following is a copy, to wit: 'No. 531. Seattle, Wash., Oct. 14, 1898. Received of Fred M. Spinning the sum of three and $\frac{100}{100}$ dollars in payment of rent for safety-deposit box No. 80, from Oct. 14, 1898, to Oct. 14, 1899. The National Bank of Commerce, by W. H. Wright. Read agreement on back,'—on the back of which receipt was the following indorsement, to wit: 'Read This Agreement. It is understood and agreed by and between the National Bank of Commerce and the lessee that, in case of the loss of the key of said box, it will be replaced only at the expense of the lessee, and the National Bank of Commerce shall not be responsible in any way for such loss. It is further understood and agreed by and between the National Bank of Commerce that said bank may refuse access to said box to any agent of the lessee not regularly designated by an instrument in writing filed with the bank.' (2) That the said defendant ever since the said 14th day of October, 1898, has continued to hold said box and compartment under said contract and lease. (3) That said box is an ordinary tin box inclosed within said compartment, and said compartment is closed with a door fitted with a lock. At the time of renting said box and compartment, the garnishee delivered to the defendant two duplicate keys

The method of opening said box and compartment is as follows: Said garnishee, through one of its employees, turns in said lock what is known as a 'master's key,' after which the keys furnished to the defendant will unlock the lock of said compartment, and permit the same to be opened. Said master's key will not unlock said lock. Said garnishee did not retain, and has not now, and has not at any time since renting said box and compartment had, any key whatsoever with which to open the said box or compartment, and has not now, and has not at any time, since renting said box and compartment, had, any means of opening or obtaining access to said compartment or box.

(4) Said master's key is not used for the purpose of giving said garnishee access to said box or compartment, but as a check on fraud and imposture, and to prevent unauthorized persons having access thereto. (5) Said garnishee has no information or knowledge as to what, if any, the contents of said box and compartment are, and no evidence has been introduced as to what such contents are, or whether said box contains anything save and except to the effect that the garnishee has been informed by the defendant that there are in said box papers belonging to other persons than the defendant. (6) Said garnishee has no means of ascertaining the contents of said box and compartment, and has no information, and is unable to ascertain, whether or not said box and compartment contain anything subject to execution, attachment, garnishment, or anything whatsoever. (7) That the sum of fifty dollars (\$50) is a reasonable sum to be allowed the garnishee as an attorney's fee. (8) At the time of the service of said writ said garnishee was not, and has not since been, indebted to defendant; nor has it had in its possession or under its control any property or effects of defendant, except as above set forth.

"Conclusions of Law: From the foregoing facts the court concludes, as a matter of law, that the garnishee the National Bank of Commerce is entitled to judgment discharging it upon its said answer, and for its costs against the plaintiff, including a reasonable attorney's fee, to wit, the sum of fifty dollars (\$50)."

The errors assigned are as follows:

"(1) The court erred in sustaining the demurrer to the amended complaint. (2) The court erred in discharging the garnishee defendant the National Bank of Commerce. (3) The court erred in discharging the other garnishee defendants."

The first point urged by the respondent against this complaint is that the authority of the circuit court of the city of St. Louis in proceedings for divorce and alimony is not shown or alleged in this complaint. It is alleged that the circuit court of the city of St. Louis at all the times mentioned in the complaint was and is a court of general jurisdiction over matters in equity and law, duly organized and existing under and by virtue of the laws of Missouri. "Questions of divorce and alimony," says the learned

counsel for the respondent Spinning, "are regulated by statutory provisions only, and the jurisdiction of courts over them cannot be extended beyond the statute authority. Proceedings in such matters are not according to the course of the common law, and there is no presumption in favor of the regularity of courts of general jurisdiction in such cases." Where a question arises under that part of the Constitution of the United States and the act of Congress which requires full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, our courts will take judicial notice of the local laws of the state from which the record comes. *Ohio v. Hinchman*, 27 Pa. 483; *Paine v. Schenectady Ins. Co.* 11 R. I. 415; *Rae v. Hulbert*, 17 Ill. 576. The supreme court of Pennsylvania, where the question was as to the jurisdiction of the probate courts of Ohio, in *Ohio v. Hinchman*, 27 Pa. 483, says: "The questions before us arise under the Constitution and laws of the United States. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, says the Federal Constitution; and the act of Congress of 26th May, 1790, providing for the mode of authenticating the records and judicial proceedings of the state courts, declares that 'the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.' A judgment of this court adverse to the right arising out of the Federal Constitution and legislation would be reviewable in the Supreme Court of the United States, and there the states of the Confederacy are not regarded as foreign states, whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that in questions of this sort we should take notice of the local laws of a sister state in the same manner the Supreme Court of the United States would do on a writ of error to our judgment. *Ferguson v. Harwood*, 7 Cranch, 408, 3 L. ed. 380; *Mills v. Duryce*, 7 Cranch, 481, 3 L. ed. 411; *Hampton v. M'Connell*, 3 Wheat. 234, 4 L. ed. 378; *Baxley v. Linah*, 16 Pa. 243, 55 Am. Dec. 494." The supreme court of Illinois, in *Rae v. Hulbert*, 17 Ill. 576, says: "While for many, if not for most, purposes, the several states of the Union are, as to each other, considered and treated as foreign states, yet it is not strictly so as to the judgments rendered by their several courts. I will not quote from the Constitution and laws of the Federal government, but from the opinion of this court in the case of *Welch v. Sykes*, 8 Ill. 199, 44 Am. Dec. 680. It is there said: 'Under the Constitution of

the United States, and laws made in pursuance thereof, the judgments *in personam* of the various states are placed on the footing of domestic judgments, and they are to receive the same credit and effect when sought to be enforced in different states, as they, by law or usage, have in the particular states where rendered.' We are then to treat this judgment, or give it the same effect, as if rendered by one of our own courts, or as if this were a proceeding in New York. We do not hesitate to declare that it is our duty to take notice that the supreme court of New York had jurisdiction of the subject-matter, and the same presumptions arise in favor of the jurisdiction of the person, and of the regularity of the proceeding, that would arise upon a domestic judgment. How far those presumptions arise in favor of the jurisdiction of the person, it is not necessary now to discuss particularly, for that is a question rather of evidence than of pleading. Though it may be necessary, when used as evidence, that the record should show such facts as are necessary to give the court jurisdiction of the person of the defendant, or at least as raise a presumption of jurisdiction, yet it is not necessary that such facts should be set out in the pleading. It is only necessary to aver that, by the consideration of the court, a judgment was rendered against the defendant. The implication is that it was a valid judgment, and that is sufficient to lay the foundation for the proof of every fact necessary to show that it was a valid judgment." The supreme court of Wisconsin, in *Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391, which was an action to recover alimony adjudged to the plaintiff in a divorce action brought in Illinois, says: "This is an action brought to recover alimony adjudged to the plaintiff in a divorce action heretofore brought in Illinois. It appears by the complaint that the court in which the divorce action was brought—i. e., the circuit court of Cook county, Illinois—was a court of general jurisdiction, as its name indicates. Hence it was unnecessary to allege any jurisdictional facts. *Jarvis v. Robinson*, 21 Wis. 524, 94 Am. Dec. 560. The allegation that the judgment was rendered in that court, and that it was afterwards duly amended, are sufficient in the first instance. From these facts jurisdiction is presumed. If in fact there was any want of jurisdiction, it is a fact to be set up by answer. *Ibid.*" For the reasons given in these decisions, which we think are sound, we take judicial notice that the circuit court of the city of St. Louis had jurisdiction to render the judgment alleged.

It is further objected that the appellant alleges that she filed her answer and cross-complaint, but she fails to allege that the same was served. This objection is also answered in the quotation from the cases of *Rae v. Hulbert*, 17 Ill. 570, and *Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391. Besides, we take judicial notice that under the laws of Missouri in all suits for divorce the defendant may set up in defense to the action in the answer any facts which, if proved,

would entitle the defendant to a divorce, and in such answer pray to be divorced from the plaintiff, and on the hearing of the cause the court can grant the defendant a divorce, if satisfied the defendant was the injured party. 1 Mo. Rev. Stat. 1879, § 2176. The complaint sufficiently alleges that she appeared in the action and filed her answer alleging she was the injured person praying for the decree, etc., and that such proceedings in the action were had that she obtained the judgment alleged. Whether the answer was served or not is immaterial. That is a mere matter of practice. It was filed, and the allegations of the complaint are sufficient to admit proof by exemplified copy of the record of the issues tried, and upon which the judgment was rendered.

The principal contention of the respondent Spinning is that the judgment for \$5,000, as for alimony in gross, given by the circuit court of the city of St. Louis, is not a final judgment, because the statute of Missouri provides that the court, on the application of either party, may make such alteration from time to time as to the allowance of alimony as may be proper; that the judgment of a sister state cannot be sued upon in this state unless it is final and conclusive in the state where it was rendered, according to the law of that state. We are now called upon to determine a question arising under the Constitution and laws of the United States, and we should look as far as possible to the decisions of the Federal courts for guidance. The case of *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, decided by the Supreme Court of the United States in 1858, as we view it, is decisive of this case. That was a case arising under a suit in equity in the district court of the United States for the district of Wisconsin, wherein by the decree the wife, by her next friend, the plaintiff in the suit, was awarded a judgment for \$5,936.80 on a decree of divorce from bed and board given by the state courts of New York, and decreeing alimony to the wife in the annual sum of \$360 in each and every year. The respondent Spinning insists, however, that under the laws of New York the decree for alimony in that case was final, and that that case must be distinguished from the one at bar. The precise point insisted upon here was undoubtedly before the Supreme Court of the United States and considered in that case. In the dissenting opinion of Justice Daniel, he says: "The second error in the position before mentioned is shown by the character and objects of the allowance made as alimony to a wife. This allowance is not in the nature of an absolute debt. It is not unconditional, but always dependent upon the personal merits and conduct of the wife,—merits and conduct which must exist and continue in order to constitute a valid claim to such an allowance. This allowance might unquestionably be forfeited upon proof of criminality or misconduct of the wife, who would not be permitted to enforce the payment of that to which it should be shown she had lost all just claim; and this inhibi-

tion, it is presumed, might embrace as well a portion of that allowance at any time in arrears, as its demand in future. The essential character, then, of this allowance, viz., its being always conditional and dependent, both for its origin and continuation, upon the circumstances which produced or justified it, is demonstrative of the propriety and the necessity of submitting it to the control of that authority whose province it was to judge of those circumstances. That authority can exist nowhere but with the power and the right to control the private and domestic relations of life. The Federal government has no such power. It has no commission of *censor morum* over the several states and their people." P. 603, 21 How., and p. 233, 16 L. ed. And it is said in the opinion of the majority of the court that "alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." P. 595, 21 How., and p. 230, 16 L. ed. From this it would seem that the Supreme Court of the United States understood that under the New York decree the allowance might be forfeited, and the decree annulled or recalled, for the subsequent immoral conduct of the wife. The case of *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, relied upon by respondent, was decided in 1884; and the point involved was whether the plaintiff, who had obtained a decree in 1869 which had made no provision for her support could ten years afterwards, by petition in the same case, be then allowed alimony. The court held that she could not, and in deciding that proposition said: "The question presented by this appeal is whether a court has power after the entry of a final decree in an action for limited divorce, establishing a cause of action in favor of the wife, to order an additional allowance for her support. . . . The question comes back to the interpretation of our own statute. No case has been cited in our courts where an application for the allowance for the support of the wife after final decree has been made, except in the case of *Kamp v. Kamp*, 59 N. Y. 219, where the allowance was refused. That was a case of absolute divorce, but no distinction is seen to exist between such a case and one of limited divorce. The statutes authorizing such an allowance in the final decree are similar in both cases, and the power of the court to make such order after final decree is given and prescribed in the same language by the same section. . . . By expressly authorizing an order to be made after judgment providing only for the 'care, custody, and education of the children of the marriage,' it has impliedly prohibited such an order for any other cause." The allowance to the wife is in the nature of a debt due from one party to the other. The supreme court of Missouri has held that the statutory authority to alter a decree as to alimony or the custody of the children can only be exercised upon new facts occurring after the trial. *Deidesheimer v. Deidesheimer*, 74 Mo. App. 54 L. R. A.

236. Unless such facts occur, there can be no alteration of the decree. An ordinary judgment or decree in a suit at law or in equity may be discharged by payment, or new facts might arise after judgment warranting its discharge or modification by the court, and proceedings by petition in the same suit might be entertained by the court for that purpose. That would not affect the finality in the first instance. So, in the case at bar, facts might occur after the decree, such as indicated by Justice Daniels, which would authorize the court to recall the decree. The proceedings in the action to bring these facts to the attention of the court would be in the nature of a new suit. In this case the husband has removed from the jurisdiction of the Missouri court, probably carrying with him all his property, and, from what the record discloses, has taken no steps to modify the decree; and, if his contention here is correct, he need take no such steps. By pursuing this course he prevents any payment of the judgment of the Missouri court, no matter how able to respond he may be. "Final judgments," says Blackstone, "are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for." 3 Bl. Com. 398. The plaintiff in this action, by the answer in the circuit court of the city of St. Louis in the case of Fred M. Spinning against her, put an end to that action, and recovered the remedy she sued for; and for the purpose of that action, so far as the issues then joined, the judgment was final, within Blackstone's definition. Facts might or might not subsequently arise which would destroy the effects of the judgment or modify it, but these would only furnish grounds for what we have seen would practically be a new suit. To give effect, as required by § 1, art. 4, of the Constitution of the United States, and the acts of Congress passed in pursuance thereof, to the judgment alleged in the complaint, we hold it to be final, and, in the language of the Supreme Court of the United States in *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, "as much a debt of record until the decree has been recalled, as any other judgment for money is." Should any modification thereof be hereafter made in the courts of Missouri, our courts, by proper proceedings instituted therein, will give effect to such modification, thereby carrying out the requirements of the Federal Constitution. If any modification was made before this action was instituted, it can be pleaded by way of a defense or counterclaim in this action. In the case of *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, it was also held that a decree awarding alimony rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given, and that for such purpose both the equity courts of the United States and the same courts of the state have jurisdiction. In *Kunze v. Kunze*, 94 Wis.

54, 68 N. W. 391, the supreme court of Wisconsin says: "If a divorce judgment decree the payment of a specific sum absolutely as alimony, and if (as alleged in this case) such a decree has the effect in that state of a judgment at law for the payment of money, there seems no reason why such a decree may not be enforced by action at law in another state." The law of Missouri expressly enacts that, when alimony is decreed in gross, such decree shall be a general lien on the realty of the party against whom the decree may be rendered, as in the case of other judgments. For the reasons given herein, we think the lower court erred in sustaining the demurrer to the amended complaint.

The second assignment of error is that the court erred in discharging the garnishee respondent the National Bank of Commerce, from whom the respondent Spinning had rented a compartment and box in its safety-deposit vaults. Under our laws the writ of garnishment commands the garnishee to answer on oath, not only as to his indebtedness to the defendant, but also as to the personal property or effects of the defendant in possession of the garnishee or under his control. 2 Ballinger's Anno. Codes & Statutes, § 5393. From and after the service of the writ, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects, and any such payment or delivery shall be void and of no effect as to so much of the debts and effects as may be necessary to satisfy the plaintiff's demand. Id. § 5398. Should it appear from the garnishee's answer or otherwise that the garnishee had in his possession, or under his control, property or effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff on demand such personal property or effects, or so much of them as may be necessary to satisfy the plaintiff's claim. Id. § 5404. The answer of the garnishee may be controverted by the plaintiff or defendant. An issue shall be formed and tried under the direction of the court. Id. §§ 5409-5411. When the writ is served the garnishee is to retain control of the effects of the debtor until the court shall order that part liable to execution turned over to the sheriff. The writ is in aid of the writ of execution. Under § 5404, *supra*, the court is required to ascertain whether the garnishee has under his control, or not, any effects of the defendant liable to execution, and the court shall thereupon render a decree requiring the garnishee to deliver such effects to the sheriff. The language of the statute is, "Should it appear from the garnishee's answer or otherwise that the garnishee has in his possession or under his control, or had when the writ was served, any personal property or effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff on demand such personal property or effects or so much of them as may be necessary to satisfy the plaintiff's claim." § 5404, *supra*. And this 54 L. R. A.

answer must be a true answer as to the several matters inquired of in the writ. § 5399. This means that there shall be a hearing by the court preliminary to such decree, and that the court shall ascertain from the answer or otherwise whether or not the garnishee has under his control effects of the debtor liable to execution. There was a trial in this case to ascertain these facts. The only question, however, inquired into by the court on the answer of the garnishee, was touching the manner in which the box was locked, and the control of the garnishee over the box. The answer of the garnishee nowhere alleges that it did not have effects of the defendant under its control. In substance, it says it did not have such effects, unless they were in the box, and the answer then states the facts touching the control of the box. No evidence was introduced as to the contents of the box. It was simply as to the manner of control. From the conclusions of law, the findings of fact, the evidence, and the brief of the garnishee, it is evident that the only question considered by the court below and passed upon was whether the garnishee had control of the effects in the box. If we are correct in this we are of the opinion that the court erred in holding that the garnishee did not have control of the contents of the box. At any time on the request of the defendant the garnishee could put it within the power of the defendant to remove the contents of the box, and the defendant could not remove the contents without the consent and active co-operation of the garnishee. As against the defendant, then, the garnishee had control of the contents of the box. It is true that it was impossible for the garnishee to answer specifically as to the contents of the box. The court, however, under § 5404, *supra*, is authorized to determine from the answer or otherwise the effects under the control of the garnishee liable to execution. Under the broad provisions of this section, the court could inquire into the contents of the box by causing the defendant to be examined as a witness, and might even require an inspection of the contents, to the end that the effects liable to execution should be delivered to the sheriff. In the meantime, after the service of the writ, it would be the duty of the garnishee to retain exclusive control of the box until discharged by the court. Should the defendant desire to remove from the box articles not liable to execution, the court, under proper restrictions, could allow the same.

From what we have said, it follows that the court erred in discharging the garnishee respondent the National Bank of Commerce. The court also erred in discharging the other garnishees herein, resulting from its decision that the amended complaint did not state facts sufficient to constitute a cause of action. The court also erred in sustaining the demurrer to said amended complaint, and in dismissing this action, and in awarding costs herein to respondent Spinning and the garnishee respondents.

In all the particulars herein enumerated

the court below is reversed. This action is remanded to the court below, with instructions to proceed with the hearing of this case as in this opinion indicated. The appellant is also entitled to her costs on this appeal against the respondent Spinning and the respondent the National Bank of Commerce.

Anders, Reavis, and Fullerton, JJ., concur. Dunbar, Ch. J., not sitting.

Rehearing denied.

NORTHWESTERN LUMBER COMPANY,
Appt.,
v.

CHEHALIS COUNTY *et al.*, Resp'ts.

(.....Wash.....)

1. Ocean-going tugboats are not exempt from taxation by the state in whose waters they are exclusively employed, by the fact that they are registered and taxed at a port in another state, where their owner is domiciled.
2. The collection of a tax cannot be enjoined because the person by whom it was assessed had no right to the office of assessor, if he was a *de facto* assessor properly exercising the functions of the office.

(April 29, 1901.)

APPPEAL by complainant from a judgment of the Superior Court for Chehalis County in favor of defendants in an action brought to enjoin the collection of taxes. *Affirmed.*

The facts are stated in the opinion.

Mr. Sidney Moor Heath, for appellant:

The legal situs of vessels employed in navigation is, for purposes of taxation, the port where they are registered under the laws of the United States as their home port. The situs dependent on registration continues until a new situs is acquired, and is not lost by absence or employment elsewhere.

2 Dill. Mun. Corp. 4th ed. p. 965, § 787, and cases cited in note 3.

A vessel enrolled and licensed or registered under United States navigation laws, and owned by a nonresident of the state, does not become subject to the taxing powers of the state by engaging in business therein.

See *Roberts v. Charlevoix Twp.* 60 Mich. 197, 26 N. W. 878.

A tax upon a vessel in another state than that which contains its home port is an interference with commerce of the country, which is not permitted to the state.

Hays v. Pacific Mail S. S. Co. 17 How. 506, 15 L. ed. 254; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Moran v. New Or-*

NOTE.—On the question where ships are taxable, see *Johnson v. De Bary-Baya Merchants' Line* (Fla.) 37 L. R. A. 518, and note.

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leans, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Johnson v. De Bary-Baya, Merchants' Line*, 37 Fla. 499, 37 L. R. A. 518, 19 So. 640.

Mr. W. H. Abel, for respondents:

The acts of a tax officer *de facto* do not invalidate an assessment made within the scope of the authority of his office.

Black, Tax Titles, 2d ed. § 93; *Ronken-dorff v. Taylor*, 4 Pet. 349, 7 L. ed. 882; *Cooley*, Taxn. 256; *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437; *Mechem*, Pub. Off. § 330; 1 *Desty*, Taxn. 510.

While such vessels are presumptively taxable at the port of registration, yet this presumption is rebuttable. The question is at least one of situs in fact, and where this is shown neither foreign registry nor foreign ownership is of any consequence.

National Dredging Co. v. State, 99 Ala. 462, 12 So. 720; *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 37 L. R. A. 518, 19 So. 640.

Reavis, Ch. J., delivered the opinion of the court:

Suit to enjoin the collection of taxes levied upon property belonging to appellant in Chehalis county. The assessor listed and assessed to appellant some reservoirs and lines of pipes in the town of Hoquiam, and also listed and assessed three steam tugs,—the *Traveler*, *Astoria*, and *Printer*. The complaint states that the acts of the assessor were invalid, and questions his right to his office as assessor, and alleges that he arbitrarily, fraudulently, and maliciously overvalued property in the waterworks; that the tugs were ocean-going tugs, and in use wherever charters were available; that each was registered, under § 4319, Rev. Stat. U. S., at the port of San Francisco, and was assessed and paid taxes in the state of California; that plaintiff was a corporation organized under the laws of California, and qualified to do business in the state of Washington. The superior court, after trial, found substantially the following facts: That the tugs *Traveler*, *Astoria*, and *Printer* and the waterworks were assessed at a fair cash valuation required by law; that all the property mentioned was a part of the taxable personal property situate in Chehalis county, and said tugs, and each thereof, were so blended with the personal property in general situated in said county that it was impossible to distinguish it therefrom; that such property, and the whole thereof, was controlled at Hoquiam by the resident management of the plaintiff corporation, and each of said tugs was and has been engaged in plying wholly within the waters of this state. It concluded that the tax was legal and justly due, and rendered judgment dismissing the action.

The material controversy here is the validity of the assessment upon the three tugs. Counsel for plaintiff urges that, as these tugs were registered in the port of San Francisco, they are not liable to taxation

in this state. The question is not entirely free from doubt. In 1854 the right to tax a vessel engaged in interstate commerce was considered by the Supreme Court of the United States in *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254. The facts were that the steamship company was incorporated under the laws of New York; that all the stockholders were residents and citizens of that state; that the principal office for transacting business was in the city of New York, but the company had agencies in the cities of Panama, New Grenada, and San Francisco, California, and had a naval yard and ship yard for repairs at Benicia, California; that, on the arrival of the ships at the port of San Francisco, they remained no longer than to land passengers, mail, and freight, usually done in a day, and then proceeded to Benicia for repairs and refitting until the commencement of the next voyage, usually some ten or twelve days; that the business they were engaged in was transportation of passengers and merchandise, treasure, and the United States mail between the city of New York and the city of San Francisco, by way of Panama, and between San Francisco and different ports in the territory of Oregon; that the company was the sole owner of the vessels, and no portion of the interest was owned by citizens of California; that the vessels were all ocean steamships, employed exclusively in navigating the ocean, and each of them was registered at the custom house in New York, where the owners resided; that taxes had been assessed upon all the capital of the company represented by the steamers in the state of New York under the laws of that state; that the vessels were assessed in the county of San Francisco, California, and the suit was to recover taxes paid under protest. The tax collector demurred to the complaint, and judgment was given for the plaintiffs. The court, in affirming the judgment, referred to the Federal statutes of the 31st of December, 1792, and the 29th of July, 1850, which provide for the registration of vessels at the port which shall be at or nearest the owner, if there be but one, or, if more than one, nearest the place where the husband or the acting and managing owner usually resides, and also the provision for the recording of bills of sales, mortgages, and conveyances in the office of the collector of customs where the vessel is registered or enrolled, and observed: "These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside." In speaking of the vessels, it was said: "They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And, so far as respects the ports and har-

hors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the Constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states. . . . Besides, whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the state, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the state, or changing her home port." Again, in *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303, the facts were that a vessel, the *Frances*, was brought to Mobile, Alabama, which was duly registered at the port of New York, under the ownership of the plaintiff, according to the acts of Congress. The plaintiff was, and had since remained, a citizen of New York, and the vessel was the property of the plaintiff. The vessel was assessed as personal property in the city of Mobile. The tax remaining unpaid, the vessel was seized by the collector of the city. The owner brought an action for trespass against the collector for such seizure, and the collector justified by virtue of his tax warrant. The vessel was brought to Mobile in 1865. From that time until 1870 it had been employed as a coasting steamer between Mobile and New Orleans. In January, 1867, the vessel was regularly enrolled at the custom house by her master as a coaster, and license was issued in 1868 and 1869 as a coaster, and the *Frances* was one among several of a daily line of steamers plying between Mobile and New Orleans. The captain of the vessel was a resident of Mobile, and the agent conducting the business of the vessel at Mobile was resident there, occupying an office for such business, and paid the persons who assisted him, but was under the control of his superior agent, residing in New Orleans, who employed and paid the captain. A wharf and office in Mobile were occupied for the use of the vessels. They transported the mails, freight, and passengers between Mobile and New Orleans. The court held the tax was invalid, and said: "The fact that the vessel was physically within the limits of the city of Mobile at the time the tax was levied does not decide the question. Thus, if a traveler on that day had been passing through that city in his private carriage, or an emigrant with his worldly goods on a wagon, it is not contended that the property of either of these persons would be subject to taxation as property within the city. It is conceded by the respective counsel that it would not

have been. On the other hand, this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steamboat or a post coach engaged in a local business within a state may be subject to local taxation, although it carry the mail of the United States. The commerce between the states may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. It is not, therefore, upon this principle that we are to decide the case. . . . The imposition in this class of cases was a tax upon the use of the public waters of the country, and tended immediately to interfere with and to obstruct the commerce between the states. In the instance before us the tax was upon a vessel at the wharf. It was in this respect as if a tax had been laid upon lumber or cotton lying on the dock at Mobile. This vessel was owned by, and employed in the service of, a resident of the state of New York. It was primarily and presumptively taxable under the authority of that state, and of that state only." And again the court concludes: "It is the opinion of the court that the state of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that state, but was there temporarily only, and that it was engaged in lawful commerce between the states, with its situs at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value." It is also said that it was immaterial whether the steamer, the *Frances*, was actually taxed in New York or not; she was liable to taxation there. Again, in *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38, a municipal ordinance of the city of New Orleans to establish the rate of license for professions, callings, and other business, which assessed and directed to be collected from persons owning and running towboats to and from the Gulf of Mexico and the city of New Orleans was adjudged to be a regulation of commerce among the states and invalid. It will be observed that the first two cases seem to put the invalidity of the tax upon the ground of an interference with commerce among the states, the regulation of which is exclusively with Congress; and in each instance the vessels were engaged in interstate commerce, and were only temporarily in the ports where the tax was attempted to be levied. We have been unable to find any adjudication of the Supreme Court of the United States specifically determining that the registry of the vessel conclusively fixes its situs. The registry is presumptive evidence of such situs. Counsel have, however, referred us to an authority (*Roberts v. Charlevoix Twp.* 60 Mich. 197, 26 N. W. 878) which seems to determine that a vessel enrolled, licensed, or registered under the United States navigation laws does not, by engaging in business within a state, become subject to its taxing power if the owner is a nonresident. Again, in the case of *Johnson v. De Bary*-

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Baya Merchants' Line, 37 Fla. 499, 37 L. R. A. 518, 19 So. 640, the facts were that the vessel was owned by a corporation of New York, with its headquarters and chief office in the city of New York, and was duly registered in the custom house at that port, and a tax had been regularly levied upon it in New York. The New York corporation maintained a line of boats on St. John's river for a portion of the year, engaged in the business incident to steamboats plying upon a river; but at different times the vessels went to any other waters which supported profitable engagements, and were engaged upon waters in other states. It was adjudged that the state of Florida could not levy a tax upon the vessels, the court observing: "Under the admitted facts of this case, we are of the opinion that the vessels of the appellee were not subject to taxation in Duval county. The vessels were owned by a New York corporation, and had acquired a situs in that state by being duly registered in the port of New York, the nearest to the residence of the owner, and were engaged in commerce in that state, where, it is conceded, the most profitable employment could be procured for them. The mere fact of being employed in interstate commerce would not exempt them from taxation, and we do not say that registration in a foreign port and nonresident ownership should control absolutely, but such ownership and registration render them primarily and presumptively taxable only in their home port." But in the well-considered case of *National Dredging Co. v. State*, 99 Ala. 462, 12 So. 720, the facts were that the dredging company was a Delaware corporation, and the tugboat was registered at Wilmington, Delaware, and afterwards was in Mobile bay for a long time, engaged in dredging in connection with other scows and machinery owned by the same company. The contract for dredging was with the government of the United States. The court observed of the tugboat *Curtis*: ". . . A special consideration is advanced in support of its non-taxability. It is a seagoing vessel, propelled by steam, and entitled to registry under statutes of the United States at the port of its owner's domicile. As a matter of fact, it is registered at the custom house in the city of Wilmington, Delaware. On this the contention is that, that being home, it cannot be taxed elsewhere. There are many cases which hold that such vessel, engaged in commerce between its home port and others, or even wholly between other ports than that of its registry, can be taxed only at the port of registry. It is not our purpose to question these decisions; it is not necessary that we should. They all proceed upon the theory that vessels thus engaged are never in foreign jurisdiction except temporarily, and as an incident to the commerce to which they are devoted, and hence that they do not and cannot acquire a situs in foreign ports for the purposes of taxation. They do not become incorporated with the property of other states and countries, which they touch intermittently, are never indefinitely

there, and their business, the work they perform, the uses to which they are put, are not done and performed within, and are not local to, the foreign state or country." And the court concludes: "The question, indeed, is at last one of situs in fact, and, where this is shown, neither foreign registry nor foreign ownership is of any consequence."

Sound reasons exist for the right of the state to tax these vessels that are permanently here transacting local business. They receive the full protection of the local government, and, if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this state. Such construction should not be adopted unless imperatively demanded by superior authority. Under the revenue law of this state, personal property is taxed at its situs, and without reference to the residence of the owner.

We have examined the evidence in the record upon the exception made to the findings of the superior court, and fully coincide with the findings. The evidence discloses that for from four to seven years the three tugs have been at Hoquiam, in Chehalis county; that their business has been towing in the waters of Gray's and Willapa harbors in this state; that the corporation plaintiff, for some fifteen years last past, has owned and operated large sawmills, owns large areas of timber lands, and has manufactured from

twenty to thirty million feet of lumber annually; that these tugs tow vessels usually from Hoquiam through the harbor to the ocean; that all contracts of towage are made by the captains of the respective tugs, who reside at Hoquiam; that the crews reside there; that the assistant secretary and manager of the company resides there; that all accounts are rendered to him there; that the captains and crews are paid there; and the only absences of the tugs from these harbors shown by the record have been for the purpose of repairs. They appear to have been used for all these years as appurtenant to, and a part of, the lumbering plant and business of the plaintiff in Chehalis county. Upon these facts, we conclude that the situs in fact of the three tugs is in Chehalis county, and that there was a valid assessment levied upon their value.

The objection to the assessment upon the pipe lines and reservoirs has been considered, and we are not inclined to disturb the conclusion of the superior court upon such assessment. We do not think the objection to the right of the officer who made the assessment to his office can be made here. The record shows that he was certainly a *de facto* assessor, exercising properly all the functions of the office.

The judgment is affirmed.

Dunbar, Fullerton, and Anders, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Charles E. HOGG *et al.*, Exrs., etc., of Henry J. Fisher, Deceased, *Pliffs. in Err.*,

v.

Anderson C. HARTLEY.

(.....W. Va.....)

*1. A personal judgment upon any cause of action merges and ends that cause of action, and thereafter the statute of limitations runs against the judgment.

2. If a defendant once a resident of the state departs and resides out of it before a personal judgment against him, the time of his residence abroad will not excuse the judgment from the statute of limitations, though he was a resident when the cause of action on which the judgment rests arose or accrued.

3. If before both the birth of the cause of action and the accrual of the right of action a resident of the state removes out of it, his departure and residence abroad will not save the action from the statute of limitations.

*Headnotes by BRANNON, J.

NOTE.—As to effect of absence from state when right of action accrues, on statute of limitations, see the earlier case in this series of *Mason v. Union Mills Paper Mfg. Co.* (Md.) 29 L. R. A. 273.

For statute excluding defendants who become 54 L. R. A.

4. Departure from and residence out of the state after the accrual of the right of action are, of their own force, an obstruction to the prosecution of such right of action, excusing from the statute of limitations.

(December 1, 1900.)

ERROR to the Circuit Court for Jackson County to review a judgment in favor of defendant in an action brought to enforce a judgment which had been recovered by plaintiffs' testator against defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles E. Hogg, for plaintiffs in error:

Statutes providing for the deduction of the time of absence from the state so as to avoid the running of the statute of limitations have been passed in many of the states, and are always construed so as to advance the remedy of the creditor.

Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364; *Leeds Lumber Co. v. Haworth*, 98 Iowa,

nonresidents after cause of action accrues, from benefit of statute of limitations, see *Bates v. Cullum* (Pa.) 34 L. R. A. 440.

As to interruption of statute by absence from the state generally, see *Stanley v. Stanley* (Ohio) 8 L. R. A. 333, and note.

463, 67 N. W. 383; *Weille v. Levy*, 74 Miss. 34, 20 So. 3; *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210; *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347; *Ficklin v. Carrington*, 31 Gratt. 219.

The removal of the defendant from the state is of itself an obstruction to the prosecution of the action, and he cannot allege that by such removal he did not obstruct the plaintiff.

Abell v. Pennsylvania Mut. L. Ins. Co. 18 W. Va. 400.

Mr. John H. Riley, for defendant in error:

The statute, so far as it relates to obstructions caused by a defendant's having departed from the state, means that, being a resident when the cause of action accrues against him, and being then suable in the state, the defendant shall not, in computing the time in which he must be sued, have the benefit of any absence caused by his departure after such right of action accrues and before the expiration of the period limited for the beginning of suit.

Embrey v. Jewison, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776.

It cannot be said that defendant obstructed Fisher in the prosecution of his suit on the original contract and cause of action. The fact that a personal judgment was entered is the answer.

11 Enc. Pl. & Pr. 825; *Mahoning County Bank's Appeal*, 32 Pa. 160.

The judgment merged the original contract and cause of action thereon.

1 Freeman, Judgm. § 216; *Carr v. Risch-er*, 119 N. Y. 117, 23 N. E. 296.

Fisher could have sued upon his judgment at any time within the statutory period.

Hale v. Angel, 20 Johns. 342.

The cause of action on which plaintiffs base their action is the judgment rendered in favor of their testator nearly thirteen years before their proceeding was begun, and that long after Hartley ceased to reside in the state. It cannot be said that plaintiffs or their testator have been obstructed in the prosecution of their action by reason of the departure of the defendant.

Walsh v. Schilling, 33 W. Va. 108, 10 S. E. 54.

Brannon, J., delivered the opinion of the court:

On the 12th of August, 1881, Fisher, then in life, recovered a personal judgment against Hartley; and on the 4th day of May, 1894, Hogg and Campbell, executors of Fisher, brought an action of debt in the circuit court of Jackson county upon said judgment against Hartley, and he pleaded the statute of limitations, and to that plea the plaintiffs filed a replication setting up "that, before the right of action in the premises in the declaration alleged accrued to the plaintiffs, the said defendant resided in this state, and resided therein when the liability was contracted upon which the judgment sued on in this action is founded, and that on the — day of —, 1880, the said defendant departed and removed out of said 54 L. R. A.

state, and that the defendant continued to remain and reside out of this state until the — day of —, 1894; and the plaintiffs further say that the defendant returned into this state on the — day of —, 1894, and that the plaintiffs commenced this action on the 4th day of May, 1894, and so, deducting the time the said defendant remained out of this state as aforesaid, the said several causes of action in the declaration mentioned did accrue to the said plaintiffs within ten years next before the commencement of this suit." The court afterwards struck this replication out of the case as presenting no answer to the plea of the statute of limitations, and, judgment having been rendered by the court upon facts agreed in favor of the defendant, Fisher's executors have brought the case to this court.

The case turns entirely upon the question whether the court was right in striking out said special replication. It will be observed that that replication does not state that on the 12th day of August, 1881, Hartley resided in this state, but, on the contrary, it states and admits that he removed out of the state in 1880. This suit is based alone on the judgment, and on it the statute of limitations commenced to run the instant it was rendered. Before that judgment was rendered Hartley had ceased to reside in this state. That replication says that Hartley resided in the state when the liability was contracted upon which the judgment was founded, and thus seeks to introduce as a material element in the case that fact; but it is wholly immaterial. No matter what the cause of action on which that judgment rested, the law is well settled that, whatever that cause of action was, it is merged, closed, and drowned in that personal judgment; for, when a personal judgment is rendered upon any cause of action, that cause cannot be again made the subject of a suit, and the judgment is thereafter the sole test of the rights of the parties.—constitutes a new debt, of the highest dignity, closing the statute of limitations on the original cause of action. Such is the general law. 15 Am. & Eng. Enc. Law, p. 336; Freeman, Judgm. §§ 215-217. By the judgment the debt is "changed into a matter of record and merged in the judgment, and the plaintiff's remedy is upon the latter security while it remains in force." "The original claim has, by being sued upon and merged in the judgment, lost its vitality and expended its force and effect." Black, Judgm. § 674. It is plain, therefore, that the residence in the state of Hartley at the time of the accrual of the original cause of action on which the judgment is based cannot save the plaintiffs from the statute of limitations. To escape the statute of limitations, Hartley must have resided in the state on the date of the judgment, for then this new debt and its right of action arose and accrued: and on that date he was not a resident. That such is the true view (that is, that the date of the judgment is the crucial point as to residence) is further fortified by the consideration that chapter 104 of the Code gives limi-

tations on notes and other causes of personal action, while chapter 139 prescribes limitation to a judgment, showing that when there is a judgment that limitation applies, not the limitation applicable to the original cause of action. Hartley being a nonresident at the time of the birth of the demand and the accrual of the right of action, the exception from the statute of limitations that where the cause of action shall accrue against a person who had before resided in this state, "if such person shall by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right . . . the time that such obstruction may have continued shall not be computed," cannot save the plaintiffs' demand from the statute of limitations. *Walsh v. Schilling*, 33 W. Va. 108, 10 S. E. 54, holds that where the defendant, though once a resident of the state, removes out of the state before the accrual or birth of the cause of action, such removal does not bring him within the exception specified in the statute just quoted. So, also, holds *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776, construing the Virginia statute precisely the same as ours. So, in effect *Heflebover v. Detrick*, 27 W. Va. 16. Hartley had removed from the state before the birth of the present cause of action, and before right of action thereon, both being in this case the same instant. The origin and accrual of the cause of action being simultaneous, we need not discuss the conflict of opinion between the cases of *Embrey v. Jemison*, which holds that, to bring a party within the exception of the statute, he must be a resident of the state at the accrual or maturity of the right of action, and that if a resident at the birth of the cause of action, but not at the accrual or maturity of right of action, he does not come within the exception, and *Heflebover v. Detrick*, which holds that if a party is a resident at the birth, but removes before the accrual, of the cause of action, he does come within the exception. I think the replication was properly stricken out, as presenting no answer to the plea of the statute.

It is objected that the replication is bad, also, because it does not affirmatively allege that the removal of Hartley from the state did in fact obstruct the prosecution of the plaintiffs' action. I think this is no objection to the replication, because, as held in *Cheatham v. Aistrop*, 97 Va. 457, 34 S. E. 57, and *Picklin v. Carrington*, 31 Gratt. 219, the "removal of a judgment debtor from the state is of itself an obstruction to a suit to enforce the judgment, and the statute of limitations does not run against the judgment while the debtor remains out of the state." The statute itself seems to confirm this construction, in the fact that it mentions departure from the state, absconding, and concealing as specific grounds of obstruction of the right of action excusing from the operation of the statute, and then adds "or by any other ways or means obstruct the prosecution of such right," thus plainly intending
 as L. R. A.

to say that such departure, absconding, or concealing himself shall *per se* be regarded as obstruction of the prosecution of action, excusing from the bar of the statute. Therefore we affirm the judgment of the Circuit Court.

M. L. GRAY, Appt.,

v.

BALTIMORE BUILDING & LOAN ASSOCIATION.

(.....W. Va.....)

- *1. While a building association may fix a minimum premium payable in advance or in periodical instalments, such premium must be a lump sum, certain and definite, and not a percentage payable indefinitely at fixed periods.
2. A percentage payable indefinitely at fixed periods is interest, and although it be called "premium," and is in addition to the legal rate of interest already charged, it is usurious, and should be expunged from the account.

(April 21, 1900.)

APPEAL by complainant from a decree of the Circuit Court for Kanawha County sustaining a demurrer to her bill filed to enjoin the sale of her property for failure to comply with her contract with the defendant association. *Reversed*.

The facts are stated in the opinion.

Mr. J. W. Kennedy for appellant.

Messrs. Flournoy, Price, & Smith and Ivory C. Jordan for appellee.

Dent, J., delivered the opinion of the court:

M. L. Gray, on the 10th day of December, 1897, filed her bill in the circuit court of Kanawha county against the Baltimore Building & Loan Association, alleging that she borrowed the sum of \$800 from such association on the 8th day of March, 1895, and the association, for the purpose of evading the usury laws, required her, as a mere shift and device, to become the ostensible owner of eight shares of stock in such association, of the par value of \$100 each, and to execute a bond and a deed of trust on her property to secure the same. She was also re-

*Headnotes by DENT, J.

NOTE.—For other cases in this series as to usury upon loans by building and loan associations generally, see note to *Reeve v. Ladies' Bldg. Asso. Perpetual* (Ark.) 18 L. R. A. 129; *Pioneer Sav. & L. Co. v. Cannon* (Tenn.) 33 L. R. A. 112; *Falls v. United States Sav. Loan & Bldg. Co.* (Ala.) 24 L. R. A. 174; *Bennett v. Eastern Bldg. & L. Asso.* (Pa.) 34 L. R. A. 595; *Smoot v. People's Perpetual Loan & Bldg. Asso.* (Va.) 41 L. R. A. 589; *Iowa Sav. & L. Asso. v. Heidt* (Iowa) 43 L. R. A. 689; and *Borrowers' & Investors' Bldg. Asso. v. Eklund* (Ill.) 52 L. R. A. 637.

As to fixed premiums or fixed minimum of premiums in building and loan associations as usury, see *McCauley v. Workman's Bldg. & Sav. Asso.* (Tenn.) 35 L. R. A. 244, and note.

quired to pay 50 cents each per month for dues, interest, and premiums per share, and 10 cents per month per share for expense fund, making her monthly payments \$18.80, in addition to \$1 per share as a preliminary fee. On failure to pay up her dues, interest, and premium, the whole sum was to become due, and her property liable to sale. She paid into the association the sum of \$132, and interest to March 30, 1896, and stopped when the association claimed a balance due from her of \$930.45, and had her property advertised for sale the 11th day of December, 1897. She prayed an injunction, and that the claim be purged of its usury. The injunction was granted. The defendant appeared and demurred to the bill. The circuit court sustained the demurrer, and dismissed her bill, and thereupon she appealed.

The sole question presented to this court is as to whether the circuit court erred in sustaining such demurrer. The defendant insists that while the bill alleges that the plaintiff was only an ordinary borrower, and the whole transaction was under a building form merely as a device to evade the usury laws, the exhibits filed clearly refute this allegation, and show the bona fides of the transaction as the usual, ordinary building association arrangement, exempted from the operation of the statutes against usury. The association is a corporation of Maryland, doing business through agents in this state, and ordinarily its contracts between itself and stockholders would be subject to the laws of Maryland, at least to the extent they are not repugnant to the laws of this state. It has been held by the court of appeals of Maryland that to exempt building associations from the general usury laws is class legislation, and repugnant to the Constitution of the state, and that the legislature has no such power. *Citizens' Security & Land Co. v. Uhler*, 48 Md. 455. It was also held in the case cited that "where a shareholder in a corporation executes a mortgage to such corporation to secure a loan, on which he agrees to pay interest at the legal rate weekly during the continuance of the mortgage, and also a premium of twenty-five cents weekly on each of his shares of stock, making in all 9½ per cent interest on the money loaned, such charge is usurious." In this case Mrs. Gray is required to pay 50 cents per month premium, and 50 cents per month interest, making 12 per centum. In the case of *Geiger v. Eighth German Bldg. Asso.* 58 Md. 569, the same court held that a premium of 30 cents per share, payable weekly, amounting to more than the legal rate of interest, was usurious. In its opinion the court says: "It is not called interest, but is called premium, but it is manifestly intended for interest, and is an invasion of, and in violation of, law." Again: "In this case the word 'premium' and charge for it can only be regarded as meaning interest, and to the extent that the charge exceeds the rate of 6 per centum it cannot be allowed." The conclusion reached is that it is usurious to have the premium take the form of a percentage, payable, as

interest is paid, indefinitely, so long as the loan continues; that such method of fixing the premium is but an evasion of the laws against usury, for the purpose of obtaining a greater rate of interest than the legal rate; that the amount of the premium proper should be fixed and determined as a bulk sum at the time of the building or borrowing, and then it can be divided into instalments, to be paid periodically. To fix the premium at the rate of 50 cents per month, payable monthly, for an indefinite period, in addition to the regular rate of interest at the same percentage, is nothing more than doubling the rate of interest.

Since writing the foregoing, I have been furnished the decision of the court of appeals of Maryland in the case of *White v. Williams*, 90 Md. 719, 45 Atl. 1001, assignee of this same defendant, holding that prior to chapter 321 of the Acts of the Legislature of Maryland of 1894, in effect April 6, 1894, to fix the premium in shape of percentage, was usurious; thus adhering to the case of *Geiger v. Eighth German Bldg. Asso.* cited. The court did not pass on the effect the act would have on cases arising after its passage, although an inference might be drawn from the opinion that after the passage of the act the premium could be fixed in the shape of a percentage. The language of the act, as quoted, is that "instead of receiving the whole amount of said premium in advance, or deducting the whole amount of said premium," the building association may receive the same in weekly, monthly, or such other instalments as may be agreed upon. But it does not follow that the premium may take the form of a percentage, payable indefinitely, nor does it preclude the idea that the premium must be first fixed in amount by the by-laws, and then be divided into periodical instalments. In *Endlich, Bldg. Asso.* (§ 407) it is said: "The statutes authorizing the reservation of premiums have in general been understood to mean a definite sum for the whole period of the loan, and not anything whatever that the parties in their contract may choose to denominate a bonus or premium." In *Thompson, Bldg. Asso.* (p. 104) it is said: "The legislative intention in allowing premiums was to confer on the association an equitable and profitable method of selecting its borrowers by requiring of them a bonus. So, if the association disregards this intention, and by any form increases the interest, the courts promptly restrain any such practice, and compel it to refund any such overcharge." The premium in this case seems to be fixed, not for the purpose of providing a bonus, but merely as a subterfuge to double the rate of interest. It having been held that the loans of the defendant prior to the 6th of April, 1894, were usurious, and such holding destroying the mutuality of the association, it would be inequitable to require this plaintiff to abide by her contract, and pay this percentage premium, although it should be determined not to be usurious under the latter enactment.

It is eminently proper in this case that

the laws of Maryland should prevail, as they are in no wise repugnant to the laws of this state, and all borrowers and shareholders of such association should be placed on the same footing, and only required to settle with the association on the same basis. Nor could a different conclusion be reached under the statutes of this state. Section 26, chap. 54, Code, provides that "every such association shall have the power to provide by its by-laws for selling to the stockholders who shall bid the highest premium therefor the money in the treasury, or in default of bidders at or above a minimum premium may award to a member the value of any shares held by him less such minimum premium, the minimum premium and the mode of making the award to be fixed by the by-laws. Or such association may charge and receive the premium bid by a stockholder for the priority of right to such loans in periodical instalments, but the by-laws of every association shall set forth whether the premium bid for the prior right to a loan shall be deducted therefrom in advance, or be paid in periodical instalments." This provision does not authorize the minimum premium to be fixed at a percentage on the amount borrowed, to be paid during an indefinite period; for such would be nothing more than increasing the rate of interest from 6 to 12 per centum. But the law requires that the premium should be fixed at a lump sum, commonly known as a "bonus," and then it may be deducted in advance from the principal or paid in periodical instalments. For instance, if such premium is fixed at \$10 on the \$100, it can be deducted or be divided into ten equal annual instalments of \$1 each, or 100 equal monthly instalments of 10 cents each. Thus, the borrower knows just what premium is required of him. But where the premium is an increased interest percentage, indefinite in time, he is at the mercy of the association, and may be required to pay the same until his dues alone are sufficient to cancel the loan. In the present case, although Mrs. Gray had paid in \$132, she only receives credit for the amount of her dues as of the time of their payment, to wit, \$44, being the one third thereof, the other two thirds being retained by the association as though it were interest, and not to be accounted for; and in addition she is charged the further sum of \$184.40 for the further time elapsed, composed of \$84 interest, \$84 premium, and \$8.40 fines, for which she gets no credit on her indebtedness, but it all goes into the earnings of the association, from which she is allowed no dividend; thus being denied the right of a shareholder or participant in the social funds. One of the main justifications for building associations is the fact that the earnings are social assets, to be divided among the membership, so that, while a borrowing member is required to pay interest, premium, and fines, a large portion, being an equal share thereof, is returned to him in the shape of dividends. Mrs. Gray, receiving no dividends, makes out a prima

facie case of usury, without regard to the manner of the payment of the premium. The prospectus of the association filed herein as its by-laws provides for the quarterly division of the profits, and, although Mrs. Gray was a member in good standing for about four quarters, she was not allowed any share in such quarterly division. Why this omission the bill does not disclose. The presumption is, in the absence of other explanation, that she was treated merely as a borrower, and not as a shareholder. Being such, she has paid or been charged with 12 per centum interest per annum, payable in monthly payments; which, without further explanation, renders the loan usurious, and the demurrer to the bill should have been overruled. In the case of *Archer* against this same association (45 W. Va. 37, 30 S. E. 241), this court held that "building associations are authorized to adopt by-laws fixing a minimum premium at which to award loans to their members, such premiums to be deducted from the loans in advance or paid in periodical instalments." This is merely declarative of the statute, and does not in any wise conflict therewith. In the opinion I sought to hold that the premium could only be charged once, and that Mrs. Archer could not be required to pay the monthly premiums assessed. My associates were of a different opinion, and held her bound for such payments. The question did not then present itself in the exact form that it does in the present case, or the court would have probably viewed it in the same light.

The question, then, being whether the association had the right to fix a minimum premium to be paid in instalments, the answer was in the affirmative. The present question is, Has the association the right to fix a minimum premium at a certain percentage on the amount borrowed, payable indefinitely at fixed periods? In other words, under the name of "premium," to increase the rate of interest? If such is the case, the association could not be guilty of taking usury, it matters not how high its rate of interest might be fixed, so the word "premium" is substituted for the word "interest." To demand 12 per centum interest would be usury, but to demand 6 per cent interest and 6 per cent premium would not be usury. Such an evasion is too transparent to escape condemnation, and cannot for a moment be upheld. And if there is any language in the *Archer* Case that leads to such a conclusion it is disapproved. A minimum premium may be fixed under the law, but it must be a lump sum, certain and definite, which may be paid in advance or in periodical instalments. Under the pretense of fixing such premium, the legal rate of interest may not be increased indefinitely. To allow such to be the law would permit the association to charge Mrs. Gray both premium and interest until her payment of dues canceled her indebtedness, when she would have paid into

the association for the use of \$800 three times that amount, or \$2,400, while denied the right to participate in the profits otherwise dissipated. Such a contract is usurious and unconscionable.

The decree is reversed, and the demurrer to the bill overruled, and the cause remanded.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

T. H. JOHNSON *et al.*, Appts.,

v.

Charles B. WILLIAMS'S ADMINISTRATOR.

(.....Ky.....)

1. A sheriff is liable on his bond for the killing by a deputy of a third person under the mistaken belief that he is one for whose arrest on a charge of felony he has a warrant, and that the killing is necessary to prevent his escape, where the statute provides that the sheriff shall be liable on his bond for any misconduct or default of his deputies.
2. Punitive damages cannot be awarded against a sheriff's bond for the wrongful act of the sheriff's deputy in killing a third person under the mistaken belief that he is a felon for whose arrest the deputy has a warrant, and that the killing is necessary to prevent his escape.

(Burnam, J., dissents.)

(June 14, 1901.)

A PPEAL by defendants from a judgment of the Circuit Court for Hickman County in favor of plaintiff in an action brought to hold the defendant sheriff liable on his bond for the wrongful act of his deputy in killing plaintiff's intestate while attempting to prevent his escape from arrest under a warrant which they held against a third person. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. C. Flourney, Robertson & Thomas, and R. T. Tyler for appellants.

Messrs. John W. Ray and Shelbourne & Kane for appellee.

Paynter, Ch. J., delivered the opinion of the court:

This action was instituted by the appellee against the appellant T. H. Johnson, sheriff, and the sureties in his bond, for the alleged negligent killing of the intestate, Charles Williams, by two of his deputies. Dave Browder murdered a negro. Ernest Johnson and H. C. Judge were deputies under Johnson, and were sent to arrest him for the crime which he had committed. They went to Casye, a small village, where Browder seems to have lived, with the view of ac-

complishing his arrest. It was there ascertained that he had gone to Moscow, a near-by village, to see his father, as he said he would not surrender until he had a consultation with him. It was thought probable that he would return to Casye. So the parties started in the night-time, with the view of apprehending him. Johnson and Judge went to a point where the Moscow road crosses another one. Shortly after reaching that crossing two men were discovered approaching in a buggy, leading behind them a gray horse. The deputies had been informed that Browder was riding a gray horse, and they also claim that they thought they recognized the voice of one of the parties as being his. The deputies claim they halted them as they approached, and, instead of stopping the speed of the horse, they increased it, and after the buggy had passed them they fired, with the intention of preventing Browder's escape. It turned out that he was not in the buggy, but a young man by the name of Campbell, and with him was Charles Williams. One shot took effect in Williams's head, from which he shortly thereafter died. Campbell testified that as soon as the deputy sheriffs cried "Halt" he hollowed "Whoa" to his mare, and about that time the deputies began to fire on them. There is also some testimony tending to show that the ball which killed Williams entered his forehead. The whole defense is based upon the idea that the deputy sheriffs had the right, if it was necessary to do so to prevent Browder's escape, to kill him; that, as they had probable cause for believing that he was one of the occupants of the buggy, they therefore had the right to shoot, and, if in doing so they killed Williams, there is no more liability than there would have been had Browder been killed. The case was tried, at the instance of the defendants, upon the theory that they had the right to kill Browder under the circumstances detailed by them, and that there is no more liability created for the killing of Williams than there would have been had they killed Browder. It is not denied that the deputies were acting *virtute officii*, as the defendants sought to escape liability upon the grounds that they were so acting, and that they had acted properly. It is not claimed that the killing was *colore officii*. In the court below both the plaintiff and defendants endeavored to try, and did try, the case upon the theory that an officer has the right to shoot one charged with felony, to prevent his escape.

The opinions of courts and the writers upon criminal law recognize the rule to be that an officer has the right to shoot one

NOTE.—For another case in this series as to liability of sheriff for wrongful killing of person by deputy, see *Brown v. Weaver* (Miss.) 42 L. R. A. 423.

As to liability on official bonds generally for trespasses or unauthorized acts done *colore officii*, see note to *McLendon v. State* use of *Kennedy* (Tenn.) 21 L. R. A. 738; and *State use of Cocking v. Wade* (Md.) 40 L. R. A. 628.

54 L. R. A.

charged with a felony, to prevent him from escaping. It was so held by this court in *Head v. Martin*, 85 Ky. 480, 3 S. W. 622. But we do not decide whether or not the deputies would have been authorized, in law, to have shot Browder, had he been in the buggy, attempting to prevent arrest by fleeing. Whether fleeing under such circumstances is such an escape, in the meaning of the law, as would authorize officers who have a warrant of arrest for one on a charge of felony to shoot him, we do not decide. Courts recognize the rule to be that if a process is put in the hands of an officer to execute against B., and he seizes the goods of A. under it, he is liable on his official bond to A. for damages. *Norwalk ex rel. Faucett v. Ireland*, 68 Conn. 1, 35 Atl. 804; *People ex rel. Norris v. Mercereau*, 74 Mich. 689, 42 N. W. 153; *Walter v. Jacobson*, 7 N. D. 32, 73 N. W. 65. It was held in *Lammon v. Feuster*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286, that the taking by a marshal of the United States, upon a writ of attachment against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable. It has been held that an illegal arrest is a breach of a bond to faithfully and without oppression discharge all duties required by law. *Yount v. Carney*, 91 Iowa, 550, 60 N. W. 114. It was held in *West v. Cabell*, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752, that a warrant to arrest James West for murder will not authorize the marshal to arrest Vandy M. West, and for the arrest and imprisonment of the latter on such warrant by one of his deputies the marshal and his sureties are liable upon his official bond. Murrefe, Sheriff, § 60, says: "On the common-law principles governing the ordinary relations of principal and agent, a sheriff would not be responsible for an act done by his deputy *colore officii*, but it is held in Virginia and West Virginia that on principles of public policy, applying to the relation of a sheriff and his deputy, the former is liable in such a case; and, on the same principle, it would seem that he and his sureties are liable on his official bond. In a Massachusetts case (*Knockton v. Bartlett*, 1 Pick. 273) the court says: 'If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable. If it was not an official, but a personal, act, it is equally clear that he is not answerable. But an official act does not mean what a deputy might lawfully do in the execution of his office. If so, no action could ever lie against the sheriff for the misconduct of his deputy. It means, therefore, whatever is done under color or by virtue of his office.' To hold the deputy and his sureties liable to the sheriff on his bond, it is not necessary that the deputy should be acting under color of some writ, but if he is acting under color of his office, and professing so to act, and inducing others interested to believe he is acting *colore officii*, he and his sureties will be bound by such acts. No other rule would be safe. Sureties are not needed on a sher-

iff's bond, if they are only to be held when he acts legally. They vouch for his acts, and bind themselves to make good any damage he may cause to anyone while acting under color of his office. And, if the sheriff and his sureties are bound for such acts of the deputy while acting under color of his office, then the deputy and his sureties are liable to the sheriff for his act." In *Brown v. Weaver*, 76 Miss. 7, 42 L. R. A. 423, 23 So. 388, it was held that an officer had no right to shoot a misdemeanor to prevent his escape, and that if he was unjustifiably shot by a deputy sheriff in attempting to arrest him under a warrant, or in attempting to prevent his escape after arrest, he can maintain an action for damages on the official bond of the deputy's principal. In *Head v. Martin* the court held that an officer had no right to shoot one charged with a misdemeanor, while escaping. It does not appear from the opinion what was the purpose of the action, but, as it was not a criminal prosecution, it must have been an action for damages. This court, in *Shields v. Pfanz*, 101 Ky. 407, 41 S. W. 267, held that a sheriff was responsible for the mistreatment of the prisoner by his deputy while conveying him from one county to another.

The covenants of the sheriff's bond required him to faithfully discharge the duties of his office. This imposes the duty of executing the processes which the law authorizes to be issued and placed in his hands, and to make arrests in the manner and upon the conditions imposed by law. If he attempts to make an arrest, and in doing so inflicts an injury in violation of law upon the party sought to be arrested, or upon another, then he and his sureties are liable for the damages sustained. If the sheriff, in executing an order of attachment against the property of one person, seizes that of another, he and his sureties are liable. If he should seize the property of one not a defendant in the execution, and sell it to satisfy it, he is liable on his bond for the tort. If he has a warrant against one, and under it arrests another, he is liable on his bond for the tort thus committed. He cannot justify the wrongful arrest by showing he believed, and had reasonable grounds for believing, that he was executing it upon the party named in it. If he cannot in that way justify a wrongful arrest, much less should he be permitted to justify the killing of another by showing that he had probable cause for believing that he was shooting at the party whom he was authorized to arrest. The law which gives an officer the right to kill an escaping felon certainly requires him to know that it is the felon, not an innocent party, whose life he is attempting to take. The question here is quite a different one from what we would have if the deputy sheriffs had shot at Browder while escaping, and killed Williams. In the latter case they would have been shooting at the right man, if the facts justified it, but here they shot at and killed an innocent man. While they did an unlawful act,

still they were acting in their official capacity. They had the authority as deputy sheriffs to arrest Browder, but in the exercise of that authority they acted improperly, abusing the confidence which the law imposed in them. They were guilty of misconduct in office, for which their principal and his sureties are liable; for § 4141, Ky. Stat., provides: "The sheriff may, with the approval of the county court, appoint one or more deputies, and take bond to himself for the faithful discharge of the duties of such deputies; but in all cases the sheriff shall be liable on his bond or bonds for any misconduct or default of such deputies; any deputy may be removed at any time by the sheriff."

The instructions which the court gave were more favorable to the defendants than they were entitled to have given to the jury, except the one on the measure of damages. The part of the instruction giving the measure of compensatory damages is substantially correct, but the instruction also authorized the jury to award punitive damages. Punitive damages might have been awarded against the deputies who killed the decedent, but it is not proper that they should be given against the sheriff and the sureties in his official bond. The covenants of the bond do not require the sureties to do more than compensate an injured party for the actual damages which he may have sustained by reason of the misconduct of the sheriff or his deputies. Its covenants do not require them to pay a sum of money which is inflicted by way of punishment.

They have committed no wrong, and therefore the reason of the law which allows exemplary damages against wrongdoers cannot make it apply to them. In fact, the reasons which allow a recovery of exemplary damages would forbid their assessment against sureties in the official bond. This is an action upon contract. Usually exemplary damages are allowed only in actions of tort. It has been held in some cases that where the condition of the bond given in pursuance of the statute is broken by the commission of a tort, such as would be a proper cause for exemplary damages, such damages may be recovered in the action on the bond. But it is stated in *Sedgw. Damages*, § 370, that "this is contrary, however, to the current of authority, which is to the effect that only compensatory damages can be recovered in an action on a statutory bond." While the court should not have given an instruction awarding exemplary damages, still the verdict was only \$2,500. Considering the evidence as to the age and health of the young man who was killed, the jury could not have included in their verdict any exemplary damages.

The judgment is affirmed.

Burnam, J., dissenting:

In my opinion, the act of the deputies in killing decedent was not in discharge of an official duty; hence the securities on the sheriff's bond cannot be made liable under the facts of this case, and I therefore dissent from this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Re C. TOLLETT.

(46 C. C. A. 11, 106 Fed. 866.)

The voluntary conveyance by an insolvent, for the use of his wife, without actual fraud, of all his real estate, the value of which is not greater than is subject by law to a homestead exemption during the life of himself and wife and the minority of his children, will not deprive him of the right to have the homestead set off to him in a bankruptcy proceeding, in case he obtains a reconveyance after the adjudication of his bankruptcy, and includes the land in his schedule of property.

(March 5, 1901.)

PETITION to the Circuit Court of Appeals for the Sixth Circuit to revise the action of the District Court of the United States for the Eastern District of Tennessee refusing to allow a homestead exemption of a bankrupt's property. *Reversed.*

The facts are stated in the opinion.

NOTE.—For the effect of a fraudulent conveyance upon a right to homestead, see also *Stern v. Lee* (N. C.) 26 L. R. A. 814, and *Kennedy v. First Nat. Bank* (Ala.) 36 L. R. A. 308. 54 L. R. A.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

Mr. Harvey Terry for petitioner.

Mr. J. V. Lee opposed.

Lurton, Circuit Judge, delivered the opinion of the court:

The petitioner, a voluntary bankrupt, seeks to review the order of the district court denying him a homestead in land set out in his schedule as an asset. 105 Fed. 425. He is a citizen and resident of Tennessee, and is the head of a family. For many years he owned and occupied a small farm, valued at \$1,000, which he claimed and held as a homestead under the homestead law of the state. This was the only land owned or claimed by him at the time of his bankruptcy. Within four months prior to his adjudication as a bankrupt he conveyed this land by a deed, in which his wife joined, to one Taylor, for the recited consideration of \$500, but remained in possession. Shortly after his bankruptcy, and before examination, Taylor reconveyed same to petitioner, who thereupon applied for and obtained leave to amend his schedule, and include this land as an asset, and to claim a homestead therein. The referee denied this claim, and on

request certified the question to the district judge, together with an agreed statement of the facts and his own finding. Upon this record the district judge affirmed the order of the referee. The ground upon which the right of homestead was denied was that under the Tennessee decisions a debtor was not entitled to a homestead in property recovered by his creditors which had been fraudulently conveyed by him, and that the reconveyance procured by the bankrupt after he had been adjudicated a bankrupt accomplished no more than would have resulted from a suit by the trustee in bankruptcy. The findings of the referee and the opinion of the district judge are reported in 105 Fed. 425, 427. The Tennessee Constitution (art. 11, § 11) provides that "a homestead in the possession of each head of a family and the improvements thereon, to the value, in all, of \$1,000, shall be exempt from sale, under legal process, during the life of such head of a family to inure to the benefit of the widow, and shall be exempted during the minority of their children occupying the same. Nor shall said property be alienated without the joint consent of husband and wife, when that relation exists."

The homestead estate or interest is but an estate carved out of the fee for the life of the debtor, his widow, and his children during their minority. The homestead interest is the estate which is exempted from sale under legal process, and which can be conveyed only by the joint conveyance of husband and wife, where that relation exists. The remainder interest, subject to this homestead estate, is subject to sale by legal process to pay the debts of the owner of the fee. *Platt v. Stadler*, 16 Lea, 371; *Hovell v. Jones*, 91 Tenn. 403, 19 S. W. 757. The only land which the petitioner owned was the land in which he now claims a homestead. Inasmuch as its value did not exceed \$1,000, no formal assignment of homestead in it was necessary. The homestead right attached to and covered the whole land and its improvements. *Briscoe v. Vaughn*, 103 Tenn. 308, 52 S. W. 1068. Neither does the right of homestead depend upon occupancy since the Tennessee act of 1879, for it constitutes, when assigned, a vested life estate, which passes under the deed of the owner in the same manner as any other life estate. Acts 1879, chap. 171 (Shannon's [Tenn.] Code, §§ 3798, 3800); *Cowan v. Carson*, 101 Tenn. 523, 50 S. W. 742; *Briscoe v. Vaughn*, 103 Tenn. 308, 52 S. W. 1068. The only interest which was subject to the creditors of the petitioner was the remainder interest in the land in which he now asks a homestead. If the homestead estate was not subject to creditors, it is difficult to see how a conveyance limited to that estate could be fraudulent as to creditors. *Leslie v. Joyner*, 2 Head, 514. A voluntary conveyance of a homestead neither hinders nor prejudices creditors, and, whatever the motive of the grantor, creditors are not wronged, inasmuch as it was not subject to either legal or equitable process in their favor. *Thomson v.*

Crane, 73 Fed. 327; *Fellows v. Lewis*, 65 Ala. 343, 354, 30 Am. Rep. 1. The difficulty is that the petitioner conveyed the entire fee, thereby including the remainder interest, which was subject to creditors. But does it follow that, because exempt and nonexempt property are joined in one conveyance, the creditors' rights are enlarged if the conveyance was a voluntary one? How a homestead may be acquired or lost must depend upon the law of the state under which the right of homestead arises. That law, as construed and applied by the highest court of Tennessee, constitutes a rule of property binding upon the Federal courts in respect to homestead rights claimed in that state. *Brashear v. West*, 7 Pet. 608, 8 L. ed. 801; *Allen v. Massey*, 17 Wall. 351, 21 L. ed. 542; *First Nat. Bank v. Glass*, 25 C. C. A. 151, 49 U. S. App. 228, 79 Fed. 706.

What, then, is the effect upon a debtor's right of homestead if he fraudulently convey the property in which he claims it? In *Cowan v. Johnson*, 2 Tenn. Cas. 41, it was held that, where the husband and wife joined in the execution of a conveyance which was fraudulent in fact, neither could claim a homestead in the property so conveyed when their deed had been set aside by creditors. In *Ruohs v. Hooke*, 3 Lea, 302, 31 Am. Rep. 642, a transfer of a house and lot, occupied by the debtor, to his wife, based upon love and affection, was held void as to existing creditors, because the husband had not retained property sufficient to provide for his existing liabilities. But upon application by the wife homestead was assigned in the property so recovered. *Cowan v. Johnson* was distinguished upon the ground that both husband and wife had participated in a conveyance which was fraudulent in fact. The case is a distinct authority for holding that the right of the wife to claim a homestead in property subject to the right of homestead is not forfeited when conveyed by the husband to the wife by a deed which is only constructively fraudulent. In *Nichol v. Davidson County*, 8 Lea, 389, a conveyance by the husband to his wife was set aside for fraud, and the wife denied a homestead. The case was rested upon *Cowan v. Johnson*. The latest Tennessee case dealing with this subject is that of *Rosenbaum v. Davis*, decided since the decision in the court below, and reported in 106 Tenn. 51, 60 S. W. 497. There a conveyance by the husband to the wife was set aside by creditors as fraudulent in law. The wife was held not to be estopped by her acceptance of the deed, and was allowed homestead out of the property recovered from her by the creditors. The preceding cases were fully reviewed by Judge McAlister, and the conclusion reached that the wife's right of homestead is not lost when the conveyance is not fraudulent in fact. It is a matter of no importance whether the application for a homestead came from the petitioner, or his wife, or both. The homestead is for the joint benefit of husband, wife, and minor children. The wife's application, as would that of the hus-

band, inures to the use of all. In *Himes v. Smith*, 2 Tenn. Cas. 431, a homestead was allowed upon the husband's application against his own deed, his wife not having joined therein. A valid joint conveyance by husband and wife, or a joint participation in a conveyance fraudulent in fact, is necessary to convey or forfeit the homestead right. In both *Ruohs v. Hooke* and *Rosenbaum v. Davis*, cited above, the husband was grantor and the wife grantee; yet the wife's application for homestead was not denied, though she was a party to the conveyance which had been set aside as constructively fraudulent. The estoppel in those cases was no stronger against the husband than the wife. What the one gave, without moral fraud, the other had accepted. The test is, Was the conveyance in which husband and wife participated, either as joint grantors or as grantor and grantee, free from actual, wicked fraud? If so, the homestead right may be asserted in property thus conveyed as against the claims of creditors affected thereby. If, on the other hand, the transaction is tainted with purposed fraud, the right of homestead is lost when both husband and wife participate. This forfeiture of the homestead right in cases of actual fraud is said in *Gibbs v. Patten*, 2 Lea, 180-183, to be a rule founded on ethics, "in that it visits fraud, with severe penalties."

This brings us to the question as to the actual character of the conveyance made by the petitioner and his wife of the property in which the petitioner now asserts a right of homestead. That this review of the order of the district judge extends only to questions of law must be conceded. If the facts have been settled by the district judge, we cannot go behind his finding of fact. There was a finding of fact and law by the referee, but the order of the referee was not reviewed upon this finding of facts nor upon the referee's summary of the evidence. The referee certified the entire evidence as an agreed statement of facts, and the district judge reviewed the referee's order upon the entire evidence heard by the referee. In this state of the record the finding of facts or opinion of the referee upon the facts is of no evidential value. The hearing by the district judge was an original hearing upon all of the evidence. But it has been argued that the learned district judge found that the deed to Taylor was fraudulent, and that this finding is conclusive. But the learned district judge did not find that the transaction was fraudulent in fact. Having well in mind the distinction between constructive and actual fraud, he stopped with a finding that the conveyance was "fraudulent in law." Referring to his opinion, which constitutes the only finding made by him, he said upon this subject that, "upon the evidence disclosed by the record, there can be no doubt that the conveyance made by the bankrupt of the land in which the homestead is now

claimed was fraudulent; certainly so in law, whatever might be considered true as a matter of fact." In the absence of a specific finding of the fact of actual as distinguished from constructive fraud, we can only conclude that the order of the referee was confirmed upon the ground that the conveyance was constructively fraudulent, and that under the Tennessee decisions the bankrupt forfeited his right of homestead by a conveyance constructively fraudulent if the wife joined therein. That the learned judge did not mean to be understood as finding fraud in fact is very obvious from the agreed statement of facts, which constituted the whole of the evidence. The only evidence consisted in that given by the bankrupt himself when examined at a creditors' meeting. The sum of it is this: Acting under bad legal advice, he assumed that this entire tract of land, being only of the value of \$1,000, was exempt, and could be conveyed at his pleasure, without wrong to his existing creditors. He wished to convey it to his wife, but, being advised that he could not do so directly, he conveyed to Taylor, who was closely related to his wife, with the purpose and in trust that Taylor would convey it to his wife. Two months afterwards he applied to be declared a bankrupt, and omitted this property from his schedule. Later on, and before he had been examined, or any step taken to reach this property, he was advised that the creditors had a right to the remainder interest in his homestead. Thereupon he procured Taylor to reconvey to him, applied for and obtained leave to amend his schedule by adding this property as an asset in which he claimed a homestead. That the conveyance of the remainder estate was voluntary and void as to creditors because he was at the time indebted to insolvency, is plain. But that his purpose was to cheat, defraud, or hinder his creditors is not the inference which the district judge drew from this evidence. So far as the conveyance was in contravention of the rights of his creditors, he has rectified matters by procuring a reconveyance. This he did in advance of any action by creditors or in their behalf. But, assuming that he has thereby accomplished what an action by the trustee would have accomplished, and that his rights are not other or greater than if the trustee had set the deed aside, we nevertheless reach the conclusion that the transaction was free from moral fraud, and was only constructively fraudulent. The case is therefore governed by the milder and more just rule announced in *Ruohs v. Hooke* and *Rosenbaum v. Davis*, cited above.

The order denying homestead was erroneous. It will be set aside, and the property sold, subject to the homestead rights of the petitioner as herein indicated. The trustee will pay the costs of this proceeding out of the bankrupt's estate.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

LIFE INSURANCE CLEARING COMPANY, *Plff. in Err.*,

v.

O'NEILL.

(45 C. C. A. 641, 106 Fed. 800.)

1. An adult son has not, from the bare fact of relationship, an insurable interest in the life of his father.
2. The existence of a law imposing upon a son the duty of supporting his father in case the latter becomes unable to support himself gives the son no insurable interest in the father's life, in the absence of any expenditures, past or prospective, towards such support.
3. Ability on the part of the father to support his adult son in case of the latter's inability to support himself is necessary to give the son an insurable interest in the father's life, under a statute imposing upon fathers the duty of caring for their indigent children.

(March 12, 1901.)

NOTE.—*Insurable interest in life of parent or child or other relative by blood.*

- I. The rule that pecuniary interest is necessary.
 - a. Its origin and extent.
 - b. What pecuniary interest is sufficient.
- II. The rule that close relationship is sufficient.
 - a. Origin, general statement and scope.
 - b. Application to interest of child in life of parent.
 - c. Application to interest of parent in life of child.
 - d. Application to interest in lives of brothers or sisters.
 - e. Application to interest in lives of other relatives.
- III. Consent of the insured.
- IV. Conclusion.

1. The rule that pecuniary interest is necessary.
 - a. Its origin and extent.

The rule was formerly a general one, and still exists to some extent and in some jurisdictions, that a pecuniary interest of some kind on the part of the assured in the life of the insured is necessary to support insurance upon the life of the latter in favor of the former, and that mere consanguinity or blood relationship is not sufficient, however close it may be, without such pecuniary interest. This rule seems to have originated in, or at least to have been largely based upon, *Halford v. Kymer*, 10 Barn. & C. 724, in which it was held that, to render a policy of insurance upon the life of another valid, within the meaning of 14 Geo. III., chap. 48, § 1, providing that no insurance shall be made on lives or any other event wherein the person for whose benefit the policy shall be made shall have no interest, and that every such insurance shall be void, and § 8 thereof, providing that in all cases where the insured has interest in such life or event no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life or other event, the party for whose benefit it is effected must have a pecuniary interest in the life or event insured, 54 L. R. A.

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of life insurance. *Reversed.*

The facts are stated in the opinion.

Argued before *Dallas* and *Gray*, Circuit Judges, and *McPherson*, District Judge.*Mr. J. F. Kyle* for plaintiff in error.*Mr. James Scarlett* for defendant in error.*J. B. McPherson*, District Judge, delivered the opinion of the court:

This is an action on a policy of insurance taken out and maintained by an adult son for his own benefit upon the life of his father, and the question for decision is whether, under the facts in evidence, the son had an insurable interest sufficient to support the policy. The learned trial judge held that such interest existed, relying mainly upon *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 154,

and a policy effected by a father in his own name on the life of his son is void for want of such pecuniary interest.

14 Geo. III., chap. 48, however, never became a part of the jurisprudence of the United States; but, notwithstanding this fact, a number of the courts of the United States have adopted, and some have clung to, the rule requiring a pecuniary interest to support insurance upon the life of another.

Under that rule relationship is of little importance in determining the existence of an insurable interest upon the part of one party in the life of another, except as tending to give rise to circumstances which justify a well-founded expectation of pecuniary advantage from the continuance of the life insured, or risk of loss from its termination. *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180.

Thus, the mere relation of father and son, when both parties are of mature years and live apart in independent pecuniary circumstances, and are mutually entirely independent of each other, and have no business relations with each other, does not create an insurable interest upon the part of the son in the life of the father. *Ibid.*; *Chicago Guaranty Fund Life Soc. v. Dyon*, 79 Ill. App. 100; *Mitchell v. Union L. Ins. Co.* 45 Me. 104, 71 Am. Dec. 529.

Unless the son had a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father. *Chicago Guaranty Fund Life Soc. v. Dyon*, 79 Ill. App. 100.

And a daughter has not an insurable interest in the life of her mother which will sustain insurance upon the mother's life for the benefit of the daughter, so as to warrant a decree of specific performance of an alleged agreement by an insurance company to issue such a policy. *Continental L. Ins. Co. v. Volger*, 89 Ind. 572, 48 Am. Rep. 185; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 522, 52 N. E. 772.

And a complaint in an action for specific performance of an agreement by an insurance company to issue a paid-up policy to a daughter for her own benefit upon the life of her mother falls within the rule which requires complaints in actions on insurance policies to aver an insurable interest in the plaintiff in the life in-

22 Am. Rep. 741, but evidently deciding the point with some reluctance. His opinion upon this subject is as follows: "The second question is, Had the plaintiff an insurable interest in the life of his father? We have examined with much care the authorities and text-books on this subject. We find them conflicting to such an extent as to support a judgment on this reserved point for either the plaintiff or defendant. The supreme court of Pennsylvania in *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 154, 22 Am. Rep. 741, held an adult son had an insurable interest in the life of his father. While the Federal courts are not bound by the state courts' construction of a contract of insurance (*Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 443, 32 L. ed. 788, 9 Sup. Ct.

Rep. 469), yet, in view of the general conflict of decisions on this question, the fact that a state statute was an element in the conclusion reached by the supreme court of Pennsylvania, and that a decision holding the son had not an insurable interest might unsettle the status of policies in this state, we are moved, sitting at circuit, to hold, for the purposes of this case, the plaintiff had an insurable interest in the life of his father, leaving it to the circuit court of appeals to settle the question."

The uncontradicted evidence established the facts that the son was an adult, married, and having a home and family of his own apart from his father; that he was not supported by, and did not support, his father, but that each maintained himself by his own exertions. There is nothing to show that the relation of debtor and creditor existed

sured. *Continental L. Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185.

So, the mere relationship of brother to brother is not such an interest as will support a policy of life insurance obtained by one upon the life of the other. The interest required to make such a contract valid must be of a pecuniary nature. *Lewis v. Phenix Mut. L. Ins. Co.* 39 Conn. 104.

And a mother suing upon a policy issued upon the life of her son cannot be permitted to claim that the complaint declares upon a policy issued to her as his mother, and also that it declares upon a policy issued to him upon his own life. *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772.

So, in *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316, it was said that it has been held in some cases that the interest in the life of another which will support insurance thereon must be in some sense a pecuniary one, not predicated merely upon the fact of existing relationship; but in other cases the contrary view has been intimated, which does not, however, seem to be sustained by the weight of authority.

And in *Continental L. Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, it was said that an insurable interest in the life of another must be a pecuniary interest. Some of the authorities tend in the direction that mere relationship, as between parent and child, is a sufficient foundation upon which to rest an insurable interest; but this view is not sustained by the weight of authority.

But the statute of 14 Geo. III., chap. 48, prohibiting wager policies, is a defense to an insurance company only if they choose to avail themselves of it. If they do not, the question, Who is entitled to the money? must be determined as if the statute did not exist; and where a father effects insurance in the name of, and on the life of, his son, in which he has no insurable interest, intending it for his own benefit, and the son dies intestate, and the father takes out administration on his estate, and the insurance company pays the money assured by the policy to him, although as between him and the company the policy is illegal and void under that statute, yet, as between the father and the estate of the son, the father is entitled to retain the money for his own benefit. *Worthington v. Curtis*, L. R. 1 Ch. Div. 419, 45 L. J. Ch. N. S. 259, 33 L. T. N. S. 828, 24 Week. Rep. 228.

b. What pecuniary interest is sufficient.

The general rule is that when insurable interest arises or is implied from relationship it will be deemed to exist when the relationship

is such that the insurer has a legal claim upon the insured for service or support, or where, from their personal relations and the kindness and good feeling displayed by the insured to the assured, the latter has a reasonable right to expect some pecuniary advantage from the continuance of the life of the former, or to fear loss from his death. *Rombach v. Piedmont & A. L. Ins. Co.* 35 La. Ann. 233, 48 Am. Rep. 239.

In the above case it was said that the statement in *Phenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501, which was a case of insurance upon the life of a husband for the benefit of his wife, that it is sufficient to show that a policy is not invalid as a wager policy if it appears that the relation of consanguinity or affinity is such as to warrant the conclusion that the beneficiary has an interest, whether pecuniary or arising from dependence, or from natural affection, in the life of the person assured,—was a mere dictum of Clifford, J., and not in accord with the decisions generally.

Thus, a father is entitled to the earnings of his minor child, and may maintain an action for their recovery, and has a pecuniary interest in its life which the law will protect and enforce, and which will uphold a policy of insurance taken out upon such life for his benefit. *Mitchell v. Union L. Ins. Co.* 45 Me. 104, 71 Am. Dec. 529; *Grattan v. National L. Ins. Co.* 15 Hun, 74; *O'Rourke v. John Hancock Mut. L. Ins. Co.* 10 Misc. 405, 31 N. Y. Supp. 130.

And after his majority the son, in case of indigence of his father, may be compelled to aid in his support and maintenance. *Grattan v. National L. Ins. Co.* 15 Hun, 74.

And this interest is sufficient to take the policy out of the class of wager contracts, and thus to give it validity. *O'Rourke v. John Hancock Mut. L. Ins. Co.* 10 Misc. 405, 31 N. Y. Supp. 130.

So, where a father purchased a contingent legacy of his son which was bequeathed to him if he should attain thirty years of age, and, when the son wanted twenty months of that age, took out insurance upon his life for two years of his life upon an annual premium calculated without reference to the legacy, and after the son attained the age of thirty and the father received the legacy the son died before the expiration of the two years, it was held to be a question for the jury whether, by insuring for two years, when the father had an insurable interest for twenty months only, a fraud upon the statute prohibiting wager policies was intended. *Lau v. London Indisputable Life Policy Co.* 1 Kay & J. 223, 1 Jur. N. S. 178, 3 Eq. Rep. 338, 24 L. J. Ch. N. S. 196.

And where in such case the father was told

between them. It will be observed, therefore, that the precise question is—laying aside, for the present, the effect of the poor law of Pennsylvania—whether the bare fact of relationship is sufficient to give an adult son an insurable interest in his father's life. Upon this point all the decisions, so far as we have been able to discover, declare that no such interest exists, although *dicta* to the opposite effect are no doubt to be found, and in our opinion this declaration is not only supported by the weight of authority, but is also in harmony with the principles upon which the doctrine of insurable interest rests.

The sum of the decisions and of text-book discussion upon the subject of insurable interest may, we think, be fairly stated thus: No person has an insurable interest in the life of another unless he would in reasonable

probability suffer a pecuniary loss, or fail to make a pecuniary gain, by the other's death; or (in some jurisdictions) unless, in the discharge of some undertaking, he has spent money, or is about to spend money, for the other's support or advantage. The extent of the insurable interest—the amount for which a policy may be taken out, or for which recovery may be had—is not now under consideration. What is often called "relationship insurance" must be governed by this rule. It must rest upon the foundation of a pecuniary interest, although the interest may be contingent, and need not be capable of exact estimation in dollars and cents. Sentiment or affection is not sufficient of itself, although it may often be influential in persuading a court or jury to reach the conclusion that a beneficiary had a reasonable expectation of pe-

that, according to the practice he must insure two years of his son's life, which he did, and the whole case showed perfect bona fides on the part of the father, the policy is not void as in contravention of the statute against wager policies, because the father took an interest in the life of the son only for the whole twenty months; and the sum to be recovered cannot be cut down by any calculation of value made on the principle of the interest insured being reversionary at the time of applying for the insurance, but the whole sum may be recovered. *Ibid.*

Nor does the fact that a father was put to expense in his son's education give him such interest in his life as would support a policy of insurance thereon in his favor. *Worthington v. Curtis*, L. R. 1 Ch. Div. 419, 45 L. J. Ch. N. E. 259, 33 L. T. N. S. 828, 24 Week. Rep. 228. And see *LIFE INSURANCE CLEARING CO. v. O'NEILL*.

So, that a father and a son were amicable and affectionate, and that the father was prosperous and the son had remained at home and worked for his father several years after he became of age, without compensation, and had made valuable improvements after he became of age upon a tract of land belonging to his father, under a promise, or well-founded expectation, that the father would give him the land; and that the father had subsequently disposed of it and made no compensation to the son,—is no more than evidence tending to show an insurable interest upon the part of the son in the life of the father, and should not be declared by the court, in an action upon an insurance policy upon the life of the father in favor of the son, to constitute an insurable interest. *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 190.

In determining whether a son has an insurable interest in the life of his father which will support an insurance procured by the son thereon, the jury, in an action upon the policy thus obtained, should take into account the respective ages and situations in life of the father and son, and their respective business and social relations, and all other facts bearing upon the question of insurable interest at the date of the application for the insurance. *Ibid.*

In *Kane v. Reserve Mut. L. Ins. Co.* 9 Phila. 234, however, it was held that a son upon whom his father's family is liable to become a charge upon the death of the father has an insurable interest in his life.

But in *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 154, 22 Am. Rep. 741, the judgment in the case above set forth was affirmed, but the affirmation was put upon the ground that the Pennsylvania 54 L. R. A.

poor law of June 13, 1876, § 28, providing that the father and grandfather, and the mother and grandmother, and the children and grandchildren of every poor person not able to work shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, makes maintenance of a father or mother unable to work a legal liability, so that a son would have an insurable interest in the life of his father. But see *LIFE INSURANCE CLEARING CO. v. O'NEILL*, which is a Federal case originating in Pennsylvania.

The poor law of Illinois, however, making a son liable for the maintenance of his mother, and the mother liable for the maintenance of the son, in the event that one is unable to earn a livelihood and the other is of sufficient ability to provide such support, creates a legal liability in behalf of the county or town, but creates no right of action by the son against the mother or by the mother against the son, and does not give a son an insurable interest in the life of his mother which will sustain a policy issued to him, where the mother was seventy-six years of age when the policy was issued, and he supported and maintained her till the time of her death, and it does not appear that he expected any benefit from her by way of maintenance, service, or the like. *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809.

So, an allegation in an interplea in an action on an insurance policy showing only that the assured was the brother of the insured is insufficient to show an insurable interest in the latter's life. *Masonic Benev. Asso. v. Bunch*, 109 Mo. 560, 19 S. W. 25.

But one who, upon obtaining life insurance for his own benefit upon the life of a brother, answered in the application therefor that he had an interest in the life to be insured to the full amount applied for, is estopped, in an action against the insurance company to recover the premiums paid after cancellation of the policy, from showing his want of insurable interest, though he was advised by the agent that he had the right to insure the life of his brother, as his ignorance of the law is no excuse. *Lewis v. Phoenix Mut. L. Ins. Co.* 39 Conn. 104.

Likewise, as a general rule a grandfather is under no legal obligation to support or provide for a grandchild, and a grandchild therefore has no such insurable interest in the life of the grandfather growing out of the relationship alone as will uphold a policy of insurance issued upon his life directly to the grandchild. *Burton v. Connecticut Mut. L. Ins. Co.* 119 Ind. 209, 21 N. E. 746.

And a complaint in an action upon a policy of insurance issued and made payable directly

pecuniary advantage from the continued life of the insured. In one relation only—the relation of husband and wife—is the actual existence of such a pecuniary interest unimportant; the reason being that a real pecuniary interest is found in so great a majority of cases that the courts conclusively presume it to exist in every case, whatever the fact may be, and therefore will not inquire into the true state of a few exceptional instances. This, we think, is essentially what is meant by the declaration of courts and text-book writers that the mere relationship of husband and wife is sufficient to give an insurable interest. The supreme court of Vermont—alone, we think, among judicial tribunals—seems disposed to hold the presumption to be rebuttable. In *Currer v. Continental L. Ins. Co.* 57 Vt. 496, 52 Am. Rep. 134, it is said: “Ad-

mitting that the rule as to the interest necessary to support a contract of life insurance is that the interest must be a pecuniary one, we think that, where no facts are shown in relation to the wife, the presumption is that the husband has an insurable pecuniary interest in her life. He is entitled to her services. There are many cases where she is the real support of her husband and family, or, as is sometimes said, she is the ‘man of the house.’ In all ordinary cases, the husband has a deep interest in the continued life of the wife. Cases may exist where the husband has no interest whatever in his wife’s life. She may be a burden,—a hopeless maniac, or invalid,—and such facts may require the application of a different rule. There are none such in this case, and we only hold that the presumption is that the wife is a help-

to a grandchild, insuring the life of her grandfather, does not show a cause of action, in the absence of an allegation that the grandchild had an insurable interest in the life of her grandfather. *Ibid.*

And a recital in such a complaint that the insurance was procured by the grandfather because he desired to make provision for the grandchild does not warrant the omission of an allegation of insurable interest, where the policy recites payment of the advance premium by the grandchild, and her promise to pay future premiums as therein stipulated as the consideration for the execution of the policy. *Ibid.*

But an instruction in an action upon an insurance policy that if a grandfather procures an insurance upon his life in favor of a grandson, with whom he lives, the grandson will have such an insurable interest in the life of the grandfather that the policy will not be invalid in the absence of fraud, and that the grandson may maintain an action upon the policy, is not an erroneous proposition of law. *Elkhart Mut. Aid. Benev. & Relief Assn. v. Houghton*, 108 Ind. 286, 53 Am. Rep. 514, 2 N. E. 768.

II. The rule that close relationship is sufficient.

a. Origin, general statement and scope.

In *Warnock v. Davis*, 104 U. S. 779, 26 L. ed. 926, the rule was laid down that an insurable interest which will take an insurance policy out of the class of wager policies may be stated generally to be such an interest, arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from a continuance of his life; and it is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation.

This rule was quoted and adopted in *Connecticut Mut. L. Ins. Co. v. Lucha*, 108 U. S. 498, 27 L. ed. 800, 2 Sup. Ct. Rep. 949; *Ingersoll v. Knights of Golden Rule*, 47 Fed. 272; *Adams v. Beed* (Ky.), 36 S. W. 568; *Bayse v. Adams*, 81 Ky. 368; *Geoffroy v. Gilbert*, 5 App. Div. 98, 38 N. Y. Supp. 643, Affirmed in 154 N. Y. 741, 49 N. E. 1097; *Grattan v. National L. Ins. Co.* 15 Hun, 74; *Trinity College v. Travelers’ Ins. Co.* 113 N. C. 244, 22 L. R. A. 291, 18 S. E. 175; *Keystone Mut. Ben. Assn. v. Morris*, 115 Pa. 446, 8 Atl. 638; *Corson’s Appeal*, 113 Pa. 446, 57 Am. Rep. 479, 6 Atl. 213; *Cronin v. Vermont, L. Ins. Co.* 20 R. I. 570, 40 Atl. 497; *Tate v. Commercial Bldg. Assn.* 97 Va. 74, 45 L. R. A. 243, 33 S. E. 384; *Roller v. Moore*, 86 Va. 512, 54 L. R. A.

sub nom. Roller v. Beam, 6 L. R. A. 136, 10 S. E. 241.

And it has been adopted and applied in numerous other cases, and may now be said to be a general, if not the prevailing, rule in the United States.

Under this rule it is assumed that close ties of blood or affinity, as parent, child, brother, sister, husband and wife, with the natural affection and moral forces which generally prompt one such to serve and protect the other, rendering it highly improbable that one for money would take the life of the other, afford a surer guaranty to society against the dangers of betting on the duration of human life than any mere pecuniary interest in the life insured. *Crosswell v. Connecticut Indemnity Assn.* 51 S. C. 103, 28 S. E. 200, *dictum*.

And an interest which will support insurance in favor of one party upon the life of another may arise from relationship of blood, or from pecuniary interest. *Hilliard v. Sanford*, 4 Ohio N. P. 363.

And every person has an insurable interest in the life of any person on whom he depends wholly or in part for education or support. *Union Cent. L. Ins. Co. v. Hilliard*, 16 Ohio C. C. 434.

But to constitute an insurable interest there must in all cases be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or marriage, to expect some benefit or advantage from the continuance of the life of the insured. *Warnock v. Davis*, 104 U. S. 779, 26 L. ed. 926; *Connecticut Mut. L. Ins. Co. v. Lucha*, 108 U. S. 498, 27 L. ed. 800, 2 Sup. Ct. Rep. 949; *Lamont v. Grand Lodge I. L. of H. 81 Fed. 177*; *Bayse v. Adams*, 81 Ky. 368; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. 324, 1 L. R. A. 238, 15 Atl. 439; *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. 446, 8 Atl. 638; *Corson’s Appeal*, 113 Pa. 446, 57 Am. Rep. 479, 6 Atl. 213; *Brady v. Prudential L. Ins. Co.* 5 Kulp, 505; *Roller v. Moore*, 86 Va. 512, *sub nom. Roller v. Beam*, 6 L. R. A. 136, 10 S. E. 241.

Otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the insured. *Warnock v. Davis*, 104 U. S. 779, 26 L. ed. 926; *Connecticut Mut. L. Ins. Co. v. Lucha*, 108 U. S. 498, 27 L. ed. 800, 2 Sup. Ct. Rep. 949; *Bayse v. Adams*, 81 Ky. 368; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. 324, 1 L. R. A. 238, 15 Atl. 439; *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. 446, 8 Atl. 638; *Corson’s Appeal*, 113 Pa. 446, 57 Am. Rep. 479, 6 Atl. 213; *Brady v. Prudential L. Ins. Co.* 5 Kulp, 505.

As to the Pennsylvania rule, see also *Lira*

meet, and the husband has an interest of a pecuniary nature in her living."

In all other relationships there is no presumption of interest, and no insurable interest exists, unless the reasonable likelihood of pecuniary loss or gain is present in actual fact. No doubt, judicial language is to be found supporting the view that the mere relationship of parent and child is sufficient to give an insurable interest. The dictum in *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, is perhaps more often referred to than any other similar declaration, and it may therefore be quoted as an example: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party ob-

taining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage

INSURANCE CLEARING CO. V. O'NEILL, which, however, was decided by a Federal court.

So, in *Trenton Mut. Life & F. Ins. Co. v. Johnson*, 24 N. J. L. 576, it was said that the interest required to support insurance in favor of one upon the life of another need not be such as to constitute the basis of any direct claim in favor of the assured upon the insured. It is sufficient if an indirect advantage may result to the assured from the continuance of the insured's life, and therefore the reciprocal interest of husband and wife, parent and child, and brother and sister in the lives of each other is sufficient to support the contract.

b. Application to interest of child in life of parent.

The general rule in this class of cases is that a wife and children have an insurable interest in the life of the husband and father. *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

Thus, a son has an insurable interest in the life of his mother, on account of relationship alone, which will sustain an assignment by the beneficiary to him of a policy procured by the mother on her own life for the benefit of a daughter. *Crosswell v. Connecticut Indemnity Assn.* 51 S. C. 103, 28 S. E. 200.

So, a daughter living with her father, and presumably dependent upon him for support, has an insurable interest in his life. *Geoffroy v. Gilbert*, 5 App. Div. 98, 33 N. Y. Supp. 643, affirmed in 154 N. Y. 741, 49 N. E. 1097.

And a life-insurance policy payable to a son of the insured is not a wager policy, where the first premium was paid by the insured and the others by the son, who had general charge of the business of the insured, and forwarded them in her behalf. *Heinlein v. Imperial L. Ins. Co.* 101 Mich. 250, 25 L. R. A. 627, 59 N. W. 615.

And a child has an insurable interest in the life of a parent who is a member of the household, at least to the extent of burial expenses. *Shadlinger v. Metropolitan L. Ins. Co.* 30 Ohio L. J. 337.

And a policy of insurance procured by a daughter on the life of her father, without his knowledge, to an amount not more than sufficient to cover his funeral expenses, she signing his name as the applicant by the agent's direction, the agent falsely certifying to the company that he had examined the life to be insured, is not void, and the company cannot be compelled to pay back the premiums. *Ibid.*

So, an insurable interest of a son or daughter in the life of their mother will be inferred, in the absence of anything tending to show that, notwithstanding such relationship, the transac-

tion was a mere cover for a gambling speculation in the mother's life. *Crosswell v. Connecticut Indemnity Assn.* 51 S. C. 103, 28 S. E. 200.

In the above case *Continental L. Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, *supra*, I. a., was distinguished upon the ground that that was a case in which a daughter procured insurance on her mother's life for her own benefit, while in the case at bar the policy was procured by the mother on her own life for the benefit of a daughter; and *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180, *supra*, I. a., was distinguished upon the ground that in that case the father was infirm, unable to labor, engaged in no business, and about sixty years of age, and the son who procured the insurance upon his life himself paid the premiums therefor, and was forty years old, and not dependent upon the father, and lived at a distance in another county with his own family on his own farm, the court saying that all that can be said to have been held in that case is that the mere relationship of father and son, where both parties are of mature years and live apart in independent pecuniary circumstances, and mutually independent of each other, and having no business relations with each other, does not create an insurable interest in the son in the life of his father.

And where, under the by-laws of a beneficiary society, the children of a member have the right to be named as beneficiaries, two daughters of a member who are named in her certificate as beneficiaries have such an insurable interest in her life as to entitle them to recover thereon in case of her death. *Voorhels v. People's Mut. Ben. Soc.* 91 Mich. 469, 51 N. W. 1109.

But an illegitimate child is not a child or relative of her father within the meaning of a statutory provision that children or relatives may be made beneficiaries in certificates of mutual benefit associations. *Lavigne v. Ligue Des Patriotes*, 178 Mass. 25, 59 N. E. 674.

And no relation or dependency exists between an illegitimate child of a married woman and her putative father which will entitle her to become a beneficiary in a benefit certificate issued to the father under a statutory provision authorizing persons dependent upon a member of the association to be made beneficiaries, where he merely boarded with her mother, paying his board when able, and was under no legal obligation to support the child. *Ibid.*

So, in *Williams v. Washington L. Ins. Co.* 81 Iowa, 541, a life insurance policy upon the life of a woman in favor of her daughter was treated as a valid contract, but the decision turned upon other grounds than that of insurable interest.

from the continuance of the life of the assured. Otherwise, the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy."

The comment upon this passage in the note to *Morrell v. Trenton Mut. L. & F. Ins. Co.* (Mass.) 57 Am. Dec., on page 96, seems to us to be sound, and we quote it with approval: "If we correctly understand the doctrine here laid down, it amounts simply to this,—that an insurable interest in another's life need not be pecuniary, in the sense of being susceptible of definite 'pecuniary estimation,' nor in the sense of being founded upon any mere pecuniary relation, but that

it may rest solely upon ties of blood or affinity, and yet that the mere existence of such a tie is not of itself sufficient to constitute an insurable interest, but that the tie must be such as to give reasonable ground for an expectation of benefit or advantage from the continuance of the life. By 'benefit or advantage,' in this connection, we understand that it must be a material or physical 'benefit or advantage;' that is to say, a mere sentimental benefit arising from a gratification of the affections by the prolongation of the life assured will not suffice. The expected benefit must consist in service, maintenance, or the like. This is equivalent to saying that it must be a pecuniary benefit, as distinguished from a mere sentimental or moral gratification. Thus understood, the doctrine of these cases, which professedly reject the test of pecuniary interest, is not substan-

And in *Geoffroy v. Gilbert*, 5 App. Div. 98, 88 N. Y. Supp. 643, Affirmed in 154 N. Y. 741, 49 N. E. 1097, it was said that the tendency of the decisions in the English courts was that a minor child had no insurable interest in the life of a father, and this continued to be the law for many years; but that more recently the tendency of the decisions in that respect has been from exceeding strictness to considerable liberality.

So, in *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 88, it was said that the right of a child to effect insurance upon the life of a father who depended on some fund terminable by his death to support the child would never be questioned.

And in *Clemmitt v. New York L. Ins. Co.* 76 Va. 355, which was an action upon an insurance policy upon the life of a man issued for the sole benefit of his wife and in case of her death before his decease then to be payable to her children, it was determined that the beneficiaries had an insurable interest in the life of the insured; but this was said not to have been questioned.

And in *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 154, 22 Am. Rep. 741, it was said, in substance, that it would be technical in the extreme to say that a son has no insurable interest in the life of his father. Poverty might overtake the father in his lifetime, and thus both father and mother be cast upon the son, or, if the father should die before the mother, the necessity of supporting her might fall at once upon the son; and that no injury is done to the insurance company, as it knows, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of human nature.

See also *Union Fraternal League v. Walton*, 109 Ga. 1, 46 L. R. A. 424, 34 S. E. 317; *Adams v. Reed* (Ky.) 36 S. W. 568; *Loomis v. Eagle Life & Health Ins. Co.* 6 Gray, 396; *Geoffroy v. Gilbert*, 5 App. Div. 98, 88 N. Y. Supp. 643; *Hilliard v. Sanford*, 4 Ohio N. P. 363; *Roller v. Moore*, 86 Va. 512, *sub nom.* *Roller v. Beam*, 6 L. R. A. 136, 10 S. E. 241; *Burslinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 925,—*infra*, II. c.

e. Application to interest of parent in life of child.

Under the doctrine of this class of cases the general rule is that a man has an insurable interest in the lives of his wife and children. *Tucker v. Mutual Ben. Life Co.* 50 Hun. 54, 4 N. Y. Supp. 505, Affirmed in 121 N. Y. 718, 24 54 L. R. A.

N. E. 1102; Relf v. Union Mut. L. Ins. Co. (Cin. Super. Ct.) 17 Ins. Chronicle, 3, May, Ins. 3d ed. 180, § 107.

Whether he is in any way dependent upon them or not. *Relf v. Union Mut. L. Ins. Co.* (Cin. Super. Ct.) 17 Ins. Chronicle, 3, May, Ins. 3d ed. 180, § 107. But see *LIFE INSURANCE CLEARING CO. v. O'NEILL*, which is a Federal case.

And the fact that a child is in infancy at the time insurance upon its life is taken out by a parent does not affect the question as to the right of the parent to insure it, as the parent is authorized to recover damages for the loss of expected services of an infant child in an action against another for causing its death through negligence. *O'Rourke v. John Hancock Mut. L. Ins. Co.* 10 Misc. 405, 31 N. Y. Supp. 130.

All that is required to take the case of an insurance by a father on the life of his son out of the objection of being a wager policy is that the father should have some interest in the life of the son,—that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage or advantage in life, will be impaired. *Loomis v. Eagle Life & Health Ins. Co.* 6 Gray, 396.

And a father who supported, maintained, and educated a son under twenty-one years of age and not emancipated, who, upon the son's going to a different state and engaging in a business enterprise, emancipated him, and made advances to him, has a direct pecuniary interest in his life which will sustain a policy of insurance thereon in his favor. *Ibid.*

And the nearness or remoteness of the majority of a son upon whose life a father obtained insurance upon emancipating him and making advances to him does not affect the father's insurable interest in his life. *Ibid.*

In the above case it was said by the court that it believed that the principle laid down in *Halford v. Kymer*, 10 Barn. & C. 724, *supra*, II. a, that a man has no such interest in the life of his wife and children, merely in the character of husband or parent, as to sustain an insurance thereon in his favor, is not law, and that it arose partly from a misconstruction of the statute of 14 Geo. III. chap. 48, prohibiting wager policies, which statute has never been in force in this country.

So, a father has such an insurable interest in the life of his son as will warrant an assignment by the son of insurance policies on his own life as security for debts due from the father to a third party, as the assignment would be for the benefit of the father, as well as of the third party. *Burslinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290.

tially different from that held in other cases. If it were true that the reasonable expectation of advantage from the continuance of another's life, required to constitute an insurable interest in that life, had reference in any case solely to the satisfaction of an affectionate desire for the prolongation of the life, ought not the insurers to be permitted to show in defense that there was in fact no affection between the parties? And, on the other hand, ought not an insurable interest to be held to exist wherever there is affection, though there was no other relation? Yet we venture to say, on the one hand, that the right of a husband to insure his wife's life would not be denied even if it should be distinctly proved that he had never had the slightest affection for her, and uniformly treated her as a mere household drudge; and, on the other hand, that,

where there was no tie giving a reasonable ground to expect service or support, a friendship as warm and abiding as that between Damon and Pythias would not furnish an insurable interest in behalf of one in the life of the other. For a further discussion of this point, see the note to *Lord v. Dall* (Mass.) 7 Am. Dec. 42."

We think it cannot be doubted that the tendency of the recent decisions is to insist upon an actual or presumed pecuniary interest in every case (although such interest may no doubt be contingent, and to some extent undefined), and to give relationship its proper place by regarding it merely as an important factor in the inquiry, whether such an interest does in reality exist. If, then, the test of pecuniary interest is to be applied to the facts of the present case, it is clear that the son had no insurable in-

And insurance effected by a son on his own life for the benefit of his father is valid. *Tucker v. Mutual Ben. Life Co.* 50 Hun, 54, 4 N. Y. Supp. 505, Affirmed in 121 N. Y. 718, 24 N. E. 1102.

And where an insurance policy is taken out by the insured and made payable to his executor or administrator for the use of his father, upon his death his executor is a trustee of an express trust to hold the money realized upon the insurance for the father, and in that capacity he is entitled to recover the money. *Grattan v. National L. Ins. Co.* 15 Hun, 74.

So, while insurance by a mother upon the life of her child might be invalid at common law, by reason of the exclusive right of the father to the benefit of the child's services, it would not be so under N. Y. Laws 1893, chap. 175, clothing a mother with powers, rights, and duties with regard to her children equal to those of her husband, as that statute extends to her the benefit to be derived from the child's services. *O'Rourke v. John Hancock Mut. L. Ins. Co.* 10 Misc. 405, 31 N. Y. Supp. 130.

And a policy of insurance issued in Ontario by a New York insurance company upon a child's life upon the application of its mother, in which the mother is named as a beneficiary, is not invalid as a wager policy, whether the validity is determined by the law of New York or that of Ontario, as, if the Ontario law governs, the insurance on the life of the child by the mother is legalized by 55 Vict. chap. 39, § 35, subsec. 60, and if the New York law governs the rule there is that the parent has an insurable interest in the life of the child. *Wakeman v. Metropolitan L. Ins. Co.* 30 Ont. Rep. 705.

And while N. Y. Laws 1892, chap. 690, § 55, providing that no policy or agreement for insurance shall be issued upon the life or health of another except upon the application of the person insured; but that a person liable for the support of a child of a designated age may take a yearly renewable term policy of insurance thereon, the amount payable under which shall not exceed specified sums, is to be construed strictly as an act in derogation of the common law, which construction would preclude the giving of effect to a supposed intention of the legislature not actually expressed, so that a policy taken upon the life of a child by virtue of its provisions cannot exceed the specified sum. It does not restrict the parent or person liable for the support of the child to one such contract of insurance, the limit being upon the entire amount to be obtained. *O'Rourke v. John Hancock Mut. L. Ins. Co.* 10 Misc. 405, 31 N. Y. Supp. 130.

So, in *Adams v. Reed* (Ky.) 36 S. W. 568, it 54 L. R. A.

was said that between husband and wife and parent and child an insurable interest has universally been held to exist.

And the same rule was adopted in *Union Fraternal League v. Walton*, 109 Ga. 1, 46 L. R. A. 424, 34 S. E. 317.

And in *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, it was said that a parent has an insurable interest in the life of his child, and the child in the life of his parent, and that the natural affection in cases of this kind is considered as more powerful, and as operating more efficaciously, to protect the life of the insured, than any other consideration.

And this rule was stated and acted upon in *Geoffroy v. Gilbert*, 5 App. Div. 98, 38 N. Y. Supp. 648, Affirmed in 154 N. Y. 741, 49 N. E. 1097; *Hilliard v. Sanford*, 4 Ohio N. P. 363; *Roller v. Moore*, 86 Va. 512, sub nom. *Roller v. Beam*, 6 L. R. A. 136, 10 S. E. 241; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290.

And in *Loomis v. Eagle Life & Health Ins. Co.* 6 Gray, 396, it was said by the court that it could not doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent, not merely on the ground of a provision of law that parents and grandparents, children and grandchildren, are bound to support their lineal kindred when they may stand in need of relief, but on considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law.

So, in *Valley Mut. Life Assn. v. Teewalt*, 79 Va. 421, it was said to be well settled that a father has an insurable interest in the life of his child, whether a minor or of full age, and the child in the life of his father.

And in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, it was said to be well settled that a man has an insurable interest in the lives of his wife and children, and that the essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the assured has no interest; but the case was one of the validity of an assignment of a policy.

d. Application to interest in lives of brothers or sisters.

Under this rule it has been held broadly and generally that a brother has an insurable interest in the life of his sister. *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217, 12 S. W. 621.

And a policy of insurance upon a man's life,

terest in his father's life. Again, laying aside the effect of the poor law of Pennsylvania, it is plain that the son would lose nothing by his father's death, and would gain nothing by his father's continuance in life. His father did not support him, and he himself had not spent, nor was he about to spend, any money in his father's behalf or support. Upon principle, therefore, we think that the policy cannot be supported.

If we turn to the decided cases, the weight of authority leads to the same conclusion. We have not been referred to any case in which it is held that the mere fact of relationship between a father and his adult son is sufficient. As already stated, *dicta* to this effect are certainly to be found, notably in *Loomis v. Eagle Life & H. Ins. Co.* 6 Gray, 396; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; and *Corson's Appeal*, 113

Pa. 446, 57 Am. Rep. 479, 6 Atl. 213. But, while these expressions of opinion are entitled to much respect because of the sources from which they come, it is also true that the point was not presented for decision in these cases, and was therefore, presumably, neither argued nor specially considered. For this reason, we cannot give to such expressions the same weight that is properly given to a decision upon the very question. The following cases deal with the insurable interest growing out of the relation of parent and child. Other citations may be found in the note to 57 Am. Dec. 96, and in May, Ins. 4th ed. §§ 104-107. In Illinois, the case of *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180, decides that the mere relation of father and son does not give to the son an insurable interest in the life of the father, the court

with a stipulation and agreement that the money should be paid to his sister, is sustainable at law on account of the nearness of relationship between the parties,—especially where the sister at the time the insurance was effected was one of the brother's next of kin, prospectively interested in his estate as a distributee. *Aetna L. Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287.

And a young woman without property, who was and had been for several years supported by and educated at the expense of her brother, who stood toward her *in loco parentis*, was held to have an insurable interest in his life. *Lord v. Dall*, 12 Mass. 116, 7 Am. Dec. 38.

In the above case it was said that with respect to a child for whose benefit a policy may be effected on the life of its parent the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother who provides for her.

So, a brother whose sister had lived with him, and who had at times paid her something and given her money, but no account was kept between them, has an insurable interest in her life which will support a policy taken out by him thereon. *Keystone Mutual Asso. v. Beaverson*, 16 W. N. C. 188.

And a sister with whom a brother had made his home for many years prior to the issuance of an insurance policy on his life in her favor, and to whom he paid no board, and who nursed him in sickness and took care of him as a brother, has an insurable interest in his life at common law. *Hosmer v. Welch*, 107 Mich. 474, 87 N. W. 504.

And a sister whose brother is indebted to her in a large sum of money has an insurable interest in his life, and a policy thereon for her benefit is not within the prohibition of the statute against wager policies. *Goodwin v. Massachusetts Mut. L. Ins. Co.* 78 N. Y. 480.

And a policy of insurance obtained by the insured, who directs that a part of the proceeds is to be paid to his brother, is not a wager policy; and the fact that the brother paid the premiums does not invalidate it, as a man may take out a policy of insurance upon his life for the benefit of his brother, and it is immaterial what arrangement is made between them for the payment of the premiums. *Fidelity Mut. Life Asso. v. Jeffords*, 53 L. R. A. 193, 46 C. C. A. 377, 107 Fed. 402.

So, Mo. Rev. Stat. 1889, § 5853, gives a sister an insurable interest in her brother's life. *Sternberg v. Levy*, 159 Mo. 617, 53 L. R. A. 438, 80 S. W. 1114.
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And that act contains no restrictions similar to those of § 5851 thereof, as to the amount which a husband or wife may pay in premiums out of her husband's money upon insurance upon his life for her benefit; and therefore it is not a fraud for a brother, who is the head of a family composed of himself, his sister, and her children, to apply his wages, or his exempt property, to the procuring of insurance for her benefit. *Ibid.*

So, under Mich. Stat. 1887, § 3960d5, providing that no policy of insurance shall issue upon a life in which the beneficiary named has not an insurable interest, and under a later clause of the same section providing that, while any certificate or policy issued in violation of the above section shall be void as to the beneficiary therein named, yet the amount thereof shall, in case of death, be payable to the heirs of the member, where a policy is issued to a member of a beneficiary society made payable to his wife, heirs, administrators or assigns, the policy is payable, upon his death after that of his wife and two children, to his heirs at law, consisting in this case of brothers, sisters, and children of a deceased brother, though they have no insurable interest in his life. *Silvers v. Michigan Mut. Ben. Asso.* 94 Mich. 39, 53 N. W. 935.

e. Application to interest in lives of other relatives.

The rule has been laid down generally that a granddaughter has an insurable interest in the life of her grandfather. *Breeze v. Metropolitan L. Ins. Co.* 37 App. Div. 152, 55 N. Y. Supp. 775.

And policies of insurance taken out by a woman in her own name, and afterwards delivered to a daughter-in-law with directions to pay the premiums on them and to pay the funeral expenses of the insured from their proceeds, and that what was left should go to her granddaughter, are not invalid as wager policies. *Burke v. Prudential Ins. Co.* 155 Pa. 295, 26 Atl. 445.

So, in *Hilliard v. Sanford*, 4 Ohio N. P. 263, decided in the Licking common pleas court in 1897, it was held that a grandfather has an insurable interest in the life of a grandson so as to relieve the contract of insurance from the charge of being a wagering contract, since the relationship is a good consideration for, and will support, a deed or a gift or a grant; and that the Ohio statute against wagering or betting and gambling applies only to games and such things, and does not apply to a contract of insurance procured by a grandfather upon the life of his grandson.

But in *Union C. L. Ins. Co. v. Hilliard*, 16 Ohio C. C. 434, it was said that Connecticut Mut. L.

saying that the son must also have a well-founded or visible expectation of some pecuniary advantage to be derived from the continuance of his father's life; and the recent case of *Chicago Guaranty Fund Life Soc. v. Dyon*, 79 Ill. App. 100, repeats the ruling, that the mere relationship of father and adult son is not sufficient to give the son an insurable interest in the father's life. The point decided in *Mitchell v. Union L. Ins. Co.* 45 Mo. 105, 71 Am. Dec. 529, was that a father has an insurable interest in the life of his minor son, but the court added the *dictum*—which may be cited in connection with opposing expressions of opinion—that “a father, as such, has no insurable interest, resulting merely from that relation, in the life of a child of full age.” The supreme court of Indiana in *Continental L. Ins. Co. v. Volger*, 89 Ind.

572, 46 Am. Rep. 185, held that a daughter has no insurable interest in the life of her mother, saying that the insurable interest in the life of another must be a pecuniary interest, and adding: “Some of the authorities tend in the direction that near relationship, as between parent and child, is a sufficient foundation upon which to rest an insurable interest, but this view is not sustained by the weight of authority.” *Wake-man v. Metropolitan L. Ins. Co.* 30 Ont. Rep. 705, decided that a parent has a valid insurable interest in the life of a minor child. *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328, which was an action on a policy in favor of a wife upon the death of her husband, contains a *dictum* that “at common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has

Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251, and *Ætna L. Ins. Co. v. France*, 94 U. S. 581, 27 L. ed. 287, do not go to the extent of holding that a grandfather has an insurable interest in the life of his grandson; and that no such question was before the court in either case.

And in *Union Cent. L. Ins. Co. v. Hilliard*, 16 Ohio C. C. 434, which probably grew out of the same facts as *Hilliard v. Sanford*, 4 Ohio N. P. 363, *supra*, which was decided about a year later by the Licking county circuit court, it was said by the court that nowhere did it find it even suggested that a grandfather had an insurable interest in the life of a grandson, but that there might be some statutory provision applying to the case by which grandchildren and grandparents are bound to care for and support each other. But the case turned upon the question of usury in a loan which the insurance policy in question was taken out to secure.

So, the mere relation of uncle and nephew does not constitute an insurable interest which will enable either to insure the life of the other, in the absence of any pecuniary interest. *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321.

And a nephew has not an insurable interest in the life of his aunt by force of the mere relationship existing between them. *Corson's Appeal*, 113 Pa. 446, 57 Am. Rep. 479, 6 Atl. 218.

And a policy of insurance obtained by an uncle upon the life of his nephew, with whom he lives and whom he supports upon a farm owned by his sister, the uncle paying the premiums and the policy being payable to him, is invalid for want of an insurable interest. *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056.

And the burden rests with an uncle who took out insurance upon the life of his nephew to show, in an action on the insurance policy, some pecuniary interest to support the policy besides the mere interest arising from relationship. *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321.

But an aunt whose niece lives with her and has done so from early childhood at different times amounting to years, their relations being those of mother and daughter, the aunt supporting the niece, has an insurable interest in the life of the niece, in view of the moral obligation from which she has the right to expect care and kindness from the niece in case of need. *Cronin v. Vermont L. Ins. Co.* 20 B. I. 570, 40 Atl. 497.

So, that a person obtaining insurance upon the life of another for her benefit was the niece of the insured, and that the uncle had raised her and been a father to her all her life, and that she had lived with him until her marriage, 64 L. R. A.

and that she had always helped support the uncle, are sufficient evidence of insurable interest in his life to warrant the submission, in an action upon the insurance policy of that question to the jury. *McGraw v. Metropolitan L. Ins. Co.* 5 Pa. Super. Ct. 488.

In *Mowry v. Home L. Ins. Co.* 9 R. I. 353, however, which was an action by a nephew to recover the amount of a policy of insurance effected by him upon the life of his uncle, it was in effect determined that some interest on the part of the nephew in the life of the uncle other than that growing out of the mere relationship was necessary to sustain the policy; and it was held that the burden of proof rests with the insurance company to show that statements made by the nephew in his application as to his interest in his uncle's life were untrue.

So, the relationship of cousins between the insured and assured does not give the assured such an insurable interest in the life of the insured as will take the policy out of the wager class. *Brady v. Prudential L. Ins. Co.* 5 Kulp, 505.

Likewise, *Union Fraternal League v. Walton*, 109 Ga. 1, 46 L. R. A. 424, 34 S. E. 317, inferentially determined that one cousin has not an insurable interest in the life of another; but it was said that the true rule which should attain in such cases is that where one obtains a contract of insurance on his own life, and keeps up the same out of his own means, and directs the amount of the policy to be paid at his death to another, whom, from love, friendship, or any other reason, he desires to benefit, the named beneficiary is entitled to recover on such contract, notwithstanding it may not be shown that he or she has any other insurable interest in the life of the deceased than exists in good will, and emanates from his expressed wish to benefit.

III. Consent of the insured.

As in case of insurance by a wife of the life of her husband, consent of the assured would seem to be necessary to the validity of insurance by one relative upon the life of another, whatever the degree of relationship, and whether an insurable interest existed or not.

Thus, a life-insurance policy issued to a son upon the life of his father is invalid where the father did not give his consent that the son should be made the beneficiary. *Chicago Guaranty Fund Life Soc. v. Dyon*, 79 Ill. App. 100.

And insurance policies issued upon the life of a father to his daughter, without previous knowledge or consent upon his part, and without a medical examination, are invalid, and the

not such an interest in the life of his wife or child merely in the character of husband or parent." In *Valley Mut. Life Assn. v. Teewalt*, 79 Va. 423, decided in 1884, it does not appear whether the son was a minor or an adult, nor whether the son had taken out the policy on his father's life, or was merely the beneficiary in a policy taken out and maintained by the father himself. But, assuming the facts to have been as they are in the case now being considered, we cannot agree with the assertion of the supreme court of appeals of Virginia that "it is now well settled that a father has an insurable interest in the life of his child, whether a minor or of full age, and the child in the life of his father." Two cases are cited in support of this assertion, the first being *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, in which the validity of an assignment of a life policy, made to a person having no insurable interest, was the point at issue,—the declaration concerning the interest between parent and child being merely a *dictum*,—and the second case being *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800, 2 Sup. Ct. Rep. 940, in which the point decided was that one partner had an insurable interest in the life of his copartner. We think, therefore, it may be safely said that the Virginia court was perhaps overconfident in declaring the proposition just quoted to be well settled. In the English courts it has been distinctly decided that a father has no pecuniary interest in the life even of his minor son (*Halford v. Kymer*, 10 Barn. & C. 725); and in *Worthington v. Curtis*, L. R. 1

Ch. Div. 419, the court assumed, as a proposition that did not need discussion, that a father has no insurable interest in the life of his adult son. The cases thus cited and referred to are, with few exceptions, the only cases in which the question now before us has been passed upon, and they certainly justify the conclusion that there is a conflict of opinion, if not of decision, upon the question now before the court. But, while this is true, the weight of authority is, in our opinion, against the position that an adult son has an insurable interest in the life of his father merely by virtue of kinship. The current of the recent decisions shows a clear tendency to insist upon the existence of a pecuniary interest, actual or contingent, upon the part of the son before he can take out a valid policy upon his father's life.

It remains to consider the poor law of Pennsylvania, and *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 154, 22 Am. Rep. 741. The opinion in that case is as follows: "By the 28th section of the poor law of June 13, 1836, the father and grandfather, and the mother and grandmother, and the children and grandchildren, of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the court of quarter sessions of the proper county shall order and direct. Maintenance of a father or mother unable to work is therefore a legal liability. When we add to this the feelings of natural affection and the desire produced by these feelings to provide for the comforts of parents, the right to

premiums paid thereon may be recovered, where the daughter was induced to take them out by the representations of the company's agent that she should not lose the money paid thereon, and it does not appear that she was aware that such insurance was against public policy. *Metropolitan L. Ins. Co. v. Blesch*, 22 Ky. L. Rep. 530, 58 S. W. 436.

But see *Shadlinger v. Metropolitan L. Ins. Co.* 30 Ohio L. J. 337, *supra*, II. b. See also cases on the subject of consent in *note to Metropolitan Life Ins. Co. v. Smith*, 53 L. R. A. 817, *Wife's right to insure life of her husband*.

IV. Conclusion.

The early rule in England, based on the statute 14 Geo. III., chap. 48, prohibiting wager policies, was that, to support insurance on the life of another, there must have been a pecuniary interest on the part of the insured in the life of the assured, and the interest ordinarily growing out of relationship or consanguinity is not alone sufficient. And the pecuniary interest must have been such as to amount to a claim recognizable and enforceable in law as distinguished from a mere expectation. This rule, though based upon a statute which never became a part of American jurisprudence, was, and still is, followed to some extent by courts in the United States.

The rule prevailing in many of the American states, however, is generally stated to be that an insurable interest which will take an insurance policy out of the class of wager policies is such an interest arising from ties of blood or other relations as will justify a reasonable expectation of advantage or benefit from a contin-

uance of the life of the assured, and that it is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. This rule, it would appear, does not dispense entirely with a pecuniary interest, but merely permits that interest to consist of a mere expectation of a pecuniary benefit as distinguished from the requirement of the other rule that the interest must amount to a claim recognizable and enforceable in law. The later or American rule, therefore, would include the interest which a child might have in the life of its parent or a parent in the life of a child, or that which might exist between brothers and sisters based upon the affection supposed to exist between them; and the supposition and expectation that one would render the other pecuniary aid in case of need; while the former rule would cover the case of the interest of a child in the life of its parent only in case the child was a minor and entitled to support from the parent; and the case of the interest of a parent in the life of a child only when the child is legally bound to support the parent; and the interest between brothers and sisters based on affection only is not sufficient to support insurance by the one upon the life of the other.

The more distant relationships, however, such as that between grandparents and grandchildren, uncles or aunts, and nephews or nieces, and cousin and cousin, are not generally regarded under either rule as sufficiently conducive to love, affection, and interest to warrant insurance by one upon the life of the other, though exceptions have been made in case of grandparents and grandchildren in a few instances.

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effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or, if the father die before her, the necessity may fall at once upon the son. Why, then, should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which may arise at any time. We are of opinion that the policy is not void."

From this statement of the grounds of decision, it is apparent that the principal reliance of the court is upon the obligation created by the poor law of Pennsylvania. The fact of relationship is referred to, but not dwelt upon, and it is certainly not distinctly put forward in support of the court's conclusion. Turning, therefore, to § 28 of the act of 1836 (P. L. 547), we find the statutory provision to be as follows: "The father and grandfather, and the mother and grandmother, and the children and grandchildren, of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the court of quarter sessions of the county where such poor person resides shall order and direct, on pain of forfeiting a sum not exceeding \$20 for every month they shall fail therein, which shall be levied by the process of the said court, and applied to the relief and maintenance of such poor person."

Other sections of the act make it plain that the primary obligation to furnish support to any poor person is imposed upon the poor district, and that § 28 is intended to relieve the district, and not to create a legal right that is directly enforceable at the suit of the poor person against the son or the father, as the case may be. It is, of course, well known that the legal obligation of the father, under the common law, to maintain his child, ceases as soon as the child becomes of age, and that there is no legal obligation resting upon a child to support a parent. Schouler, Dom. Rel. 2d ed. pp. *321, 365, and cases cited. The obligation under the various poor laws is ordinarily a duty directly owing to the district, and only indirectly owing to the poor person. This consideration was apparently influential in determining the appellate court of Indiana to hold that a son has no insurable interest in his mother's life by virtue of a similar statutory provision, although other reasons are also given by the court for this ruling. *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809. We are not disposed, however, to lay any stress upon the indirect character of the obligation

mutually to support each other, thus laid upon parent and child by the poor law of Pennsylvania. The obligation exists, no matter for whose benefit directly, nor at whose suit it may be enforceable, and we shall consider it as if the statute made it directly available by the person reduced to poverty and needing support. Thus considered, what bearing has the section quoted upon the question now before the court? Manifestly, it affects an adult son in two ways: First, it makes him liable to support his father, if the son be of sufficient ability; and, second, it makes the father liable to support his son, if the father be of sufficient ability. The supreme court of Pennsylvania in *Kane's Case* considered the subject exclusively from the first point of view, namely, the son's liability to support the father, and put the decision on the son's right to be reimbursed for outlays, past and future, in discharge of such liability. There is no doubt that the actual expenditure of money by the son for the purpose of supporting his father would give the son an insurable interest in the father's life; nor is there any doubt that a policy could be taken out by the son to provide for the repayment of similar expenditures to be made in the future. But, if no expenditure is actually made, there is no right of recovery; and, in any event, recovery is to be limited to the amount expended. This has been several times decided by the supreme court of Pennsylvania.—*Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47, being, perhaps, the leading case,—and, if the principle of these recent decisions had been applied to the facts of *Reserve Mut. Ins. Co. v. Kane*, it would have prevented recovery in that case. There was no evidence there to show that the son had spent any money in his father's support; and, as this is true of the pending action also, we think it follows that the plaintiff below had no claim founded upon the poor law of the state. He had paid nothing to support his father, and therefore had no claim to be reimbursed. The word implies a previous payment, an expenditure actually made, for which the person paying is to be made good.

The second provision of the Pennsylvania poor law that is referred to in the foregoing paragraph of this opinion makes the father liable to support his adult son if the latter falls into poverty; and this, we think, would give the son an insurable interest in his father's life, if the remaining condition of the statute is found to exist; namely, sufficient ability, present or prospective, upon the part of the father. Two things must concur before the obligation is enforceable,—the son must be unable to work, and the father must be of sufficient ability to respond to the call for support. Clearly, therefore, the insurable interest of the son depends upon the father's ability to discharge the obligation, or, at the best, upon the reasonable prospect that the father will be of sufficient ability. Where there is no evidence, as there was none in the case at bar, to justify a finding that the father had,

or would ever have, the ability to support the son in case of need, a necessary prerequisite to the right of support is wanting, and a necessary prerequisite, also, of the right to insure the father's life. The son's interest was, not that his father should live in order to be his support if want should overtake him, but that the father should die, in order that premiums should cease upon the policy, and the principal sum should become presently payable.

Without further elaboration, we may state our conclusions as follows:

(1) The mere relationship of father and son does not give an adult son an insurable interest in his father's life. Such an interest may exist under the circumstances

of a particular case, but relationship alone is not sufficient to establish it.

(2) Under the poor law of Pennsylvania, an adult son has an interest in his father's life sufficient to support a policy of insurance for either or both of two purposes,—to reimburse him for payments actually made, or to be made, on his father's behalf; and to protect him against the loss of his father's support, when there is a reasonable expectation that his father will be of sufficient ability to respond to the call that may be made upon him.

The judgment of the Circuit Court is reversed, and the case is remanded, with instructions to enter judgment upon the reserved point in favor of the defendant.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Walker NEWTON, *Appt.*,

v.

THE CARRIE L. TYLER.

(45 C. C. A. 374, 106 Fed. 422.)

A vessel having no propelling power of her own, and in charge of a tug having on board a licensed pilot, is subject to the provisions of a state statute requiring vessels entering a certain port to take a licensed pilot, or, in case of refusal, to pay his regular fee.

(February 7, 1901.)

APPEAL by libellant from a decree of the District Court of the United States for the Eastern District of North Carolina dismissing a libel filed to enforce payment of pilotage fees. *Reversed.*

Statement by **Simonton**, Circuit Judge:

The barge *Carrie L. Tyler* has been employed in carrying phosphate rock from the port of Charleston, South Carolina, to the port of Wilmington, North Carolina. Her tonnage is 565 tons gross, 503 tons net. She is enrolled at Charleston. She draws 18 feet. This barge carries two low masts, with a spread of sails used to steady her at sea, but entirely incapable of propelling her; and, in fact, she is without any propelling power whatever. When she was towed towards the mouth of Cape Fear river, she was taken in tow by the tug *Alexander Jones*, a regular coastwise steam tug. The master of this tug and her first mate are both duly licensed as branch pilots for the Cape Fear river and bar. The libellant is a duly-licensed pilot of the Cape Fear river and bar. On three separate occasions while on his cruise he saw the *Carrie L. Tyler* proceeding towards and crossing the bar of the Cape Fear river, and on each occasion proffered his services as pilot to her. On each occasion his proffer was refused. He there-

upon filed his libel *in rem* against the said barge, demanding the fee to which he would have been entitled had he piloted the barge. Under the law of North Carolina the pilot fees for all vessels drawing 18 feet is \$143, except coastwise vessels. These are entitled to a discount of 25 per cent, leaving \$107.25. For the three occasions he demands \$321.75. The answer denies all liability to libellant on the facts stated. The district court disallowed the claim, and dismissed the libel. 103 Fed. 327.

The statutes of North Carolina under which libellant claims are as follows:

"Sec. 3496. When the Master of Vessel Need not Take Pilot. 1858-9, chap. 23, § 8. No master of a vessel shall be required to take or keep a pilot on board or pay for pilotage in the river or over bars, who is or has been a full branch pilot, or employs a full branch pilot as first mate of his vessel."

"Sec. 3499. Rights of Pilots as to Main and New Inlet Bars of Cape Fear. Rev. Code, chap. 85, § 11; 1797, chap. 486, § 1. The pilots having branches to pilot over the Main bar, or New Inlet bar, of Cape Fear river, shall be entitled to pilot and navigate vessels into port over either bar; and the pilot who shall bring a vessel into port over either bar shall be entitled, exclusively, to navigate the same vessel out of port over either bar. Provided, when any vessel shall be ready to go out of port, and such pilot does not attend to navigate the same, the captain or master may employ any other pilot for that purpose, such other pilot being a branch or commissioned pilot for the bar over which the vessel is to be navigated out; and every pilot who shall navigate a vessel out of port contrary to this section shall for every such offense forfeit and pay \$40 to the pilot or pilots, who, by this charter, would have been entitled to navigate said vessel out of port."

"Sec. 3502. Pilots Refused, Entitled to Full Pilotage. Rev. Codes, chap. 85, § 14; 1784, chap. 207, § 8. When any master of a vessel, not having a pilot on board, com-

NOTE.—As to liability of vessel or owner for compulsory pilotage fees, see *Clayton v. Hebb* (C. C. App. 4th C.) 39 L. R. A. 177, and *note*. 54 L. R. A.

ing over the bar into the Cape Fear river; or being in the river and going out of either of the inlets, shall refuse a pilot across the bar, then each pilot so refused shall be entitled to the same pilotage as if he had been actually employed to pilot, and had piloted such vessel."

"Sec. 3503. One-Third Fees to be Paid to Pilots in Certain Cases. Rev. Codes, chap. 85, § 15; 1786, chap. 262, § 6. When any vessel shall come over the bar before a pilot boards her, she shall pay only one-third fees for coming in, unless when it may happen the weather is so bad that no person can board a vessel, in which case, if he shall hail her without the bar, he shall be entitled to full fees."

"Sec. 3505. Pilot Entitled to Full Pay though Refused, When. Rev. Codes, chap. 85, § 17; 1813, chap. 866; 1823, chap. 1222, §§ 1, 2; 1831, chap. 65; 1840, chap. 48; 1856-57, chap. 1. When a master of a vessel shall refuse a pilot either up or down the Cape Fear river, then each pilot so refused shall be entitled to the full pilotage in the same manner as he would have been had he been actually employed for the purpose of piloting such vessel. But any vessel under 60 tons burden shall not be compelled to take a pilot while crossing the bar, or pay pilotage, except where signals are made for a pilot; and no vessel coming in at either of the said inlets with a view to the more convenient prosecution of her voyage, or to make a harbor, shall be subject to the payment of pilotage."

Argued before *Goff and Simonton*, Circuit Judges.

Mr. Thomas Evans, for appellant:

Where a pilot service was refused the pilot was by law entitled to the same compensation that he would have been entitled to had he actually been accepted and performed the service.

Gerrish v. Johnson, 46 N. C. (1 Jones, L.) 335.

The construction put on a state law by the highest state court is a part of the law of the state, and is binding upon the courts of the United States.

The Princess Alexandria, 8 Ben. 209, Fed. Cas. No. 11,430; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 457, 17 L. ed. 807; *The California*, 1 Sawy. 463, Fed. Cas. No. 2,312; *Cooley v. Philadelphia Port Wardens*, 12 How. 311, 13 L. ed. 1001; *The George S. Wright*, Deady, 591, Fed. Cas. No. 5,340.

To hold that this class of merchant vessels should be exempt from pilotage charges would be a discrimination against sailing, which at present is unlawful, and which would in a short period exclude all sailing vessels from commerce and navigation.

U. S. Rev. Stat. 4385, shows the only class of unrigged vessels that are exempted. The barge *Carrie L. Tyler* is not of the exempted class.

Flanders v. Tripp, 2 Low, Dec. 15, Fed. Cas. No. 4,854; *Ex parte McNiel*, 13 Wall. 236, 20 L. ed. 624.

The tugboat, being a coastwise steamer, was not required to take a pilot. The pilots

on her were not on pilotage duty to the barge during the towage operation. The whole liability of the towboats was under contract for towage; if they failed in their contract, that fact does not interest the appellant in this case.

In the absence of legislation by Congress, the states have the power to regulate the subject of pilotage.

Cooley v. Philadelphia Port Wardens, 13 How. 311, 13 L. ed. 1001; *Ex parte McNiel*, 13 Wall. 238, 20 L. ed. 625; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Hobart v. Drogan*, 10 Pet. 108, 9 L. ed. 363; *The Chase*, 14 Fed. 854; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *The California*, 1 Sawy. 463, Fed. Cas. No. 2,312; *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908.

Messrs. Robert G. Bickford and Samuel Park, with *Mr. George Rountree*, for petitioner:

The Energy, L. R. 3 Adm. & Eccl. Rep. 52, is predicated upon the fact that the position of a pilot in English waters is upon the tow, and not upon the tug, and that the pilot who is on board the tow directs the navigation of the tug, and therefore has no application to the law governing the relation of a tug and tow in the United States. This custom seems to have been dictated by experience, and has received the sanction of many legal decisions in Great Britain.

Spaight v. Tedcastle, L. R. 6 App. Cas. 217; *The Niobe*, L. R. 13 Prob. Div. p. 55; *Marsden*, Maritime Collisions, 3d ed. p. 191.

The doctrine has long been established in this country, by many cases, that a steam vessel having a tow is bound to bring to that service reasonable prudence, caution, and skill in the management, direction, and control of the navigation of the tow, and for any failure thereof the steam tug is liable.

The Quickstep, 9 Wall. 670, *sub nom. The Quickstep v. Byrne*, 19 L. ed. 768; *The Cayuga*, 61 Wall. 183, *sub nom. The Cayuga v. Wilson*, 21 L. ed. 355; *The Syracuse*, 12 Wall. 171, *sub nom. The Syracuse v. Langley*, 20 L. ed. 334.

The obligation of the steam vessel which had the petitioner's barge *Carrie L. Tyler* in tow was to tow her from port to port.

The district court found that the statutes of North Carolina did not contemplate requiring barges without motive power, in tow of a steam tug having a regular, duly licensed pilot on board, to employ a pilot. The statutes of North Carolina making compulsory the payment of pilotage for services tendered to barges in tow of a coastwise steam tug are in violation of U. S. Rev. Stat. § 4444.

A steam vessel and her tow for purposes of navigation are considered in law one vessel, and that a steam vessel.

The Civilla & The Restless, 103 U. S. 701, 26 L. ed. 600; *The Pennsylvania*, 3 Ben. 215, Fed. Cas. No. 10,946; *State v. Turner*, 34 Or. 173, 55 Pac. 92, 56 Pac. 645; *Short v. The Columbia*, 19 C. C. A. 436, 44 U. S. App. 326, 73 Fed. 226; *The Harold*, 84 Fed. 698; *Anglo-Australasian Steam Nav. Co. v. Cornell S. B. Co.* 32 Fed. 798; *New York &*

B. Transp. Co. v. Philadelphia & S. Steam Nav. Co. 22 How. 472, 16 L. ed. 399; *The Herbert Manton v. Gautier*, 14 Blatchf. 37, Fed. Cas. No. 6,399; *Sturgis v. Boyer*, 24 How. 110, 16 L. ed. 591; *The Johnson*, 9 Wall. 148, *sub nom. The Johnson v. McCord*, 19 L. ed. 610; *The Northern Belle*, 9 Wall. 528, *sub nom. The Northern Belle v. Robson*, 19 L. ed. 746; *The Merrimac*, 2 Sawy. 586, Fed. Cas. 9,478; *The Fred W. Chase*, 31 Fed. 91; *The Bordentown*, 16 Fed. 270; *The Columbia*, 19 C. C. A. 436, 44 U. S. App. 326, 73 Fed. 226.

Simonton, Circuit Judge, delivered the opinion of the court:

No objection has been or can be made to the jurisdiction of the court below. *Hobart v. Drogan*, 10 Pet. 120, 9 L. ed. 363. Nor can any objection be made to the provision of the law giving a pilot the same fees for services tendered and refused as he would have earned if the services had been accepted and performed. *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996. The sole question in the case is this: Was this barge, being wholly without motive power of any kind, bound by law to accept the services of a pilot while she was in tow of a steam tug whose master was a licensed pilot of the bar and river over which she was navigating? The point is a narrow one. It is a municipal regulation of the state of North Carolina, recognized and made of force under the legislation of Congress. *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996. No decision of any court in that state has been quoted, and none can be found, bearing on this question. It comes up for the first time for adjudication. The class of pilots has existed from the earliest times, and laws have been enacted in every nation engaged in commerce regulating and protecting them. The purpose of these laws is to insure at all times a due supply of men well qualified by skill, knowledge, and experience to protect vessels entering into ports and harbors from the dangers of navigation. They are engaged in a perilous calling, and must be ready to brave the perils of their vocation. To encourage such men, and to secure permanence in their ranks, every nation engaged in commerce, and all the states in the Union having harbors, have enacted laws making it compulsory upon all vessels entering their ports, except those of very small tonnage, to employ a duly licensed pilot for the purpose of piloting them. The propriety and legality of these regulations by the states have been sanctioned by the Supreme Court of the United States. *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234. And these cases also sustain the regulation that if a pilot offer his services, and they be refused, he is entitled to be paid the pilotage, unless some other pilot be first engaged. Mr. Justice Curtis, in *Cooley v. Philadelphia Port Wardens*, 12 How. 312, 13 L. ed. 1002, speaking on this subject, says: "We think this particular regulation concerning half-pilotage

fees is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as a part of a system of pilotage, in many places, may be inferred from their existence in so many different states and countries. Like other laws, they are framed to meet the most usual cases. *Quæ frequentius accidunt*. They rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger, to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage service one of those cases; and we cannot pronounce a law which does this to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one."

This compulsion exists on the masters of all vessels, notwithstanding that they themselves, by frequent visits to the port, may possess sufficient knowledge to cross the bar and navigate the rivers in safety. In every case the language is general—"every ship or vessel." The North Carolina statute says: "When any master of a vessel, not having a pilot on board, coming over the bar of Cape Fear river or being in the river and going out either of the inlets, shall refuse a pilot across the bar, then each pilot so refused shall be entitled to the same pilotage as if he had been actually employed to pilot and had piloted such vessel."

An examination of the regulations will disclose that the rates of pilotage are fixed by the draught of the vessel, and upon all vessels alike,—steam or sail vessels. The appellee claims that the barge in the case at bar was exempt from this regulation of the statute for two reasons: First, because she had no motive power in herself, and therefore could not be navigated by a pilot; second, because the tug already had on board of her a duly licensed pilot of the bar and river of the Cape Fear. It is true that the barge had no motive power in herself, but she supplied motive power when she engaged the services of the tug. She then

began to be navigated, and by her great draught of 18 feet she encountered the dangers of the shoals and narrows of the bar and river. A vessel with all her sails furled has no power of locomotion, and in tow of a tug is absolutely dependent upon it; yet in no instance in any port is a vessel in this condition exempted from taking a pilot simply because she is in tow of a tug. A tug is engaged in the service of towage. This is her contract, and that is all for which she can be held responsible. "The parties to this contract contemplate risk in the performance of it,—the risk of winds and waves, and of obstacles, floating or fixed, that lie about or in her path." *Mac-lachlan, Merchant Shipping*, p. 286. But the pilot contracts to navigate the vessel safely through the narrow channels of the bar and river; a danger not seen, and only known by long observation and experience. So distinct are the duties of the tow and of the pilot that Dr. Lushington always held that the tug was subservient to and must obey the pilot on the vessel in tow. *The Energy*, L. R. 3 Adm. & Eccl. Rep. 52. But the appellee contends that, as the tug had on board, in her master, a regularly licensed pilot, no pilot was needed for the vessel. But the law is imperative. A vessel must have a pilot, whether she needs one or not; and this to secure compensation to the privileged class of pilots. As has been said, very many ship masters, by frequent visits to ports, learn and know the channels. But this does not exempt them from employing a pilot. *Gerrish v. Johnson*, 46 N. C. (1 Jones, L.) 335. Again, the tug master was present, managing his tug, not as a pilot, not performing his duty as a pilot, and incurring liability as such, not charging or receiving compensation as a pilot, but engaged simply in the performance of his duty as tow master, and in fulfilling that, a wholly distinct, contract. The Congress of the United States has passed an act which exempts coastwise seagoing steam vessels from compulsory pilotage if they be under the control and direction of a pilot licensed by the United States inspectors of steamboats. U. S. Rev. Stat. § 4444. But this section in its terms is confined to coastwise seagoing steam vessels, and under the rule, *Expressio unius exclusio alterius* no other class of vessels comes within this act. See *Sprague v. Thompson*, 118 U. S. 95, 30 L. ed. 117, 6 Sup. Ct. Rep. 988.

The evidence does not disclose whether the barge was towed by a line, or whether the tug was alongside of her. If the former mode of towing was used, it was necessary that the barge should have at her helm an experienced navigator, not only to enable her to follow the general direction of the tug, but also cognizant of the dangers of the channel, so as to keep clear of them. If the tug were alongside, her helmsman must exercise the same care and be possessed of the same knowledge. It is said, however, that the tug and tow are, in contemplation of law, one vessel, and that one under steam, thus giving to the combination the

character of the tug. So they are for some purposes. They are governed by the international rules applicable to vessels approaching each other, and must observe the regulations applicable to steam vessels. *The Civitta & The Restless*, 103 U. S. 699, 26 L. ed. 599. But they are so far distinct from each other that, if a collision takes place, the tug can be held liable to the exoneration of the tow. *Cushing v. The John Fraser*, 21 How. 184, sub nom. *The James Gray v. The John Fraser*, 16 L. ed. 106. The rubric of that case is this: Although the tow was the *res* or thing which struck the brig and did the damage, that does not make her liable for the injury, unless the collision was occasioned by her fault. In the recent case of *The Minnie*, 40 C. C. A. 312, 100 Fed. 128, we held the tug responsible for a collision, exonerating the tow. It seems, therefore, that a tug and her tow are not one vessel, except under certain peculiar circumstances, such as approaching a vessel whose movements are not controlled by steam. The learned counsel for the appellee quotes and relies upon *The Glaramara*, 8 Sawy. 22, 10 Fed. 678. But that case depends upon the local law of Oregon. He also quotes Judge Lowell, in *Flanders v. Tripp*, 2 Low. Dec. 15, Fed. Cas. No. 4,854. But in that case the vessel had encountered stress of weather, which had disabled her entirely. The master, leaving her in charge of the mate, had gone for assistance. Meanwhile a pilot boarded her for the purposes of salvage. The judge ruled that he could not, under these circumstances, compel her to accept his services, nor to pay him because of his tender of them. The language of Mr. Justice Grier, in *Smith v. The Creole*, 2 Wall. Jr. 485, Fed. Cas. No. 13,033, is not inapplicable to this case: "As a general rule, masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast, nor able to conduct a vessel safely into every port. Nor can the absent owners, or their agent, the master, be supposed capable of judging of the capacity of persons offering to serve as pilots. They need a servant, but are not in a situation to test or judge of his qualifications, and have not, therefore, the information necessary to choice. The pilot laws kindly interfere, and do that for the owners which they could not do for themselves. It selects persons of skill and experience, and requires them to give bonds for the faithful performance of their duties; and if it should happen in some particular cases that owners may not need the services of such pilot selected by law, it is but just that they should contribute to the support of a system instituted for their benefit."

We are of the opinion that the barge comes within the letter of the law, and that the court below should have found for the libellant. Let the case be remanded to the district court for such further proceedings as may be necessary.

The decree of the District Court is re-

versed, and the cause remanded to that court.

Petition for writ of certiorari denied by

Supreme Court of United States *sub nom. Jones v. Newton*, 181 U. S. 619, 45 L. ed. 1031, 21 Sup. Ct. Rep. 924.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

SOUTHERN PACIFIC COMPANY, *Plff. in*

Err.,

v.

Jose TARIN.

(47 C. C. A. 648, 108 Fed. 734.)

A railroad company is liable for injuries to a passenger by the overturning of the car where it leaves her in the car without warning because she cannot understand the language in which other passengers are warned, after the engine has been overturned by a washout, and the water is running along the track on which the car stands, in such a way as to undermine one side of it and render an overturning of the car probable.

(April 30, 1901.)

ERROR to the Circuit Court of the United States for the Western District of Texas to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been negligently inflicted upon plaintiff's wife while she was a passenger upon defendant's road. *Affirmed.*

The facts are stated in the opinion.

Argued before *Pardee, McCormick, and Shelby*, Circuit Judges.

Messrs. T. J. Beall and Wyndham Kemp, for plaintiff in error:

The contract of the carrier of passengers is that he will use the utmost care and prudence to transport his passengers with safety; but where the proximate cause is an act of God, or an extraordinary rainfall, which human foresight could not reasonably anticipate and provide against, the carrier is not liable.

Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; *International & G. N. R. Co. v. Halloran*, 53 Tex. 55; *LeBarron v. East Boston*

NOTE.—The above decision is probably without any exact precedent, but it may be regarded as in some sense analogous to those decisions which hold the carrier liable to special care or duty toward persons who stand in more than ordinary need of protection.

With respect to the carrier's duty to passengers taken ill during a journey, see *Lake Shore & M. S. R. Co. v. Salzman* (Ohio) 31 L. R. A. 261, and note; also *McCann v. Newark & S. O. R. Co.* (N. J. L.) 33 L. R. A. 127.

For duty of carrier to intoxicated passenger, see *Missouri P. R. Co. v. Evans* (Tex.) 1 L. R. A. 476; *Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 6 L. R. A. 241; *Roseman v. Carolina C. R. Co.* (N. C.) 19 L. R. A. 327, and note; *Fisher v. West Virginia & P. R. Co.* (W. Va.) 23 L. R. A. 754, 33 L. R. A. 69; and *Klingston v. Fort Wayne & E. R. Co.* (Mich.) 40 L. R. A. 131.

54 L. R. A.

Ferry Co. 11 Allen, 316, 87 Am. Dec. 717; *McClary v. Sioux City & P. R. Co.* 3 Neb. 44, 19 Am. Rep. 631; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 190, 19 L. ed. 909, 913; *Shearm. & Redf. Neg.* § 270.

The test of liability is, not whether the company used such particular precaution as, it is evident after the accident happened, might have averted it had the danger been known, but whether it used that degree of care and prudence which cautious and competent persons would have used, under the apparent circumstances of the case, to prevent the accident, without reasonable knowledge that it was likely to occur.

Shearm. & Redf. Neg. § 266; *Bowen v. New York C. R. Co.* 18 N. Y. 408, 72 Am. Dec. 529.

Mr. George E. Wallace for defendant in error.

McCormick, Circuit Judge, delivered the opinion of the court:

Jose Tarin brought this action to recover damages of the Southern Pacific Company for personal injuries sustained by his wife Rosa Tarin, while a passenger on the company's railroad train near Stanwix, in the territory of New Mexico. The accident occurred on July 19, 1899. The petition charges that, through the gross negligence and carelessness of the company and its servants, the car on which the plaintiff's wife was a passenger, and the train to which it was attached, was run off the track, and thrown from the roadbed, and turned over from the embankment, and that Rosa Tarin was thereby thrown with violence against the seats and sides of the car, and seriously and permanently injured. It charges, further, that the portion of the track at the point where the injuries were received was defective, unsafe, and dangerous for trains to pass over; that the train was negligently and carelessly operated thereon, and the defendant's servants were careless and unskilful in failing to keep a proper lookout or failing to make proper inspection, in order to discover the condition of the track and avoid accident and injury, and that after the train had been run to this part of the track, and the employees had discovered that they had run into a washout, they backed the train for some distance, and ordered the passengers to alight; that the plaintiff's wife being unable to understand or speak the English language, and ignorant of the fact that the train had run into a washout and was about to be wrecked, remained in the car in which she was riding; that after she had remained in the car about thirty minutes, and as she was at-

temp ing to leave her seat and ascertain the cause of the stopping of the train, the car in which she was riding suddenly, and without warning, fell, and was thrown from the track and roadbed and overturned, and she was injured; that the defendant company and its servants were guilty of gross negligence in stopping the train and the car in which the plaintiff's wife was riding, at the place where the track was out of order and liable to be washed out, without notifying her of this fact, and assisting her to dismount from the car, and leave her seat in the car, and go to a place of safety; that, after the car had been stopped, the defendant company and its servants knew that the plaintiff's wife was still in the car, and knew that the car was liable to be overturned and wrecked, and, knowing this, carelessly failed to notify her of the danger, or to remove her out thereof to a place of safety. The company pleaded the general issue, and for further answer specially alleged that if the plaintiff's wife was a passenger on its train at the time and place alleged in the petition, and was injured as therein alleged, which is not admitted, but denied, she sustained the injuries, not by reason of any fault or negligence on the part of the company or its servants in the operation of its train, but that the same was the act of God; that on or about July 19, 1899, while the defendant's train was approaching the bridge near Stanwix, the engineer operating the engine drawing the train discovered a wash-out, and water running over the bridge; that in the exercise of due care and caution the engineer began to back up the train to get out of danger, when suddenly and unexpectedly an extraordinary and unusual torrent of water, caused by a waterspout, struck the side of the railway track, thereby undermining the train, and causing the engine, baggage car, smoker, and day coach to overturn into the water; that the accident to the train was not caused by any fault of the defendant or its servants, nor was the same due to any defect in the construction of its track, but was caused by an unusual and unprecedented cloud-burst and rainfall, which caused the heavy torrent of water to rush from the hillside against and under the railway track; and that the injuries, if any, received by the plaintiff's wife were the result of an unavoidable accident. The court instructed the jury that, "under the facts of this case as developed by the undisputed testimony, the court feels constrained to charge you that the defendant is liable to the plaintiff for damages sustained, if you find from the testimony that Rosa Tar-

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in, the wife of the plaintiff, was injured in the accident about which the witnesses have testified." There was a verdict and judgment for the plaintiff, and the company assigns that the court erred, to its prejudice, in instructing the jury as above recited.

The proof does not tend, in our view, to sustain the special defense made by the plaintiff in error. Taken as a whole, the defendant's testimony clearly shows that just before the train got to Stanwix the engineer discovered red lights of the work train closer to the switch, that there was an opening in the track, and that he ran down pretty close to that, and stopped, and the conductor went ahead to see what was wrong. When the conductor came back, they made an effort to back the train and get it into a safer place. Almost immediately thereupon the engine turned over, carrying with it one or more of the cars attached to it, but leaving the body of the train standing. The crew, with the help of the passengers began pushing the cars back, at which they were engaged for thirty or forty minutes. The conductor sent a brakeman through the train to notify the passengers and get them out. He did not speak Spanish, and the plaintiff's wife did not understand English. There was ample time to get all of the passengers out, and easy to get them to a place of safety. They all did get out, except the plaintiff's wife and one other, and none of those who got out was hurt. The dump on which the track was laid was only 2½ feet high. The train stood on it thirty or forty minutes, with the water running, not over it, but along one side of it, and washing the earth from under the ends of the ties, until this wash had so far advanced that the train turned over. No feature of a cloud-burst or of an excessive fall of rain, there or near, is shown by direct evidence, or by the effect of the water on the track. Some of the witnesses use those terms, but their testimony shows the impropriety of their use. The track was protected at this point by wings constructed to conduct the water to the culvert, where it could pass through. While the train was standing these wings became full, and the one nearest to the train gave away, and there was, of course, a rush of water from that giving away of the wing. But there is nothing in the testimony, when properly analyzed, to bring the occurrence within the defense attempted by the company.

We think the Circuit Court did not err in the charge given to the jury, and therefore its judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

W. S. DODGE, *Plff. in Err.*,

v.

TOWNSHIP OF MISSION.

(46 C. C. A. 661, 107 Fed. 827.)

- *1. The power of a legislature to levy or to authorize the levy of a tax, and to create or authorize the creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose.
- *2. The decision of the question whether a tax, or a public debt is for a public or private purpose is not a legislative, but a judicial, function. A legislature cannot make a private purpose a public purpose, or draw to itself or create the power to authorize a tax or a debt for such a purpose, by its mere fiat.
- *3. The promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup is a private, and not a public, purpose.
- *4. Township bonds issued for this purpose, and the act of March 1, 1889, authorizing their issue, are beyond the powers of the legislature and the township, and are void.

(April 11, 1901.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of defendant in an action brought to enforce payment of coupons cut from bonds issued by defendant. *Affirmed.*

Statement by SANBORN, Circuit Judge:

This is an action on 359 coupons cut from 22 township bonds issued by the township of Mission, in Shawnee county, in the state of Kansas, under an act of the legislature of that state passed on March 1, 1889, and entitled "An Act to Encourage the Erection of Mills and the Manufacture of Sugar and Syrup out of Sorghum Cane, and Authorizing Townships and Cities of the Second and Third Class to Subscribe for Stock in Sugar Factories, and to Vote Bonds Therefor." This act by its terms empowered any township or city named in its title to subscribe to capital stock of any incorporated company organized to erect and operate public mills or factories for the purpose of manufacturing sugar and syrup from sorghum cane upon a favorable vote of its electors, to issue its

*Headnotes by SANBORN, Circuit Judge.

NOTE.—For other cases in this series on the question, What are public purposes for which money may be appropriated or raised by taxation?—see *Daggett v. Colgan* (Cal.) 14 L. R. A. 474, and note; *Waterloo Woolen Mfg. Co. v. Shanahan* (N. Y.) 14 L. R. A. 481; *Wasson v. Wayne County Comrs.* (Ohio) 17 L. R. A. 796; *Henderson v. London & L. Ins. Co.* (Ind.) 20 L. R. A. 827; *Baltimore & E. Shore R. Co. v. Spring* (Md.) 27 L. R. A. 72; *Baltimore v. Keelcy Institute* (Md.) 27 L. R. A. 646; *Hayes v. Douglass County* (Wis.) 31 L. R. A. 213; *Farmer v. St. Paul* (Minn.) 33 L. R. A. 199; *Shelby County v. Tennessee Centennial Exposition Co.* (Tenn.) 33 L. R. A. 717; *Re House* (Colo.) 33 L. R. A.

bonds to pay the subscription, and to levy taxes to pay the principal and interest of the bonds. It required every company and association which received the benefit of any bonds issued under it to retain 10 cents from the purchase price of every ton of sorghum cane which it bought for use in any mill, and to pay this sum over to the treasurer of the proper township, to be applied in payment of the bonds. It declared that all sugar mills which received aid under it were public mills, that they should manufacture sugar or syrup for customers who furnished cane, that they might charge toll therefor, that no factory should be required to receive more cane than it could manufacture into sugar or syrup, and that the amount of toll to be paid should be agreed upon between the company and the persons raising and delivering the cane prior to the time of planting the cane. Each bond contained the following recital: "This bond is one of a series of thirty bonds, of five hundred dollars each, amounting in the aggregate to the sum of fifteen thousand dollars, issued by the township of Mission, of the county of Shawnee, in the state of Kansas, for the purpose of encouraging the erection of a public sugar mill, and the manufacture of sugar and syrup from sorghum cane, in the township of Mission, Shawnee county, Kansas, pursuant to and in accordance with the provisions and requirements of an act of the legislature of the state of Kansas for the year A. D. 1889, the same being an act entitled 'An Act to Encourage the Erection of Mills and the Manufacture of Sugar and Syrup out of Sorghum Cane, and Authorizing Townships and Cities of the Second and Third Class to Subscribe for Stock in Sugar Factories, and to Vote Bonds Therefor,' approved March 1, A. D. 1889. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law." Each coupon contained the statement that it represented "interest on public sugar mill bond No. ———." The plaintiff in error, W. S. Dodge, filed a complaint in this action, in which he made the necessary jurisdictional allegations, and then averred that on September 15, 1890, the defendant in error, the township of Mission, issued and delivered 30

L. R. A. 832; *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.) 34 L. R. A. 725; *Lancey v. King County* (Wash.) 34 L. R. A. 817; *State ex rel. Douglas County v. Cornell* (Neb.) 39 L. R. A. 513; *State ex rel. Garth v. Switzler* (Mo.) 40 L. R. A. 280; *Bush v. Orange County Supers.* (N. Y.) 45 L. R. A. 556; *Pritchard v. Magoun* (Iowa) 46 L. R. A. 881; and *Champaign County Comrs. v. Church* (Ohio) 48 L. R. A. 738.

For similar cases under constitutional provisions against making gifts of public money, see *Bourn v. Hart* (Cal.) 15 L. R. A. 431; *Patty v. Colgan* (Cal.) 18 L. R. A. 744; and *Conlin v. San Francisco City & County Supers.* (Cal.) 21 L. R. A. 474.

bonds, for \$500 each, payable on September 15, 1910; that these bonds were registered by the auditor of the state of Kansas; that a copy of one of them was attached to the complaint; that each of the bonds had coupons upon it for the payment of interest; and that he was the owner of 359 of these coupons, which were past due and had not been paid. A demurrer was interposed to this complaint which was sustained by the court below, and thereupon a judgment was rendered in favor of the defendant, which is now presented for review by the writ of error.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Mr. D. B. Hite, with **Mr. Henry Keeler**, for plaintiff in error:

The bonds were legal.

Burlington Twp. v. Beasley, 94 U. S. 310, 24 L. ed. 161; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 661, 22 L. ed. 461; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *American Live Stock Commission Co. v. Chicago Live Stock Exchange Co.* 143 Ill. 210, 18 L. R. A. 190, 32 N. E. 274; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota ex rel. Stocser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Osborne v. Adams County*, 106 U. S. 181, 27 L. ed. 129, 1 Sup. Ct. Rep. 168; *Blair v. Cumming County*, 111 U. S. 372, 28 L. ed. 460, 4 Sup. Ct. Rep. 449; *Cole v. LaGrange*, 113 U. S. 7, 28 L. ed. 898, 5 Sup. Ct. Rep. 416.

Messrs. D. M. Valentine, A. A. Godard, and H. E. Valentine, for defendant in error:

Bonds for the payment of money cannot be issued by a municipal township to aid a private enterprise.

Leavenworth County Comrs. v. Miller, 7 Kan. 502, 12 Am. Rep. 425.

A municipal township, or any public organization, has no power, and can have none, to subscribe for stock in a private corporation, unless, at the very time of making the subscription, it is doing an act to accomplish a public purpose.

Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442, 2 Am. & Eng. Corp. Cas. 263, and note; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413, 8 Am. & Eng. Corp. Cas. 545, and note; *Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; 7 Am. & Eng. Corp. Cas. 379, and note; *Opinion of the Justices*, 58 Me. 590; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; 15 Am. & Eng. Enc. Law, pp. 1240, 1245, 1246, and note; *Dill. Mun. Corp. §§ 508, 736*; *Cooley, Const. Lim.* 129, 174, 175, 5th ed. 152, 6th ed. 236-238; *Cooley, Taxn. chap. 4*; *Getchell v. Benton*, 30 Neb. 870, 47 N. W. 468; *Michigan Sugar Co. v. Auditor General*, 124 Mich. 674, 83 N. W. 625; *United States ex rel. Miles Planting & Mfg. Co. v. Carlisle*, 5 App. D. C. 138; *Deal v. Mississippi County*, 107 Mo. 464, 14 L. R. A. 622, 18 S. W. 24.

The business of a sugar mill cannot be 64 L. R. A.

considered as public because of any legislative fiat.

State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; *Central Branch Union P. R. Co. v. Smith*, 23 Kan. 745; *Commercial Nat. Bank v. Iola*, 9 Kan. 689, 2 Dill. 363, Fed. Cas. No. 3,061; *Genesee v. Genesee Natural Gas, Coal, Oil, Salt, & Mineral Co.* 55 Kan. 358, 40 Pac. 655; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442, 2 Am. & Eng. Corp. Cas. 263, and note; *Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416, 7 Am. & Eng. Corp. Cas. 379, and note; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366; *McConnell v. Hamm*, 16 Kan. 228; *Blain v. Riley County Agri. Soc.* 21 Kan. 558; *Atchison, T. & S. F. R. Co. v. Atchison*, 47 Kan. 712, 28 Pac. 1,000; *Osborne v. Adams County*, 106 U. S. 181, 27 L. ed. 129, 1 Sup. Ct. Rep. 168, on Rehearing, 109 U. S. 1, 27 L. ed. 835, 3 Sup. Ct. Rep. 150; *Tyler v. Beach*, 44 Vt. 648, 8 Am. Rep. 398; *Bissell v. Kankakee*, 64 Ill. 249, 21 Am. Rep. 554; *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216; *Weisner v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Kingman v. Brockton*, 153 Mass. 255, 11 L. R. A. 123, 26 N. E. 998; *People v. Parks*, 53 Cal. 624; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6, 15 Am. & Eng. Corp. Cas. 343, and note; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *sitt. Gen. v. Eau Claire*, 37 Wis. 400; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413, 8 Am. & Eng. Corp. Cas. 545, note; *People ex rel. Butler v. Saginaw County Supers.* 26 Mich. 23; *Thompson v. Pittston*, 59 Me. 545; *Crowell v. Hopkinton*, 45 N. H. 9; *Ohio Valley Iron Works v. Mountsville*, 11 W. Va. 1; *English v. People*, 96 Ill. 566; *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361.

Public organizations have no authority or power to deal or speculate in the stocks of private corporations. They were not brought into existence for any such purpose.

Leavenworth County Comrs. v. Miller, 7 Kan. 528, 12 Am. Rep. 425; *Chicago, K. & W. R. Co. v. Ozark Twp.* 46 Kan. 427, 26 Pac. 710.

The business of the sugar-mill corporation, under the statute, is purely and entirely private; but even if it should be considered as partly public and partly private, still, all the bonds and all the coupons issued, under the statute, upon a subscription by the township to the capital stock of such corporation, would be, and are, utterly void.

Central Branch Union P. R. Co. v. Smith, 23 Kan. 755. See also *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366; *People v. Parks*, 58 Cal. 624; *Kingman v. Brockton*, 153 Mass. 255, 11 L. R. A. 123, 26 N. E. 998.

All other kinds of mills are considered as private.

McConnell v. Hamm, 16 Kan. 228; *Osborn v. Adams County*, 2 McCrary, 97, 7 Fed. 441, 106 U. S. 181, 27 L. ed. 129, 1 Sup. Ct.

Rep. 168, on Rehearing, 109 U. S. 1, 27 L. ed. 835, 3 Sup. Ct. Rep. 150; *Tyler v. Beach-er*, 44 Vt. 648, 8 Am. Rep. 398.

The aiding of public grist mills, which are and have been considered public in England and in this country from time immemorial, is a very different thing from the aiding of a sugar mill.

A statute purporting to authorize municipal aid must treat all alike, and not provide for illegal and unfair discriminations.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Neal v. Delaware*, 103 U. S. 370, 28 L. ed. 567; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *Fraser v. McConway & T. Co.* 82 Fed. 257; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168; *Union Sewer Pipe Co. v. Connelly*, 99 Fed. 354; *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340; *Atchison T. & S. F. R. Co. v. Campbell*, 61 Kan. 439, 47 L. R. A. 251, 59 Pac. 1051; *State v. Hinman*, 65 N. H. 103, 18 Atl. 194; *Apea Transp. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882; *Steed v. Harvey*, 18 Utah, 367, 54 Pac. 1011; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Re Eight Hours Bill*, 21 Colo. 29, 39 Pac. 328; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579; *State v. Kuntz*, 47 La. Ann. 106, 16 So. 651; *Beardsley v. New York, L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488; *Hargraves Mills v. Harden*, 25 Misc. 665, 56 N. Y. 937; *State v. Pennoyer*, 65 N. H. 113, 5 L. R. A. 709, 18 Atl. 878; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *State v. Divine*, 98 N. C. 778, 4 S. E. 477; *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Hunt v. State*, 4 Kan. 60; *Re Page*, 60 Kan. 842, 47 L. R. A. 68, 58 Pac. 478; *Atchison, T. & S. F. R. Co. v. Clark*, 60 Kan. 826, 47 L. R. A. 77, 58 Pac. 477; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Re Langford*, 4 Inters. Com. Rep. 437, 57 Fed. 570; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Kansas City v. Grush*, 151 Mo. 128, 52 S. W. 286; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627; *Lippman v. People*, 175 Ill. 101, 51 N. E. 872; *Denver v. Bach*, 26 Colo. 530, 46 L. R. A. 348, 58 Pac. 1089; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 51 N. E. 138; *State ex rel. McCue v. Ramsey County*, 48 Minn. 236, 51 N. W. 112; *Britton v. San Francisco City & County Election Comra.* 129 Cal. 337, 51 L. R. A. 115, 61 Pac. 1115; *State v. Santee (Iowa)* 82 N. W. 445; *Los Angeles Gold Mine Co. v. Campbell*, 13 Colo. App. 1, 56 Pac. 246; *San Antonio & A. P. R. Co. v. Wilson (Tex. App.)* 54 L. R. A.

19 S. W. 610; *Monticello Distilling Co. v. Baltimore*, 90 Md. 416, 45 Atl. 210; *Green v. Port Jervis*, 31 Misc. 59, 64 N. Y. Supp. 547.

Sanborn, Circuit Judge, delivered the opinion of the court:

It is a fundamental principle of a republican form of government that no man shall be involuntarily deprived of his life, liberty, or property without due process of law. The prohibition of such a deprivation by the states is found in the 14th Amendment to the Constitution of the United States. But it lies deeper, and limits and conditions every grant of legislative, executive, or judicial authority. The proposition was announced in the early history of the Republic and it has been constantly affirmed. The Supreme Court said in *Calder v. Bull*, 3 Dall. 386, 388, 1 L. ed. 648, 649: "A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B.,—it is against all reason and justice for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it."

A legislative act which takes, or undertakes to authorize the taking, of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect. The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for public objects, and they cannot be successfully prostituted for private purposes. For the same reasons the power of a legislature to create or to authorize the creation of a public debt, and the issue of public bonds to be paid by taxation, is subject to the same limitation. The clear and forcible declarations of Chief Justice Black in 1853 in *Sharpless v. Philadelphia*, 21 Pa. 147, 169, 59 Am. Dec. 759, have long since become the settled law of the land. He said: "Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any

other power not granted to them." See also *Cole v. La Grange*, 113 U. S. 1, 6, 28 L. ed. 896, 897, 5 Sup. Ct. Rep. 416.

A necessary corollary to these propositions is that a legislature, which has no power to authorize the levy of a tax or the creation of a public debt for a private purpose, has no power to draw that authority to itself, or to create it by its mere declaration that a private purpose is a public one. Any other theory would destroy the limitation. A legislature cannot make a private purpose a public one by its mere fiat, and the determination of the question in any case whether or not a given object is public or private is a judicial, and is not a legislative, function. *Allen v. Jay*, 60 Me. 124, 139, 11 Am. Rep. 185; *Tyler v. Beach*, 44 Vt. 648, 651, 8 Am. Rep. 398; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42, 47, 48.

If the bonds and coupons upon which this action is founded are ever paid, the money to discharge them must be raised by the levying of taxes upon private property situated in the township of Mission. Their validity, therefore, must depend upon the answer to the question whether they were issued for, and their proceeds were applied to, a public or a private purpose. They were issued to raise money to pay a subscription made by the township to the stock of a private corporation organized to erect and operate mills to make sugar and syrup from sorghum cane, and their proceeds were applied to that purpose. The question, then, is whether or not the construction and maintenance of factories owned by private corporations to manufacture sugar and syrup from sorghum cane is a public or a private purpose. The true answer to the question seems to be plain and certain. Speaking generally, a public purpose is a governmental purpose, one of the purposes for which governments are instituted and maintained among men, such as the maintenance of order, the prevention and punishment of crime, the care of highways, the relief of the destitute, the education of youth, the erection of buildings for the use of schools and of the officers of the government; while a private object is one which is ordinarily sought and attained by individuals or private associations of individuals, such as the cultivation of the soil, the manufacture of useful and attractive articles, the purchase and sale of merchandise, and the thousand and one purposes which enlist individual enterprise and energy in a complex and advancing civilization. There seems to be no doubt in which category the promotion of the construction and maintenance of sugar factories falls.

Counsel for the plaintiff in error, however, call attention to the settled rule that the promotion of the construction of railroads and of custom gristmills operated by water is a public purpose, in aid of which municipal corporations may lawfully issue bonds, and to the opinion of the Supreme Court in *Burlington Twp. v. Beasley*, 94 U. S. 310, 24 L. ed. 161, and insist that the aid of the construction of sugar mills is an analogous

object, and therefore a public purpose. No argument is required to show that the erection of sugar mills, which directly benefit only those who own them, and which indirectly assist only those who raise sorghum cane, is no such public object as the construction of railroads, our chief means of transportation, whose rates are regulated by law, which may be used by every citizen for a reasonable compensation, and which are of universal benefit. In the case of *Burlington Twp. v. Beasley* the bonds under consideration were issued to aid in the construction of a custom gristmill propelled by steam, pursuant to an act of the legislature which authorized the township to emit them for the purpose of "building bridges, free or otherwise, or to aid in the construction of railroads or water power, by donation thereto or the taking of stock thereof, or for other works of internal improvement." The bonds did not show on their face for which one of the purposes named in the act they were sent forth, but simply recited that they were issued under this law. The court held in the first place, that if there was power in the township to issue the bonds under any circumstances they might be valid, and that as it was clear that such power existed to issue them for the public purpose of building bridges and constructing railroads, and there was nothing on the face of the bonds to vitiate them, they were good in the hands of innocent purchasers, and, in the second place, that the construction and maintenance of a custom gristmill propelled by steam was a work of internal improvement under this statute of Kansas, for which taxes might be levied to pay these bonds.

The decision in this case is not controlling upon the issues presented in the case at bar, because the bonds before us disclose the fact that they were issued for the purpose of encouraging the construction and operation of a public sugar mill, so that there can be no bona fide purchasers without notice of the object of their issue, and because the *Burlington Twp. Case* illustrates, not the general rule, but an exception to the well-established rule that the aid of private manufacturing or business enterprises is not a public purpose for which taxation may be imposed. This decision is the outgrowth of a more primitive state of society, when there were no railroads and few good highways, and when custom gristmills in the immediate neighborhoods of productive fields to grind grain for bread for the people and for food for the cattle were a public necessity. In this state of affairs a line of decisions was developed to the effect that aid in the construction and maintenance of custom gristmills driven by water, and the development of the necessary water power to propel them, was a public object, for which taxes might be lawfully levied upon the property of all the citizens. *Guernsey v. Burlington Twp.* 4 Dill. 375, Fed. Cas. No. 5,855; *Harding v. Funk*, 8 Kan. 315. The *Burlington Twp. Case*, perhaps, advanced another step, for the decision was that the promotion of a gristmill propelled by steam,

as well as one propelled by water, was a public purpose. This proposition, however, together with the entire line of decisions upon which it rests, forms an exception to the general rule upon this subject, is inapplicable to the public needs and purposes of this day, and ought not to be enlarged. This view is sustained by the decisions of the supreme court, by reason, and by the great weight of authority. *The Burlington Twp. Case* was decided in 1876. Six years later, in 1882, in the case of *Osborne v. Adams County*, 106 U. S. 181, 27 L. ed. 129, 1 Sup. Ct. Rep. 168, the supreme court held, under an act which authorized the issue of bonds "to aid in the construction of any railroad or other work of internal improvement," that a gristmill propelled by steam was not a work of internal improvement, and that bonds issued to aid in its construction were void. In 1883 it cited this decision with approval, and held that gristmills propelled by water were works of internal improvement under the same statute, and that bonds issued to aid in the construction of a canal to conduct the water to such mills were issued for a public purpose, and were valid. *Blair v. Cuming County*, 111 U. S. 363, 372, 28 L. ed. 457, 460, 4 Sup. Ct. Rep. 449. These decisions show the narrow limits and sharp lines which confine this exception to the general rule.

When we turn from this line of decisions to the consideration of the nature of public aid in the construction and operation of other manufacturing plants of various kinds, the decisions of the Supreme Court voice no uncertain sound. In *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 663, 22 L. ed. 455, 461, the legislature of Kansas had granted to the city council of Topeka the power "to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city" and the authority to issue bonds for this purpose. The court held that this grant was beyond the limitations upon the power of the legislature which grew out of the essential nature of all free governments, and that bonds issued by a city to aid and encourage a manufacturing company in establishing and operating bridge shops in Topeka were emitted for a private purpose, and were void. In *Parkersburg v. Brown*, 106 U. S. 487, 491, 27 L. ed. 238, 240, 1 Sup. Ct. Rep. 442, the mayor and city council of Parkersburg had been authorized by the legislature of Virginia to issue the bonds of that city for the purpose of lending them to manufacturers carrying on business in or near the municipality, and the bonds had been issued. But the Supreme Court held that they were not sent forth for a public purpose, and were invalid. In *Cole v. La Grange*, 113 U. S. 1, 9, 28 L. ed. 896, 898, 5 Sup. Ct. Rep. 416, the legislature of the state of Missouri had granted to the city of La Grange the power to subscribe for stock in any manufacturing company and to issue bonds to pay the subscription. The city had delivered its bonds to a manufacturing company established for the purpose of operating a rolling mill, but the court held that

the grant was *ultra vires* the legislature, that the object was private, and that the bonds were void.

The sugar factory, to aid in the construction of which these bonds were issued, was not to be constructed or operated by the township or its officers, but by private owners. The officers of the township were to have no control or direction of its management. It was not to be erected to perform, or to assist in the performance of, any function of government. All prosperous mercantile and manufacturing enterprises in a town tend to enhance the value of property, to employ labor, and to increase business. The fact that the construction and operation of this mill would have a similar effect in no way differentiates the purpose or object of its promotion from that of the promotion of other private business undertakings. If this attempt to promote the manufacture of sugar by taxation is to be sustained, every holder of property in this township must contribute a portion of that property to pay for the erection and operation of this mill. For what purpose must he make this contribution? Not to sustain the government, but to build a mill for private owners, in which they may conduct their own private business. Who receives the proceeds of these bonds? Or, in other words, to whom does the taxpayer really pay his tax? Not to the salaried officers of the government, not to the teachers of the children in the public schools, but to the private individuals who own the mills. For whose benefit does he contribute this share of his property? For the direct benefit of the owners of the mill alone, and perhaps for the indirect benefit of those farmers who contract with these owners before they plant their cane for its manufacture into sugar or syrup. When these facts are studiously considered, all doubt of the character of this promotion vanishes. The aid of the construction and operation of this mill actually serves but two purposes. It serves to enable the owners of the mill to gain the legitimate profits of their undertaking, and it serves to take by taxation from the owners of property in the township a portion of that property and to give it to the owners of the mill or to the promoters of the scheme for their private use. Neither of these objects is a public purpose. Neither of them is a purpose for which taxes can be lawfully levied, or for which municipal bonds may be legally issued. Our conclusion is that the promotion of the construction and operation of a mill for the manufacture of sorghum cane into sugar and syrup is not a public purpose. Township bonds issued for that purpose, and the act of the legislature which authorizes their issue, are alike beyond the powers of the legislature and of the township, and are void. *Sharpless v. Philadelphia*, 21 Pa. 147, 169, 59 Am. Dec. 759; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 661, 22 L. ed. 455, 460; *Parkersburg v. Brown*, 106 U. S. 487, 500, 27 L. ed. 238, 243, 1 Sup. Ct. Rep. 442; *Osborne v. Adams County*, 106 U. S. 181, 27 L. ed. 129, 1 Sup. Ct. Rep. 168; *Cole v. La Grange*,

113 U. S. 1, 7, 28 L. ed. 896, 898, 5 Sup. Ct. Rep. 416; *Allen v. Jay*, 60 Me. 124, 128, 11 Am. Rep. 185; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413; *Michigan Sugar Co. v. Auditor General*, 124 Mich. 174, 83 N. W. 625, 627; *United States ex rel. Miles Planting & Mfg. Co. v. Carlisle*, 5 App. D. C. 138, 146, 161; *Deal v. Mississippi County*, 107 Mo. 464, 468, 14 L. R. A. 622, 18 S. W. 24; *Kingman v. Brocton*, 153 Mass. 255, 11 L. R. A. 123, 26 N. E. 998; *People v. Parks*, 58 Cal. 624, 643; *Atty. Gen. v. Eau Claire*, 37 Wis. 400; *State ex rel. Griffith v. Osaukee Twp.* 14 Kan. 418, 420, 19 Am. Rep. 99; *Geneseo v. Geneseo Natural Gas, Coal, Oil, Salt, & Mineral Co.* 55 Kan. 358, 361, 40 Pac. 655; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42, 47, 48; *Coates v. Campbell*, 37 Minn. 498, 499, 35 N. W. 366.

The argument of counsel for the plaintiff in error that the promotion of the construction and operation of this mill is a public purpose, because the legislature declared in the act authorizing the issue of the bonds that the mills aided thereby were public mills, and because the Supreme Court in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, *Budd v. People*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, and *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857, held that the business of receiving and storing grain for compensation in elevators, warehouses, and docks might be declared by the legislature of the states to be of a public character, and might be regulated under their police power, has not been overlooked. But that contention cannot prevail, because the object of the promotion of this mill and of its operation was clearly private, and a legislature cannot by its mere fiat make a private object a public one for the purpose of taxation, and also because the limits of the power to tax are by no means the same as the limits of the police power of the states. Many private occupations, as the sale of intoxicants, the driving of carriages for hire, and the construction of private buildings along the streets of a city, bear such a relation to the public welfare that they may be regulated under the police power of a state, when there is an entire absence of power in its legislature to tax the property of its citizens to promote or maintain these enterprises.

The judgment below is affirmed.

John W. KAUFFMAN, *Plff. in Err.*,
v.

Henry RAEDER *et al.*

(47 C. C. A. 278, 108 Fed. 171.)

*1. The situation of the parties when a

*Headnotes by SANBORN, Circuit Judge.

NOTE.—On the question of the right to rescind or abandon a contract because of the other party's default, see *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 30 L. R. A. 83, and *note*; also *Worthington v. Gwin* (Ala.) 43 L. R. A. 382. 54 L. R. A.

contract is made, its subject-matter, and the purpose of its execution are always material to determine the intention of the parties and the meaning of the terms they used, and when these are ascertained they must prevail over the dry words of the agreement.

2. Where one party to a contract has received and retained the benefits of a substantial partial performance thereof by the other party, he cannot rescind it, but the contract must stand, he must perform his part of it, and his remedy for the breach of complete performance by the other party is limited to compensation therefor in damages.
3. A party to a contract who has conferred upon the other party thereto the benefits of a substantial partial performance thereof, but who has not completely performed the agreement, may maintain an action against the other party for specific performance, or for damages for the latter's failure to perform, upon plea and proof of his own partial performance, without plea or proof of his complete performance; and the defendant in such an action may recoup his damages for the plaintiff's failure of complete performance, or may recover them in an independent action therefor.
4. The breach of a dependent covenant, a covenant which goes to the whole consideration of a contract, gives to the injured party the right to rescind the contract, or to treat it as broken and to recover damages for a total breach.
5. A breach of an independent covenant, of a covenant which does not go to the whole consideration of a contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, or warrant its rescission by the injured party. The latter is still bound to perform his part of the contract, and his only remedy for the breach is compensation in damages.
6. Commercial contracts must be interpreted in the light of commercial usages, and their performance must be such as business men would naturally contemplate.
7. All that is ordinarily required of a party to a contract who has agreed to deliver personal property upon the payment of a debt or price is that he shall put the property in some convenient place, subject to the disposal of the payer upon his compliance with the terms of the contract, and that he shall notify the promisor of the fact.
8. Nine parties agreed to pay \$35,000 and interest to A on or before a day certain, and A agreed to assign and deliver certain stock in a corporation to them when they paid the money. A deposited the stock in a bank in the city of St. Louis, where the contract was made, and more than forty days before the day certain caused the obligors to be notified that the stock was in the bank, subject to their disposition, upon their payment of their debt. Some of the nine parties resided and conducted business in St. Louis; others in Chicago. *Held*, this was a reasonable, fair, and sufficient offer of performance of his contract by A.

(*Thayer, Circuit Judge, dissents.*)

(April 10, 1901.)

ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in favor of

defendants in an action brought to recover damages for breach of contract. *Reversed.*

Statement by Sanborn, Circuit Judge:

This is an action on a contract. At the close of the evidence the court directed a verdict in favor of the defendants. The writ of error challenges the judgment which followed that verdict. The material facts established when the court directed the verdict were these: The plaintiff in error, John W. Kauffman, was in 1895 the owner of certain real estate in the city of St. Louis, Missouri, at the northwest corner of Ninth and Olive streets. On June 19, 1895, he made a lease of this property to the Central Realty & Improvement Company, a corporation, for a rental of \$35,000 per annum, payable quarterly on August 1st, November 1st, February 1st, and May 1st in each year. In July, 1895, the Century Building Company, a corporation, was organized for the purpose of taking an assignment of this lease and constructing a building on these premises. On July 19, 1895, the lease was assigned to the Century Building Company, and that corporation assumed the payment of the rents reserved therein to the plaintiff, Kauffman. After the lease of June 19, 1895, had been made, the defendants in error and their associates, for the purpose of relieving the Century Building Company of the payment of the rent on this lease for one year, and of securing the payment and satisfaction of the first \$35,000 payable upon this lease, made the following contract with John W. Kauffman:

This agreement, made and entered into in triplicate this 19th day of June, 1895, by and between John W. Kauffman, of the city of St. Louis, party of the first part, and Henry Raeder, Jonathan Clark, B. S. Crocker, and A. S. Coffin, of the city of Chicago, state of Illinois, and C. W. Wall, A. O. Rule, and R. F. Kilgen, of the city of St. Louis, state of Missouri, and the McCormick-Kilgen-Rule Real-Estate Company, a corporation organized under the laws of the state of Missouri, of the city of St. Louis, state of Missouri, parties of the second part, witnesseth: That whereas, the said parties of the second part propose and intend to organize a corporation under the laws of the state of Missouri, and particularly under act March 21, 1891, of the general assembly of said state, with a capital stock of one million dollars (\$1,000,000), six hundred thousand dollars (\$600,000) of the same to be preferred and to draw a preferred dividend of six per cent (6%) per annum, said company to be known and styled the 'Century Building Company,' or such other name as may be hereafter agreed upon, said company to be organized for the purpose of acquiring a certain lease, dated the 19th day of June, 1895, entered into between said party of the first part and the Central Realty & Improvement Company, which lease covers certain premises in the city of St. Louis, at the northwest corner of Ninth and Olive streets, in said city, and to which lease ref-

erence is hereby made as part hereof, and also for the further purpose of erecting a building on such premises, including the premises covered by the Durning lease, referred to in said last-mentioned lease; and whereas, the said parties of the second part have requested, and do hereby request, the said party of the first part to accept and receive from said proposed corporation, or the said parties of the second part, in payment of four (4) instalments of rent provided for in said lease,—said four (4) instalments being respectively due August 1, 1895, the first day of November, 1895, the first day of February, 1896, and the first day of May, 1896, and aggregating thirty-five thousand dollars (\$35,000) and being for eight thousand seven hundred and fifty dollars (\$8,750) each,—three hundred and fifty (350) shares at par of the preferred capital stock of said proposed corporation, or thirty-five thousand dollars (\$35,000), divided into four (4) instalments equal to said instalments of rent; and whereas, the said party of the first part has agreed to accept said shares of stock for said instalments of rent, at and upon the times they become due, upon the condition that the said parties of the second part agree, on or before the 1st day of July, 1896, to purchase said shares of preferred stock from said party of the first part, at and for the price of thirty-five thousand dollars (\$35,000), and in addition thereto an amount equal to interest at the rate of six per cent (6%) per annum on the said several instalments of rent from the time they become severally due and payable, less any dividend which the said party of the first part may have received on account of said preferred stock: Now therefore, the said parties of the second part do hereby agree and bind themselves to purchase said preferred stock from said party of the first part, as hereinbefore recited, and to pay therefor the price hereinbefore set forth; and the said party of the first part agrees to sell and transfer to said parties of the second part the said stock at the times and for the price hereinbefore set forth. This contract shall be binding on the said parties, respectively, and as well their respective heirs, executors, administrators, and assigns.

In witness whereof, the said parties have hereunto set their hands the day and year first hereinbefore written.

[Signed]

John W. Kauffman.

Henry Raeder.

Jonathan Clark.

B. S. Crocker.

A. S. Coffin.

C. W. Wall.

A. O. Rule.

R. F. Kilgen.

McCormick-Kilgen-Rule

Real-Estate Co.,

[Corporate Seal.] R. F. Kilgen, V. Pres.,
A. O. Rule, Secy.

Kauffman satisfied the debt and discharged the lessee and its assignee from their liability for the \$35,000 rent which fell

due on and before the 1st day of May, 1896, and took the 350 shares of the preferred capital stock of the Century Building Company according to his covenant in this agreement. Some time in 1897 he assigned this stock and delivered the agreement to the Merchants-Laclede National Bank, a corporation engaged in a general banking business in the city of St. Louis, Missouri, as collateral security for an indebtedness which he owed the bank. In September, 1898, he paid his debt to the bank, and redeemed and recovered possession of the certificates and the agreement. During all the time between the execution of the agreement and the trial of this action the stock and the agreement have been under his control, and he has been able, willing, and ready to assign and deliver them to the defendants, upon their payment of the \$35,000 and interest, pursuant to the terms of their agreement. On May 16, 1898, he caused the cashier of the Merchants-Laclede National Bank to send the following letter to each of the obligors in this agreement to pay the \$35,000, and each of them received the letter in the ordinary course of the mail:

Dear Sir: As collateral security to a loan made to John W. Kauffman, we hold 350 shares of the preferred stock of the Century Building Co., together with an agreement, signed by you and others, agreeing to pay for said stock \$35,000, with interest, amounting to \$4,313.74 to July 1st next, the maturity of the agreement. We desire to notify you that we hold the stock and agreement, and to request you to arrange to take up your agreement on the date named, namely, July 1st, 1898. Yours, truly,
[Signed] George E. Hoffman, Cashier.

On July 18, 1898, the attorneys for Mr. Kauffman wrote to the defendant Jonathan Clark that the contract had not been performed on his part, that Mr. Kauffman proposed to take immediate measures to enforce his rights as defined in the agreement, and asked him to advise them if it would be necessary for them to resort to the courts to assert the rights of their client. Three days later Mr. Clark answered that he was ready at any time to perform his part of the contract, that he supposed that if legal action was necessary to collect the claim that action must be taken against all the parties to the contract, so that it would be of no avail for him to pay his proportion of the amount due, but that if Mr. Kauffman would accept the proposition he would pay him \$5,000 and permit him to retain his proportion of the stock, provided he would release the writer from any further obligation on the contract. In October, 1898, one of the attorneys of the plaintiff in error again demanded of Mr. Clark the payment of the amount owing upon the contract, and he declined to pay or take any further action in the matter, and waived a tender or production of the certificates of stock and their assignment. He declared that he did not intend

to do anything about performing the contract, and that it would make no difference in his decision if the certificates of stock were presented. Upon this state of facts the court below directed a verdict for the defendants on the sole ground that no tender or offer of the certificates of stock and an assignment thereof to the defendants was made by the plaintiff or waived by the defendants on or before July 1, 1898, although it was conceded that they were in the control of the plaintiff, who was ready and willing to transfer them during this time, and that within four months after July 1, 1898, a proper demand of performance was made of the defendant Clark, and he refused to perform and waived the production and offer of the certificates and assignment.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Messrs. J. E. McKeighan, M. F. Watts, and Shepard Barclay, for plaintiff in error:

A man bound to pay has no right to delay till demand is made, but must pay as soon as the money is due, under peril of being sued; and it has already been stated that the vendor, in the absence of a stipulation to the contrary, is not bound to send or carry the goods, or to allege or prove, in an action against the buyer, anything more than a readiness and willingness to deliver.

Benjamin, Sales, 6th Am. ed. § 707; 6 Am. & Eng. Enc. Law, 2d ed. p. 434; *Tiedeman, Sales*, § 94; *Ragland v. Wood*, 71 Ala. 150; *Locklin v. Moore*, 57 N. Y. 360; *Turner v. Goodwin*, 10 Mod. 222; *Harris v. Mulock*, 9 How. Pr. 402.

Even though the demand for performance was at an improper place, if the one party intended to make a demand, and the other so understood it, and did not object to the place as unsuitable, he cannot afterwards impeach the demand on account of the place where it was made.

Heard v. Lodge, 20 Pick. 53, 32 Am. Dec. 197; *Dunham v. Pettie*, 8 N. Y. 514; *Cobb v. Hall*, 33 Vt. 237.

If one has goods to deliver, by agreement, to another, for a stipulated price, at a fixed time, he need only have the goods where they were when the sale was made, and notify the buyer to come and get them on paying for them.

2 Kent, Com. ed. 1892, *505; 2 Story, Contr. 1410; *Barr v. Myers*, 3 Watts & S. 295; *Pordage v. Cole*, 1 Wms. Saund. 319; *Peeters v. Opie*, 2 Wms. Saund. 350; *Kings-ton v. Preston*, cited in 2 Dougl. 689; *Rawson v. Johnson*, 1 East, 203; *Neis v. Yocum*, 9 Sawy. 28, 16 Fed. 168; *Coonley v. Anderson*, 1 Hill, 519; *Carpenter v. Holcomb*, 105 Mass. 260.

An offer to perform is the utmost that is required of the vendor in cases of concurrent conditions, conceding those here in question to be strictly concurrent.

Payne v. Lansing, 2 Wend. 525; *Lester v. Jercett*, 11 N. Y. 458; *Kelley v. Upton*, 5 Duer, 336; *Chitty*, Pl. 16th Am. ed. *333;

Frey v. Johnson, 22 How. Pr. 316; *Nelson v. Plimpton Fire-proof Elevating Co.* 55 N. Y. 480; *Vaught v. Cain*, 31 W. Va. 424, 7 S. E. 9; *Benjamin Sales*, §§ 562, 592; *Mattock v. Kinglake*, 10 Ad. & El. 50; *Wilks v. Smith*, 10 Mees. & W. 355.

By Missouri law such contracts are joint and several (Rev. Stat. 1889, § 2384), and, before default, each party interested may speak with authority touching the solution of the obligation by performance.

St. Louis Nat. Bank v. Ross, 9 Mo. App. 329; *Wilson v. McCormick*, 86 Va. 995, 11 S. E. 976; *Rotan v. Nichols*, 22 Ark. 244; *Hollenback v. Todd*, 119 Ill. 543, 8 N. E. 829; *Forsyth v. Doolittle*, 120 U. S. 73, 30 L. ed. 586, 7 Sup. Ct. Rep. 408; *Pierce v. Roberts*, 57 Conn. 31, 17 Atl. 275; *Bank of United States v. Lyman*, 20 Vt. 666, 12 How. 225, 13 L. ed. 985.

Where no place of delivery is named in a written agreement the parties may verbally appoint one, or one side may verbally agree to the place appointed by the other.

Miles v. Roberts, 34 N. H. 245.

And one of several joint parties to perform may make such agreement or assent to such an appointment for others on his side of the contract, just as he may alone be made the recipient of a tender for several jointly entitled to claim tender.

Carman v. Pultz, 21 N. Y. 547; *Dawson v. Eving*, 16 Serg. & R. 371; *Prescott v. Enerts*, 4 Wis. 314; *Flanigan v. Seelye*, 53 Minn. 23, 55 N. W. 115.

All that plaintiff's duty required of him in the premises was to be ready to deliver the certificates on payment of the money.

Beardsley v. Beardsley, 138 U. S. 262, 34 L. ed. 928, 11 Sup. Ct. Rep. 318; *James v. Hamilton*, 2 Hun. 630; *Tinney v. Ashley*, 15 Pick. 546, 26 Am. Dec. 620; *Bishop, Contr. ed.* 1887, § 1433; *Jones v. United States*, 96 U. S. 27, 24 L. ed. 646; *Thorn-dike v. Locke*, 98 Mass. 340; *Olmstead v. Smith*, 87 Mo. 602.

No one need go into another state to make a formal tender, unless it is expressly stipulated, which was not the case in this instance.

Gill v. Bradley, 21 Minn. 15; *Tasker v. Bartlett*, 5 Cush. 359.

Parties, by treating a contract as valid and subsisting after it has been ended by reason of the omission of some formal act, waive the performance of such formal act. *Bishop, Contr.* 1887, §§ 795, 805.

If parties in the position of defendants recognize such an agreement as still in force after the time when it should have been performed, the mere omission of plaintiff to act at the proper time does not relieve them from their obligation.

Cobb v. Hall, 33 Vt. 239; *Carpenter v. Holcomb*, 105 Mass. 280; *Duchemin v. Kendall*, 149 Mass. 171, 3 L. R. A. 784, 21 N. E. 242; *Dunham v. Pettie*, 8 N. Y. 514; *Webb v. Hughes*, L. R. 10 Eq. 281.

No one of defendants was prepared to respond to the demand for \$35,000. July 1, 1898, had the certificates then been tendered personally to any one of them. Any 54 L. R. A.

tender, therefore, would have been fruitless, and hence it was not necessary.

Enterprise Soap Works v. Sayers, 55 Mo. App. 25; *Hills v. National Albany Exchange Bank*, 12 Fed. 93, 105 U. S. 319, 26 L. ed. 1052; *Deichmann v. Deichmann*, 49 Mo. 109. *Messrs. William E. Garvin, R. L. McLaran, and James P. Dawson* for defendants in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

May one party to a contract, who has accepted and retained the benefits of its substantial performance by the other party, retain and enjoy these benefits, and still rescind the agreement, and escape all the burdens and liabilities of the contract, because the first party has failed to perform at the exact time stipulated therein a subordinate covenant, incidental to the main purpose of the agreement, which goes only to a part of the consideration, and whose breach may be compensated by damages? This is the most important question which this case presents. It will be conducive to brevity and perspicuity to obtain a clear idea of the relations of the parties to the agreement to be considered, their respective covenants therein, and the moving considerations which induced them to make their stipulations, before entering upon the discussion of this issue. This conception must be secured by the light of the fundamental rule that the situation of the parties when the contract was made, its subject-matter, and the purpose of its execution are material to determine the intention of the parties and the meaning of the terms they used, and that when these are ascertained they must prevail over the dry words of the stipulations. *Accumulator Co. v. Dubuque Street R. Co.* 12 C. C. A. 37, 41, 42, 27 U. S. App. 364, 372, 64 Fed. 70, 74; *Salt Lake City v. Smith*, 43 C. C. A. 637, 104 Fed. 457, 462.

On June 19, 1895, when this agreement was made, the plaintiff, John W. Kauffman, had made a lease of the valuable premises in the heart of the city of St. Louis involved in the negotiation to the Central Realty & Improvement Company for a term of years, whereby he was secured—First, by his legal right to eject the lessee and to take back the premises upon default in the payment of any instalment of the rent; and, second, by the covenant of the lessee, in the receipt during the year then ensuing of a rent of \$35,000 in quarterly payments. The defendants had formed the project of organizing a corporation, the Century Building Company, of purchasing this lease from the lessee, of assuming its covenants, and of constructing a building on the leased premises in the name of this prospective corporation. They could derive no rents or income from the premises during the year then ensuing, while the building was in course of construction, and they desired to carry the time of payment of this \$35,000 forward to a period when the building would be completed and the property would be yielding an income. For this purpose they induced

the plaintiff to make the contract under consideration. In this agreement the plaintiff and the defendants made certain covenants with each other. By the dry words of the contract the plaintiff covenanted to accept preferred stock of the Century Company at its par value for the \$35,000 rent which was coming due in the then ensuing year, and to assign and transfer this stock to the defendants and their associates for \$35,000 and interest thereon at 6 per cent per annum from the time that the rent fell due by the terms of the lease. On the other hand, the defendants covenanted to pay this \$35,000 and interest to the plaintiff on or before July 1, 1898. The legal effect, the real meaning, of the agreement was that Kauffman covenanted to release (1) the security of his right to eject the lessee and its assignee, and to recover back the premises, for a failure to pay any instalment of his rent, and (2) the security of his lessee's agreement to pay it, and to accept in lieu of this security the personal covenant of the defendants that they would pay the rent, with interest, on or before July 1, 1898, and the preferred stock of the prospective corporation, which he agreed to hold and to deliver to the defendants upon their performance of their covenant to pay the rent. The considerations which Kauffman agreed to give to the defendants for their covenant to pay the rent and interest were (1) the use by the prospective corporation of the leased premises for a year without the payment of any rent; (2) the release of the premises from Kauffman's right to retake them for the failure to pay any instalment of this rent; (3) the release of the realty company and of its proposed assignee, the Century Company, from liability to pay this rent; and (4) the assignment and transfer of the 350 shares of stock. The single consideration which the defendants agreed to give to the plaintiff for all these covenants was the payment of the \$35,000 and interest on or before July 1, 1898. Thus it will be seen that the main purpose of the contract was the novation, the release by the plaintiff of the leased premises, of the lessee and of its proposed assignee from liability for the rent, and the covenant of the defendants to pay it with interest. The desideratum which induced the agreement and which went to the whole consideration of both sides was this novation. Without that the contract would never have been made. The covenant of Kauffman to take, to hold, and to assign and transfer the stock to the defendants was subordinate and incidental to the main purpose of the agreement, never induced its making, and went only to a part of the consideration. It was not their prospective procurement of this stock that induced the defendants to promise to pay the \$35,000 and interest, but it was the use of the premises by their corporation without the payment of rent for a year, and the release of the leased premises of the lessee, and of its proposed assignee from liability for this payment. They contemplated organizing the proposed corporation and issuing its

stock themselves, and they were not hiring strangers to purchase this stock for them. Nor was it the prospective acquisition of this stock, which this contract compelled Kauffman to hold in trust and to transfer to the defendants, that induced the plaintiff to agree to release his property, his lessee, and its proposed assignee from liability for the rent; but it was the personal covenant of the defendants to pay it. The plaintiff was not desirous of purchasing the stock, but the defendants, by means of their covenant to pay the rent and interest, hired him to accept and hold it until they paid it. The terms of the agreement are not conditioned by either the market price or the agreed value of the stock as in a contract of sale, but solely by the amount of the rent and the interest upon it. Thus the situation of the parties when the contract was made, the ends they sought to attain, and the very terms of the agreement compel the conclusion that its main purpose was the novation, that the stipulation concerning the stock went only to a part of the consideration and was subordinate and incidental to this purpose, while the covenants which went to the whole consideration of the agreement, those which actually induced the contract, were, on the one hand, the promise of the plaintiff to release the property, the lessee, and its assignee from liability for the rent, and, on the other, the covenant of the defendants to pay it, with interest, on or before July 1, 1898.

Now the plaintiff has performed the substantial parts of his covenants, and the defendants have accepted and retained the substantial benefits which they sought to secure by the performance of his covenants, while they have refused to perform any portion of their own. The plaintiff has released his property, his lessee, and its assignee, the Century Company, from liability for the \$35,000 rent, has furnished the use of his property to the defendants' corporation for a year without the payment of any rent, has accepted and held the preferred stock from 1896 until the present time, and has offered and still offers to assign and deliver it to the defendants, as he agreed to do. The defendants have accepted, enjoyed, and still retain the use of the leased premises by their corporation during that year without the payment of rent, and the release of the property, of the lessee, and of its assignee from liability for this \$35,000. They have received and retained the great desiderata which induced them to make their promise, and yet they refuse to pay a dollar for these benefits, and insist that they are absolved from all liability because the plaintiff did not offer to assign and deliver the stock to them in accordance with every legal technicality on the very day when their obligation matured, although he was always ready and willing, and within four months thereafter he offered, to do so in compliance with every requirement of the law which the defendants did not waive. Can a party to a contract retain all the benefits of a substantial performance of it

by the other party, and then escape all its burdens and repudiate all his obligations by means of such a technicality as this? There are two principles of law which forbid such a manifest injustice and compel a negative answer to this question. This issue will be considered and discussed on the assumption that the defendants' theory of this case is sustained by the facts,—on the assumption that the plaintiff made no sufficient offer to assign or deliver the stock until after July 1, 1898, and that his failure to make this offer was never waived by the defendants. The evidence, however, is conclusive that within four months after that date an adequate offer on the part of the plaintiff to complete his performance of the agreement was made, and still the defendants refused to pay any part of the \$35,000 and interest.

One of the rules of law which compels a negative answer to the question now under consideration is that when a contract has been partially executed, and one of the parties has derived substantial benefits or has imposed upon the other material losses through the latter's partial performance of the agreement, then the first party cannot rescind the contract on account of the failure of the second party to complete his performance, but the agreement must stand, the first party must perform his part of it, and his only remedy for the failure of the second party to completely perform is compensation in damages for that breach. *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.* 17 C. C. A. 34, 38, 36 U. S. App. 184, 190, 70 Fed. 146, 150; 1 Chitty, Pl. 16th Am. ed. *333; *Barbee v. Willard*, 4 McLean, 356, 359, Fed. Cas. No. 969; *Hunt v. Silk*, 5 East, 449; *Hammond v. Buckmaster*, 22 Vt. 375; *Brown v. Witter*, 10 Ohio, 143; *Dodsworth v. Hercules Iron Works*, 13 C. C. A. 552, 557, 31 U. S. App. 292, 66 Fed. 483; *Suain v. Seamens*, 9 Wall. 254, 272, 19 L. ed. 554; *Beck v. Bridgman*, 40 Ark. 382, 390; *Andrews v. Hensler*, 6 Wall. 254, 258, 18 L. ed. 737, 739; *Conner v. Henderson*, 15 Mass. 319, 321, 8 Am. Dec. 103; *Teler v. Hinders*, 19 Ind. 93; *Howard v. Hayes*, 15 Jones & S. 89, 103; *Welsh v. Gosler*, 15 Jones & S. 112; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598; *Brown v. Foster*, 108 N. Y. 387, 15 N. E. 608; *Vanderbilt v. Eagle Iron Works*, 25 Wend. 665; *Lyon v. Bertram*, 20 How. 149, 153–155, 15 L. ed. 847, 849, 850; *Clark v. Wheeling Steel Works*, 3 C. C. A. 600, 3 U. S. App. 358, 53 Fed. 494, 499; *Voorhees v. Earl*, 2 Hill, 288, 294, 38 Am. Dec. 588; *Barnett v. Stanton*, 2 Ala. 181; *Churchill v. Holton*, 38 Minn. 519, 38 N. W. 611; *Treadwell v. Reynolds*, 39 Conn. 31; 21 Am. & Eng. Enc. Law, p. 557, note 2. It is only when the parties to the agreement can be placed in *statu quo* that one may rescind or repudiate the entire contract for the failure of the other to perform it. When one party has received the benefits of substantial performance by the other without paying for them the price agreed on, and he cannot or does not return these benefits, it is manifestly unjust to per-

mit him to retain them without paying or doing as he promised to pay or do on account of his receipt of them. In order to avoid such an injustice, the party who has substantially performed may enforce specific performance of the covenants of the other party, or may recover damages for their breach without plea or proof of complete performance, while the defendant, on the other hand, may recover by counterclaim or by an independent action the damages which he has sustained from the plaintiff's failure to completely fulfil his covenants. This rule is settled. In *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.* 17 C. C. A. 34, 38, 36 U. S. App. 184, 190, 70 Fed. 146, 150, this court considered its reason, its justice, and its application to cases of the nature of that now in hand at considerable length, cited many authorities in its support, reviewed some decisions that illustrate it, and, without repeating that discussion here, we content ourselves with a reference to the opinion in that case, and with the following apt and terse statement of the rule and its reason from 1 Chitty, Pl. 16th Am. ed. *333: "Where the plaintiff's covenant or stipulation constituted only a part of the consideration of the defendant's contract, and the defendant has actually received a partial benefit, and the breach on the part of the plaintiff might be compensated in damages, an action may be supported against the defendant, without averring performance by the plaintiff; for, where a party has received a part of the consideration for his agreement, it would be unjust that, because he had not had the whole, he should enjoy that part without paying or doing anything for it, and therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration."

An application of this rule to this case will not permit the injustice of allowing the defendants to deprive the plaintiff of the \$35,000 rent and interest which is justly his due, while it will enable them to reduce his recovery by the amount of any damages which they sustained because the plaintiff did not legally offer them the assignment and delivery of the stock on July 1, 1898, when they ought to have paid and he ought to have delivered the stock. The case falls far within the rule. The covenant on account of the technical breach of which the defendants sought to repudiate all liability—the covenant to assign and deliver the stock to them—was a part, and only a small part, of the consideration of their covenant to pay the rent and interest. The largest part of the consideration, nay, the real consideration, for that covenant, was the use of the leased premises by their corporation for a year without the payment of rent, and the release of the land, of the lessee, and of its assignee, from liability therefor. This moving consideration the defendants have received, and they have thus derived, not only a partial benefit, but all the substantial

benefits of a performance of the contract. The record does not disclose the market value of the stock, or whether or not it ever had any actual value, and the only intimation upon the subject is that one of the nine parties who were bound to pay the \$35,000 and interest offered the plaintiff \$5,000 and his share of the stock to release him from his liability under the agreement. The breach by the plaintiff of his contract to deliver the stock on July 1, 1898, can be readily compensated in damages. Those damages are simply the diminution in the market value of the stock between July 1, 1898, and the day in October when it is certain that a sufficient offer to assign and deliver it was made. The rule which we have been considering prohibits the defendants from retaining the benefits of the substantial performance of this contract by the plaintiff, and then escaping all its substantial burdens on account of his technical failure to offer them the stock on the day when they agreed, but failed, to pay him the \$35,000 and interest, and its application to this case will prevent injustice and work no wrong or inequity to any of the parties to this agreement.

There is another principle of law which equally prohibits the maintenance of the theory of the defendants in this case. It is stated by Lord Mansfield in *Boone v. Eyre* 1 H. Bl. 273, note 1, in these words: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." *Ritchie v. Atkinson*, 10 East, 295; *Stavers v. Curling*, 3 Bing. N. C. 355; *Lowber v. Bangs*, 2 Wall. 728, 736, 17 L. ed. 768, 769; *Hague v. Ahrens*, 3 C. C. A. 426, 3 U. S. App. 231, 53 Fed. 58.

The breach of a covenant of the first class—a dependent covenant, one which goes to the whole consideration of the contract—gives to the injured party the right to treat the entire contract as broken, and to recover damages for a total breach. *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93; *Keck v. Bieber*, 148 Pa. 645, 24 Atl. 170; *Parker v. Russell*, 133 Mass. 74; *Grand Rapids & B. City R. Co. v. Van Dusen*, 29 Mich. 431; *Richmond v. Dubuque & S. C. R. Co.* 40 Iowa, 264, 275. But a breach of a covenant of the second class, an independent covenant, a covenant which does not go to the whole consideration of the contract and is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, does not authorize the injured party to rescind the agreement, but he is still bound to perform his part of it, and his only remedy is a recovery of damages for the breach. *Union P. R. Co. v. Travelers' Ins. Co.* 28 C. C. A. 1, 4, 49 U. S. App. 752, 759, 83 Fed. 676, 679; *Pordage v. Cole*, 1 Wms. Saund. 320, note; *Campbell v. Jones*, 6 T. R. 570, 573; *Surplice v. Farnsworth*, 7 Mann. & G. 576, 584; *Obermyer v.*

Nichols, 6 Binn. 159, 160, 164, 6 Am. Dec. 439; *Burnes v. McCubbin*, 3 Kan. 221, 226, 87 Am. Dec. 468; *Butler v. Manny*, 52 Mo. 497, 506; *Turner v. Mellier*, 59 Mo. 527, 530; *Pepper v. Haight*, 20 Barb. 429, 440; *Central Appalachian Co. v. Buchanan*, 20 C. C. A. 33, 43 U. S. App. 265, 73 Fed. 1007. Now, the covenant of the plaintiff to assign and transfer the stock to the defendants did not go to the whole consideration of the contract, but was subordinate and incidental to its main purpose, as has already been shown. Its breach was susceptible of compensation in damages. Therefore, even though the plaintiff committed a technical breach of it, the defendants, who had accomplished the main purpose of their contract, and had accepted the benefits of the plaintiff's performance of that part of his covenants which went to the whole consideration of the agreement, the use of the leased premises by their corporation for a year without payment of the rent, and the release of the premises, of the lessee, and of its assignee from liability therefor, were still bound by their agreement to pay this rent and interest, and their only remedy for the plaintiff's breach was compensation in damages.

The application of the two rules which have now been considered to the trial of this case will eventuate in a fair, just, and equitable result. The plaintiff will receive the rent and interest which the defendants agreed to pay him, less any damages which the defendants have sustained by the diminution in the market value of the stock between July 1, 1898, when he should have offered to assign and deliver it, and the day thereafter when he did make a sufficient offer to do so. The defendants will receive the stock which the plaintiff agreed to hold and to assign and to deliver to them, and they will pay the \$35,000 and interest, less any damages they sustained by the failure of the plaintiff to make his offer to complete the performance of his agreement in time. The manifest justice and equity of this result vindicate the purpose and the wisdom of the principles of law which compel it, and commend them to the reason and the judgment.

Counsel for defendants in error have cited and discussed a large number of decisions which illustrate established and salutary rules of law that properly govern the cases in which those decisions were rendered, but which are inapplicable to the case at bar. One class of these decisions is well represented by *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Bowes v. Shand*, L. R. 2 App. Cas. 467, 468; *Bordenave v. Gregory*, 5 East, 107; *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. ed. 219; *Telfener v. Russ*, 162 U. S. 170, 40 L. ed. 930, 16 Sup. Ct. Rep. 695, and *Kelley v. Upton*, 5 Duer, 336. The opinions in these cases relate to the performance of executory contracts of sale, under which the defendants had received no benefits from partial performance by the plaintiffs for which they had not paid; and it is there properly held

that without performance or offer of performance at the date by the plaintiffs they could not maintain actions, upon the principle, already adverted to, that where the plaintiff defaults and the parties can be put *in statu quo* the defendant may rescind. The distinction between these cases and the case in hand is that the defendants in the former had not received and retained any benefits derived from the partial performance by the plaintiffs for which they had not paid the contract price, and the covenants which the plaintiffs had failed to perform were dependent covenants, which went to the whole consideration of the contract, while the defendants in this case have received and enjoyed the benefits of a substantial performance by the plaintiff without paying the agreed consideration therefor, and the covenant of which the plaintiff has committed a technical breach is a subordinate, independent covenant, incidental to the chief object of the agreement, and his breach may be readily compensated in damages. This distinction is noted by Mr. Justice Gray in his opinion in *Norrington v. Wright*, where he says: "This case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, 15 L. ed. 847, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract." 115 U. S. 188, 205, 29 L. ed. 366, 6 Sup. Ct. Rep. 12.

It is clearly pointed out by this court in *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.* 17 C. C. A. 34, 36 U. S. App. 184, 70 Fed. 154, and by the circuit court of appeals in the third circuit in *Clark v. Wheeling Steel Works*, 3 C. C. A. 600, 603, 3 U. S. App. 358, 364, 53 Fed. 494, 498, in these words: "If the defendants in *Norrington v. Wright* had retained and used the railroad iron delivered to them after they had discovered the seller's failure to ship the stipulated quantities in February and March, they would not have been justified in rescinding their contract."

Another class of authorities upon which counsel for the defendants rely is illustrated by *Waterman v. Banks*, 144 U. S. 394, 403, 36 L. ed. 479, 482, 12 Sup. Ct. Rep. 646; *Keasey v. Crouther*, 162 U. S. 404, 408, 40 L. ed. 1017, 1019, 16 Sup. Ct. Rep. 808; *Doloret v. Rothschild*, 1 Sim. & Stu. 590; and *Henderson v. Wheaton*, 139 Ill. 581, 28 N. E. 1100. These are cases upon option contracts, upon agreements in which the liability of the parties on one side is not fixed by the covenants in the contracts at the time they are signed, but they simply agree that they will become liable to do certain acts or to pay certain moneys if within fixed times the parties upon the other side of the contracts choose to give certain notices or to do certain acts. They are governed by the indisputable rule that time is of the essence of such an offer to make an agreement, and that unless he who has the option to fix the liability of the opposite party to the contract exercises it, and does the act or gives the notice prescribed to evidence his

choice in the time and manner specified in the contract, the liability never comes into being, and no action can be maintained upon it. The rule upon this subject which has received the sanction of the Supreme Court is stated in *Waterman v. Banks*, 144 U. S. 394, 403, 36 L. ed. 479, 483, 12 Sup. Ct. Rep. 646. It is, in brief, that, where one agrees to sell and deliver, and another agrees to buy and pay for, property on a certain day, time is not of the essence of the contract, and the fact that the day fixed passes without payment or delivery, or offer to do either, will not entitle either party to refuse to complete it; but that, when one party to a contract agrees to do some act if the other chooses to give a specified notice or to perform a specified deed or act within a time certain, there time is of the essence of the contract, and a failure to give the notice or do the act prevents the creation of the liability, because the contract in its inception is a mere offer to become liable on certain terms, and, if the offer is not accepted, of course no liability is created. Cases of this character have no bearing on the questions at issue in this case (1) because the defendants in them have not received the benefits of a partial performance of the covenants of the plaintiff, (2) because the options which the plaintiffs failed to exercise went to the entire considerations of the contracts, while the covenant which the plaintiff has broken goes only to a part of the consideration of this agreement, and (3) because in those cases the parties upon one side of the contracts were by the terms of their agreements given the choice of creating or refusing to create the liability of the parties upon the other side of the contracts, by certain prescribed acts which they might do after the contracts were made, while in the case at bar neither the plaintiff nor the defendants secured any such option. The moment this contract was made all the rights and all the liabilities of the parties to it were irrevocably fixed by the covenants it contained. The plaintiff agreed absolutely to release the leased premises, the lessee, and its assignee from liability for rent for the year 1895-96, to take the preferred stock, and to assign and deliver it to the defendants. The defendants covenanted unconditionally to pay the rent and interest on or before July 1, 1898. One who undertakes by a promissory note to pay a sum of money on or before a certain day makes as absolute a contract to pay it as when he agrees to make his payment on a day certain. When the parties to this agreement had signed and delivered it, their rights and liabilities under it were absolutely fixed. Neither party had any choice or option to fulfil or accept the fulfilment of any covenant in the agreement. Either party could maintain an action for the breach of any covenant made by the other, and no choice or option of liability was left to either. The decisions upon option contracts have no relevancy to the issue presented in this case, and they are here dismissed.

Cases have also been cited in which by

the express terms of the contract time is made of the essence of the agreement, as in *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636, where there was an express stipulation that the deed should be ready on a day certain at 10 A. M., and that if the vendee did not pay the price at that time he forfeited all his rights under the contract of purchase. Other cases have been reviewed in which by express stipulation the fulfillment of one covenant was made a condition precedent to the performance of another, as in *Washington v. Ogden*, 1 Black, 450, 458, *sub nom. Turner v. Ogden*, 17 L. ed. 203, 206, where the entire agreement was made "dependent on the surrender and cancellation of said contract with said Wright" within the sixty days limited for its performance. In these cases the courts properly held, in the one case that performance or an offer to perform, and in the other that surrender or cancellation of the contract with Wright, was indispensable to the enforcement of the agreement. But decisions of this character are irrelevant to the questions here in hand, because there are no express stipulations in the agreement in suit that time shall be the essence of the contract, or that the performance of any act or the fulfillment of any covenant shall be a condition precedent to the exercise or to the fulfillment of any other, because in those cases the defendants had not received and retained the benefits of a partial performance by the plaintiffs, and because the covenants there broken were dependent covenants which went to the whole consideration of the contract.

A large number of cases have been discussed which simply hold that, before a party to mutual dependent covenants which are to be performed at the same time can maintain an action for the breach, he must perform or offer to perform his part of them, unless the offer is waived by the other party to the contract. *Bailey v. Lay*, 18 Colo. 405, 33 Pac. 407; *Thorpe v. Thorpe*, 1 Salk. 171; *Hill v. Grigsby*, 35 Cal. 666; *Ackley v. Richman*, 10 N. J. L. 305; *Barbee v. Wilford*, 4 McLean, 356, Fed. Cas. No. 969; *Johnson v. Wygant*, 11 Wend. 48; *Summers v. Sleeth*, 45 Ind. 598; *Frey v. Johnson*, 22 How. Pr. 316, 325. But none of these decisions hold that a failure of one party to perform or to offer to perform on the day fixed releases the other party from his obligation to fulfil his covenants. But one of them discusses the question whether it is necessary for one who has partially performed his covenants to the other to allege complete performance or offer to perform in order to maintain his action, and in that case (4 McLean, 356, Fed. Cas. No. 969) the court cites Chitty, Pl. *333, and declares that the true doctrine undoubtedly is that he is not required to do so. Moreover, the question these cases presented is immaterial to a decision of this case, because the fact is clearly established by the evidence and conceded by counsel for the defendants that a sufficient offer of complete performance was

made by the plaintiff before this action was commenced.

This brief review of the leading cases upon which defendants' counsel rely will serve to show why they do not convince us that their clients ought not to be permitted to retain the plaintiff's substantial performance of his agreement and to entirely escape from its burdens. None of the decisions they cite were conditioned by such a partial performance, by the receipt and retention by the defendants of the benefits of the plaintiff's substantial performance, or by so slight a technical breach of a covenant so subordinate and incidental to the main purpose of the contract as those in the case at bar; and the principles of law which controlled the cases upon which they rely are irrelevant to the issues in this case, and, if applied, would work a great and manifest wrong. The facts of this case bring it squarely under the salutary rules that (1) when a covenant goes only to a part of the consideration of a contract, is incidental and subordinate to its main purpose, and its breach may be compensated in damages, such a breach does not warrant a rescission of the contract, but the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom, and (2) where one party to a contract has received and retained the benefits of a substantial partial performance of the agreement by the other party, who has failed to completely fulfil all his covenants, the first party cannot retain the benefits and repudiate the burdens of the contract, but he is bound to perform his part of the agreement, and his remedy for the breach is limited to compensation in damages. The first party, upon plea and proof of his substantial partial performance, and without plea or proof of his complete performance, may maintain an action either for specific performance or for damages on account of the failure of the second party to perform, and the latter may secure his damages for the plaintiff's breach either by counterclaim or by an independent action. The failure of the court below to try this case in accordance with these established principles of the law necessitates a reversal of the judgment in favor of the defendants and another trial of this case.

The conclusion which has been reached renders it unnecessary to consider many of the questions which were presented and argued at the hearing of this case. It is based on the assumption that the plaintiff made no sufficient offer to assign and deliver the stock on July 1, 1898, when the defendants were bound to pay their debt. Counsel for the plaintiff in error insists that this assumption is not well founded in fact or in law, and this question will now be briefly considered. On May 16, 1896, the plaintiff caused the cashier of the bank which held the stock and the contract as collateral to a loan which it had made to him to notify each of the obligors in the covenant to pay him the \$35,000 and interest, that the bank held this stock and agreement as collateral

security, and to request each of them to take them up pursuant to their covenant. This notice was susceptible of but one meaning, and that was that the stock and the agreement were in the bank, which was situated in the city of St. Louis, subject to the disposition of the obligors in the contract, upon their payment of the \$35,000 and interest. It is contended by the defendants that the law required the plaintiff to seek out each of the defendants at his residence or place of business, and tender or offer him the stock on July 1, 1898, or to suffer the penalty of a default in the performance of his obligation. There are authorities which sustain this contention, but they are inapplicable to the facts and circumstances of this case. The law never requires the unreasonable, the impracticable, or the impossible. There were nine obligors in this covenant to pay the \$35,000 and interest. There were nine different parties who were entitled to receive this stock upon the payment of this money. Their contract was to pay it on or before July 1, 1898. Some of them resided and were engaged in business in Chicago. Some resided and were engaged in business occupations in St. Louis. The cities are more than 300 miles apart. Each one of these obligors had the right under his contract to wait until the last moment of the business day of July 1, 1898, before he was called upon by the agreement to pay the debt. If the contract required the plaintiff to search out each of these obligors at his residence or place of business, and to tender him the stock on the last moment allowed him to pay the debt, in order to hold him liable upon his obligation, then its performance by the plaintiff was clearly impossible. It is said that if this is true it is the fault of the contract and the misfortune of the plaintiff, and that the court cannot make a new contract for the parties. But the defect is not in the contract, but in its interpretation. It is the failure to apply to its construction the familiar rule that that interpretation which sustains and vitalizes an agreement, rather than that which paralyzes and destroys it, must be adopted. There is also a settled legal presumption, which conditions the interpretation of the contract and the intention of the parties to it, which should not be ignored. It is that they must have intended to make a valid and practicable contract, not one that was void or that could not be performed, and that, if there is any rational interpretation of the agreement which will render its performance practicable, that construction should prevail. Moreover, the parties to this agreement were not farmers or ranchmen, but they were business men, residing in great commercial cities, familiar with and practising commercial usages. Now, let the contract be read in the light of these rules and presumptions, and in the light of the situation and knowledge of the parties when they signed it, and let us see how they intended that it should be performed. The subject-matter of the contract was in the city of St. Louis. The agreement was made, and was presumably

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to be performed, in that city. The creditor, Kauffman, and a part of the debtors, resided in St. Louis, while the remainder were residents of the city of Chicago, more than 300 miles distant. The parties to the agreement were men engaged in business in large cities. Such men are not accustomed to transact their business, to make the delivery of personal property, or to pay their debts at their places of residence. They ordinarily conduct such transactions at convenient banks, in offices, or in shops during the business hours of the day. These debtors knew all these things when they made this agreement, and they also knew that it was impossible for their creditor to search out and tender this stock to each one of them on the last moment of the business day in such a way as to charge more than one of them, and yet each and all of them promised to pay this debt, and they intended to perform that promise and to make a valid and practicable agreement. The conclusion is irresistible that they never intended to require, and Kauffman never intended to agree to make, any tender or delivery of the stock to each one of them at their several places of residence or of business on the day when they agreed to pay the debt. The conclusion is irresistible that all they intended to require, and all that Kauffman agreed to do, was that he should make such a reasonable delivery, or such a reasonable and practicable offer to deliver the stock, as business men under such circumstances would naturally contemplate. The vendor of personal property is not ordinarily required to carry it to the vendee and there to tender it to him, and the reason is that such a requirement is unnecessary and unreasonable. It would have been far more unnecessary and unreasonable to have required the plaintiff to search out each one of these nine debtors and to tender or offer to deliver to them the stock on the last moment of the business day of July 1, 1898, and the contract called for no such performance.

Commercial agreements must be interpreted in the light of commercial usages, of reason, and of justice. It must be presumed that the intention of the parties to them regarding their performance, as well as their terms, is reasonable, fair, and practicable; and where a commercial contract between business men requires personal property, such as certificates of stock in a corporation, to be delivered to several parties at the same time that it requires them to pay a sum certain to the holder of the stock, and no place of delivery is named in the agreement, a deposit of the property in a convenient business institution in the city in which the contract was made, in which its subject-matter was situated, and in which it was presumably to be performed, and a timely notice to the debtors that it has been so deposited, is a fair, reasonable, and sufficient tender and offer of delivery by the holder of the property. *Benjamin, Sales*, §§ 679, 707; *Tiedeman, Sales*, §§ 94, 96, 207; *Carpenter v. Holcomb*, 105 Mass. 280, 284;

Wilks v. Smith, 10 Mees. & W. 355; *Heard v. Lodge*, 20 Pick. 53, 60, 32 Am. Rep. 197; *Cobb v. Hall*, 33 Vt. 233, 238; 2 Kent, Com. *505. The plaintiff notified each one of the defendants, by means of the letter of the bank, that he was ready and willing to surrender the stock and the agreement upon the payment of the defendants' obligation, and that the stock was in the bank at their disposal whenever such payment should be made. They did not pay. They suggested no other way for the performance of the agreement. They were silent. They neither performed nor offered to perform their part of the agreement, nor did they object in any way to the time, the place, or the manner of the plaintiff's offer. They knew, from the letter which they received, not only that the plaintiff offered them the stock, but that he had placed it in the bank subject to their disposal upon their payment of the debt they had promised to discharge. In view of the facts that the defendants in this case were bound under the law to pay this debt on or before July 1, 1898, whether the plaintiff completed his performance or not; that there were nine promisors in this covenant to pay; that each one was entitled to the last moment of the business day of July 1, 1898, in which to perform his promise; that each one was entitled to the stock or a part of it when he paid; that their residences and places of business were more than 300 miles apart; that the contract was made, that it was presumably to be performed, and that its subject-matter was located in St. Louis; that the letter of May 16, 1898, informed the defendants that the plaintiff had placed the stock in a convenient business institution in that city subject to their disposal upon the payment of their debt; and that they neither objected to the course he pursued, nor performed nor offered to perform their agreement,—our conclusion is that the plaintiff's offer of performance was fair, reasonable, and sufficient.

The judgment below is accordingly reversed, and the case is remanded to the court below, with instructions to grant a new trial in accordance with the views expressed in this opinion.

Thayer, Circuit Judge, dissenting:

I am not able to concur in the foregoing opinion, and accordingly express the reasons for my dissent, doing so with as much brevity as possible. The opinion of my associates, as I view it, deals for the most part with principles of the law of contract, which however correctly stated and reinforced by authority are not in my judgment applicable to the case in hand. By the terms of the agreement out of which this controversy arises the plaintiff below agreed to take certain shares of preferred stock in the Central Building Company "in payment for four instalments of rent under his lease, as the same became due. I can perceive no sufficient reason for saying that the delivery of these shares of stock did not operate as payment for the four instalments of

rent, and that the plaintiff merely held the stock when delivered in trust and as collateral security for the rent, as the majority of the court seem to hold. This view is not only opposed to the language of the agreement, which recites that the defendants had requested the plaintiff to take the stock "in payment of four instalments of rent," and that he had agreed to do so, but it is not in harmony with the conduct of the plaintiff himself, since it appears that he hypothecated the stock to secure his indebtedness to the Merchants-Laclede National Bank and that it remained hypothecated with that institution for at least two months after the defendants' option to purchase the stock expired; that is to say, for two months subsequent to July 1, 1898. In view of the language of the agreement and the conduct of the parties, I am of opinion that the stock became the absolute property of the plaintiff as soon as it was delivered to him; that it was taken in payment of the rent, and extinguished the same; that the plaintiff had an undoubted right to hypothecate it; and that there is no substantial foundation for the novation theory which is outlined in the opinion of the majority. As I feel constrained to construe the contract, the parties entered into the following stipulations: The plaintiff agreed to accept the preferred stock in payment for certain rent which was to accrue, his motive being, doubtless, to aid in the construction of a valuable building on the leasehold premises, which would insure the payment of many future instalments of rent that were to accrue under his lease, and at the same time greatly enhance the value of his property. On the other hand, the defendants agreed, if the stock was taken in payment of the rent, to purchase it from the plaintiff "on or before the 1st day of July, 1898," for a sum equal to the amount of rent which it had discharged, and the plaintiff agreed to sell the stock at that price. The result was an executory agreement for the sale of the stock, by virtue of which the defendants had the option to buy it at any time before July 1, 1898, when their obligation to take it and pay the purchase price became absolute. The plaintiff on his part had the right to call for performance on July 1, 1898, but not before that time. The contract in question is not essentially different from many contracts for the sale of stock and other securities which are daily made, whereby a vendee acquires the right to exact performance at any time intermediate the making of the agreement and a certain future date, whereas the vendor acquires the right to call for performance only at the latter date. The real question in the case, therefore, as I view it, is not the one stated at the commencement of the majority opinion, and declared to be "the most important question;" but the question is whether the plaintiff's admitted failure to tender the stock on July 1, 1898, and to demand payment therefor, released the defendants from their obligation to perform. This was the question which was decided below in the af-

firmative, and, as I think, rightly decided. This is not a case, as I view it, where a question arises concerning the right of a person, who has accepted and retained the benefits accruing from a substantial performance of an agreement, to decline to pay for what he has received because of some slight default by the opposite party which may be compensated in damages. When the stock was accepted by the plaintiff, it paid for the instalments of rent, because such was the express agreement of the parties, and presumptively, at least, the stock was adequate payment. After the stock was delivered the plaintiff held the defendant's obligation to buy it on or before July 1, 1898, at a given price; but to maintain an action on this obligation it was his duty to do whatever would be required of any other vendor of stock who agrees to sell and deliver the same on a certain future day, or on any intermediate day if the vendee elects to call for an earlier delivery. In such cases the rule is that on the day when the option expires the vendor must tender the stock and demand payment; time being of the essence. To put the vendee in default there must be an offer of the security sold and a demand for payment, or a waiver of the tender by the vendee. *Waterman v. Banks*, 144 U. S. 394, 36 L. ed. 479, 12 Sup. Ct. Rep. 846; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Kelsey v. Crouther*, 162 U. S. 404, 408. 40 L. ed. 1017, 1019, 16 Sup. Ct. Rep. 808; *Kelley v. Upton*, 5 Duer, 336; *Summer v. Sleeth*, 45 Ind. 599; *Doloret v. Rothschild*, 1 Sim. & Stu. 590; *Shinn v. Roberts*, 20 N. J. L. 435. 444, 43 Am. Dec. 636; *Stillhoell v. Bowling*, 36 Mo. 312; *Henderson v. Wheaton*, 139 Ill. 581, 28 N. E. 1100.

I do not understand that this rule of law is disputed, but the effort seems to be to differentiate the case at bar from those cited, and to show that the rule is inapplicable, on the ground that the contract in suit was not a contract of sale. Now, on the day when the plaintiff had the right to tender the stock in question and exact payment therefor, no such tender or demand was made. The plaintiff did not even have possession of the stock, but the same was then hypothecated to a third party, and remained in its hands for more than two months thereafter. The letter which was written by the pledgee of the stock on May 16, 1898, did not advise the defendants whether the Merchants-Laclede National Bank held the stock as the absolute owner or as pledgee. Neither did it advise the defendants that the bank was acting as agent for the plaintiff, or request the defendants to appoint a suitable place for the delivery of the stock on the day when the plaintiff was entitled to exact payment. The letter was silent on each of these essential points, and for that reason it imposed no liability on the defendants and called for no action on their part. The letter was entirely consistent with the view that the bank had become the absolute owner of the stock; and, if such was the fact, then the defendants were under no obligation

to take the stock from it and pay for the same, since an executory agreement like the one in hand is not assignable, and the plaintiff's assignee could not have enforced performance of the agreement to purchase. *Roykin v. Campbell*, 9 Mo. App. 495; *Lansden v. McCarthy*, 45 Mo. 106; *Lawson, Contr.* § 352. The letter of the bank was at most a mere notice that the plaintiff had parted with the stock, and, as it did not state that the bank was acting as agent for the plaintiff, the natural presumption would be that it was acting for itself and of its own volition. In my judgment, therefore, the letter in question did not alter the legal relations of the parties to any extent; and as there was no waiver by the defendants of their right to have the stock tendered to some one of them on the day the obligation to purchase became absolute, and as no request was made by the plaintiff to have them designate a place for delivery, I am of opinion that the trial court properly held that there could be no recovery, and that the judgment below should be affirmed.

CUDAHY PACKING COMPANY, *Plff. in Err.*,
v.

Frank MARCAN, by Next Friend.

(45 C. C. A. 515, 106 Fed. 645.)

- *1. A minor employed as a servant assumes, to the same extent as an adult, the ordinary dangers and risks of his employment which he actually knows and appreciates, and those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them.
2. At the close of the evidence there is always a preliminary question for the judge before the case can be properly submitted to the jury, and that is whether or not there is any substantial evidence upon which the jury can properly return a verdict in favor of the party who produces it; and, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against him.
3. A minor who for four weeks has been working upon a block 14 inches square and 5 inches in thickness, placed upon a wet, greasy, and slippery floor by himself, assumes the risk and danger of the slipping of the block upon the greasy floor, by means of which his hand is involuntarily thrown into the cylinders of a chopping machine.

(March 11, 1901.)

*Headnotes by SANBORN, Circuit Judge.

NOTE.—For earlier authorities in this series as to assumption of risks by minors, see *Hinckley v. Horazdowski* (Ill.) 8 L. R. A. 490, and note; *Brazil Block Coal Co. v. Gaffney* (Ind.) 4 L. R. A. 850; *Davis v. St. Louis, I. M. & S. R. Co.* (Ark.) 7 L. R. A. 283; and *Davis v. Forbes* (Mass.) 47 L. R. A. 170.

As to duty to warn minors of risks of employment, see note to *James v. Rapides Lumber Co.* (La.) 44 L. R. A. on page 61.

Error to the Circuit Court of the United States for the District of Nebraska to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Messrs. Cowin & Abbott and M. L. Sears, for plaintiff in error:

The plaintiff must be held to the exercise of the same degree of care as an adult, and be charged with the same responsibility, so far as the assumption of risks is concerned.

Nagle v. Allegheny Valley, R. Co. 88 Pa. 35, 32 Am. Rep. 413; *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *DeGraff v. New York C. & H. R. R. Co.* 76 N. Y. 125; *Fitzgerald v. Elsas Paper Co.* 30 Misc. 438, 62 N. Y. Supp. 597; *Sanborn v. Atchison, T. & S. F. R. Co.* 35 Kan. 292, 10 Pac. 860; *Alabama Mineral R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135; *Tinkham v. Sawyer*, 153 Mass. 485, 27 N. E. 6; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540, 21 N. E. 717; *Glover v. Kansas City Bolt & Nut Co.* 153 Mo. 327, 55 S. W. 88; *Greenway v. Conroy*, 160 Pa. 185, 28 Atl. 692; *Kleinest v. Kunhardt*, 160 Mass. 230, 35 N. E. 458.

Messrs. Connell & Ives, for defendant in error:

The trial court could not rightfully direct a verdict against the plaintiff unless it was plain that no recovery could be had upon any view which could properly be taken of the facts the evidence tended to establish.

Gardner v. Michigan C. R. Co. 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 144; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Chicago, R. I. & P. R. Co. v. Sharp*, 11 C. C. A. 337, 27 U. S. App. 334, 63 Fed. 532; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Myers v. Chicago, St. P. M. & O. R. Co.* 37 C. C. A. 137, 95 Fed. 411; *Kane v. Northern C. R. Co.* 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Lincoln v. Power*, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387.

It is the absolute duty of the employer to furnish his employee a reasonably safe place to work, having regard to the kind of work and conditions under which it must necessarily be performed.

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; *Union P. R. Co. v. Daniels*, 152 U. S. 684, *sub nom. Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 757; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 921; *Mather v. Rillston*, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464.

The employee has a right to rely upon the assumption that the employer has performed his duty, and the law protects him in that reliance unless the danger of the accident producing his injury is so obvious and

threatening that a reasonably prudent man under similar circumstances would avoid it.

Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *James B. Clow & Sons v. Bolts*, 34 C. C. A. 550, 92 Fed. 573; *Norman v. Wabash R. Co.* 10 C. C. A. 617, 22 U. S. App. 505, 62 Fed. 728; *The Ethelred*, 96 Fed. 446; *Texas & P. R. Co. v. Archibald*, 170 U. S. 605, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 741; *Mason & O. R. Co. v. Yockey*, 43 C. C. A. 228, 103 Fed. 265.

It is the danger itself, and not the dangerous condition, that must be obvious.

Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; *Kane v. Northern C. R. Co.* 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044.

An employee does not assume the risk of the safety of the place or appliances furnished for his work.

Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65.

On petition for rehearing.

It was primarily the duty of the defendant to make that block a safe, secure place upon which to stand and work.

The master may not expose his servant to perils or hazards which may be guarded against by proper diligence.

Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; *Ellis v. Northern P. R. Co.* 103 Fed. 416; *Mather v. Rillston*, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 467.

The employer says to the employee, there is no other danger than such as is obvious and necessary.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 921; *Union P. R. Co. v. Daniels*, 152 U. S. 648, *sub nom. Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 757.

It is a positive duty, and the employee has a right to rely upon this duty being performed.

Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 779; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 69.

The employee has the right to presume this duty has been performed, and to rely upon the presumption.

Norman v. Wabash R. Co. 10 C. C. A. 617, 22 U. S. App. 505, 62 Fed. 728; *Mason & O. R. Co. v. Yockey*, 43 C. C. A. 228, 103 Fed. 265.

The employee has a right to look to the master for the discharge of that duty.

Union P. R. Co. v. Daniels, 152 U. S. 648, *sub nom. Union P. R. Co. v. Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 758; *The Ethelred*, 96 Fed. 446.

This duty cannot be delegated to another servant so as to relieve the master of his responsibility.

Northern P. R. Co. v. Herbert, 116 U. S.

642, 29 L. ed. 755, 6 Sup. Ct. Rep. 593; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 69; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Texas & P. R. Co. v. Barrett*, 106 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707; *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 741; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 601.

The employee takes risk only of defects "known to him, or plainly observable by him."

New York, N. H. & H. R. Co. v. O'Leary, 35 C. C. A. 562, 93 Fed. 741.

The risk must be so obvious as not to be a matter of discussion.

Harder & H. Coal Min. Co. v. Schmidt, 43 C. C. A. 532, 104 Fed. 285.

The dangers, and not the defects merely, must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence.

Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 69; *Kane v. Northern C. R. Co.* 128 U. S. 94, 32 L. ed. 341, 9 Sup. Ct. Rep. 16; *Washington & G. R. Co. v. McDade*, 135 U. S. 570, 34 L. ed. 241, 10 Sup. Ct. Rep. 1044; *Cook v. St. Paul, M. & M. R. Co.* 35 Minn. 45, 24 N. W. 311.

A case should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tends to establish.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905.

All material facts must be conceded or established beyond controversy.

Myers v. Chicago, St. P. M. & O. R. Co. 37 C. C. A. 137, 95 Fed. 411; *Field, Damages*, 519; *Beach, Contrib. Neg.* § 447; *Chicago, R. I. & P. R. Co. v. Sharp*, 11 C. C. A. 337, 27 U. S. App. 334, 63 Fed. 532; *Chicago, M. & St. P. R. Co. v. Lovell*, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281; *Bluedorn v. Missouri P. R. Co.* 108 Mo. 439, 18 S. W. 1103; *Weller v. Chicago, M. & St. P. R. Co.* 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1049.

If inferences other than that of contributory negligence may be fairly drawn from all the evidence and facts shown to exist, then the question is one of fact for the jury whose verdict must stand.

Chicago, R. I. & P. R. Co. v. Sharp, 11 C. C. A. 337, 27 U. S. App. 334, 63 Fed. 534; *Gardner v. Michigan O. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 144; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Sadowski v. Michigan Car Co.* 84 Mich. 100, 47 N. W. 598; *New Jersey R. & Transp. Co. v. Pollard*, 22 54 L. R. A.

Wall. 341, 22 L. ed. 877; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Thompson v. Flint & P. M. R. Co.* 57 Mich. 300, 23 N. W. 820; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Marietta & C. R. Co. v. Picksley*, 24 Ohio St. 654; *Pennsylvania R. Co. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67; *Jamison v. San José & S. C. R. Co.* 55 Cal. 593; *Redf. Railways*, 5th ed. § 133, ¶ 2; *Dunlap v. Northwestern R. Co.* 130 U. S. 649, 32 L. ed. 1058, 9 Sup. Ct. Rep. 647; *Kane v. Northern C. R. Co.* 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; *Phania Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254.

Sanborn, Circuit Judge, delivered the opinion of the court:

This was an action by an employee against his employer for a failure to discharge its duty to use reasonable diligence to furnish its servant with a reasonably safe place in which to perform his work, and the answer was that the risk and danger from which the servant suffered was one of the ordinary and patent risks of the employment which he had assumed. At the close of the trial the defendant below requested the court to instruct the jury to return a verdict in its favor, and the refusal to grant this request is the chief error of which complaint is made. The Cudahy Packing Company, the plaintiff in error, was a corporation engaged in the business of packing meat, as its name implies, and Frank Marcan was one of its employees, who was engaged in operating a machine for chopping meat, called a "hasher." On April 30, 1898, Marcan accidentally put the fingers of his left hand into the hasher and lost them. He sued the corporation for negligence, in that it permitted the floor, on which he was working to become so slippery that a block on which he was standing slipped, and caused him to throw his hand into the hasher, and in that it used a box or hopper upon the chopping machine to enable the operative to feed the meat into the hasher, which he alleged also contributed to his accident. The great weight of the testimony was that the block did not slip, and that the accident was the result of the carelessness of the defendant in error in feeding the meat into the hasher. Upon the question under consideration, however, this evidence will not be considered, and it is accordingly laid aside. The testimony of the defendant in error and of his witnesses, which alone will be considered in this opinion, was that these were the facts which conditioned his case: He was a minor of ordinary intelligence, more than

seventeen years of age. He had been at work for the plaintiff in error for some weeks, when about March 20, 1898, he was assigned to operate the hasher. This hasher consisted of rapidly revolving cylinders, driven by machinery which chopped or hashed the meat which was fed into it through a hole above the cylinders. Over this hole a removable feeding box or hopper was fastened when the machine was in operation. The sides of this feeding box were 5 or 6 inches high, and it was the duty of the defendant in error to feed the meat which was placed in this box into the hasher. When he first took charge of the chopping machine he was taught to draw the meat in the box forward, and to feed it into the hasher through the hole over the cylinders with his hands. But he was afterwards furnished with a wooden tool called a "stuffer," and was instructed by his employer to use this instrument when the machine became clogged for the purpose of stuffing the meat down into and through it. This stuffer was a wooden block $3\frac{1}{2}$ inches in diameter and 4 inches long, provided with a handle. The hasher stood within a few inches of the south wall of the building, on a floor which sloped gently to the north, and when the feeding box was in place it stood so high that it was necessary for the operator to raise himself 4 or 5 inches above the floor in order to do his work conveniently. When the defendant in error commenced to operate this machine he was furnished with a box upon which he stood in front of the hasher to feed the meat into it. But four or five days later this box was broken, and then, by direction of his employer, he took a chopping block, placed it in front of the hasher, and thereafter stood upon this block when he was feeding the machine. This block was made of hard wood, was about 14 inches square, 5 inches thick, and had an iron band around it $2\frac{1}{2}$ inches wide, and $\frac{1}{4}$ inch thick. He placed this block in position the first time he used it, and from time to time thereafter, as it was misplaced during the washing of the floor, he replaced it. Neither the foreman nor any of the other employees of the plaintiff in error handled or placed the block. It was the custom in some packing houses to use salt upon the floor to prevent it from becoming slippery, but no salt was used upon the floor of this building. Marcan testified that the floor upon which this block lay was wet and greasy most of the time, that it was slippery when he first placed the block there, and that he knew it was slippery. He further testified that on April 30, 1898, while he was standing upon the block holding the stuffer in his right hand, and feeding the meat into the hasher with his left hand, the block slipped sideways to his right; that he tried to catch himself, and his hand went down into the machine; and that the block was caused to slip by "the greasy floor not being nailed." This is the case which the defendant in error made when it is conceded that all the testimony which contradicts his story is unfounded in fact.

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A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care and prudence. A minor assumes the ordinary dangers and risks of his employment that he actually knows and appreciates, and those which are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care and prudence, know and appreciate them to the same extent as an adult. By entering upon and continuing in the employment he assumes these risks and dangers, and no negligence can be charged to the master, and no liability can be fastened upon him, because he fails to give notices or warnings of or to remove these common risks of the employment. *Bohn Mfg. Co. v. Erickson*, 5 C. C. A. 341, 344, 12 U. S. App. 260, 265, 55 Fed. 943, 946; *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, 29 N. E. 1106, 1107; *Douling v. Allen*, 74 Mo. 13, 16, 41 Am. Rep. 298; *St. Louis & S. E. R. Co. v. Valirius*, 56 Ind. 511, 518; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540, 21 N. E. 717; *Louisville, N. A. & C. R. Co. v. Frauley*, 110 Ind. 18, 9 N. E. 595, 598; *Atlas Engine Works v. Randall*, 100 Ind. 293, 298, 300, 50 Am. Rep. 798; *Berger v. St. Paul, M. & M. R. Co.* 39 Minn. 78, 38 N. W. 814; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *Fones v. Phillips*, 39 Ark. 17, 38, 43 Am. Rep. 264. Under this well-settled rule and the testimony of the defendant in error, it is impossible to sustain his recovery in this case. He testified that his accident was caused by the slipping of the block which he himself placed before the hasher on the wet and greasy floor. He knew that the floor was wet, greasy, and slippery. He had walked and worked upon the floor, placed and replaced the block upon it, for four weeks. If it was wet, greasy, and slippery, he knew the fact; knew his liability to slip and fall as he walked across it; knew the danger that the block itself might slip. If, as he walked along the floor, he had slipped and fallen, could he have recovered of the plaintiff in error? The question is susceptible of but one true answer. But he was as familiar with the danger that the block would slip as he was with the risk of the slipping of his feet. He, and he alone had handled, placed, and replaced the block during the four weeks that he had occupied it as his standing ground. He knew that, if his fingers fell into the hasher, they would be injured, perhaps destroyed. All these risks and dangers were so simple, open, obvious, that the conclusion is inevitable that he impliedly contracted, not only to work in this place, but also to assume the danger of accidents arising from the wet, greasy, and slippery floor, and the revolving cylinders of the chopping machine. *Kleinest v. Kunhardt*, 100 Mass. 230, 35 N. E. 458; *O'Malley v. South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *Fisk v. Fitchburg R. Co.* 158 Mass. 238, 33

N. E. 510; *Glover v. Kansas City Bolt & Nut Co.* 153 Mo. 327, 55 S. W. 88; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540, 21 N. E. 717.

There was therefore no substantial evidence in this case upon which the jury could properly render a verdict in favor of the defendant in error, and it was the duty of the court below to direct them to return a verdict against him. *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 243, 97 Fed. 423, 427; *Marion County Comrs. v. Clark*, 94 U. S. 278, 284, 24 L. ed. 59, 61; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 31 L. ed. 287, 288, 8 Sup. Ct. Rep. 266; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Laclede Fire-Brick Mfg. Co.*

v. Hartford Steam-Boiler Inspection & Ins. Co. 9 C. C. A. 1, 4, 19 U. S. App. 510, 515, 60 Fed. 331, 354; *Gowen v. Harley*, 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973; *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 366, 368, 36 U. S. App. 682, 74 Fed. 155, 157; *Chicago, St. P. M. & O. R. Co. v. Bellinoith*, 28 C. C. A. 358, 362, 55 U. S. App. 113, 121, 83 Fed. 437, 441.

There are other specifications of error in this case, but it is unnecessary to consider them.

The judgment is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

LOS ANGELES UNIVERSITY *et al.*,
Appts.,

v.

Ernest A. SWARTH *et al.*

(46 C. C. A. 647, 107 Fed. 798.)

1. A covenant, and not a condition, is created by a clause in a conveyance of land for a college campus, which states that the conveyance is upon express condition that the land shall be devoted exclusively as part of the campus, although another condition is that it shall revert to the grantor if abandoned or devoted to other uses before a certain date, after which a forfeiture is not to occur under any circumstances.
2. Persons who have conveyed property for a college campus upon condition that it shall be used for no other purpose have, after they have disposed of all land in the vicinity which can be benefited by performance of the covenant, no standing in a court of equity to enforce such performance.
3. A covenant in a conveyance of land for a college campus, that it shall be devoted exclusively as a part of the campus, and that no buildings shall be erected thereon except those devoted to university purposes, is not broken by the placing thereon of lumber, tools, sheds, derricks, engines, and oil tanks for the exploration for oil supposed to be beneath the surface, where such occupation will probably be of a temporary character, even if oil is found, and the general purposes of the grant may be materially advanced by the pecuniary results of the development.

(March 4, 1901.)

NOTE.—For conditions in deeds restricting the use of the land to a specified charitable, public, or quasi-public purpose, see note to *Greene v. O'Connor* (R. I.) 19 L. R. A. 262; also the cases of *Kilpatrick v. Baltimore* (Md.) 27 L. R. A. 643, and *Mills v. Davison* (N. J. Eq.) 35 L. R. A. 113.

For distinction between covenants and conditions, see also *Woodruff v. Woodruff* (N. J. Eq.) 1 L. R. A. 380, and cases in note thereto; also *Post v. Well* (N. Y.) 5 L. R. A. 422, and cases in note thereto.

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APPEAL by defendants from a judgment of the Circuit Court of the United States for the Southern District of California granting a preliminary injunction to restrain them from converting land conveyed to the university in trust to the purpose of prospecting for oil. *Reversed.*

Statement by Morrow, Circuit Judge:

This is an appeal from an order granting a preliminary injunction. The suit was brought by the appellees to restrain the appellants from converting and using part of the campus of the Los Angeles University for the purpose of excavating, drilling, and digging into the land for oil, and from erecting, on and over the surface of the land, buildings and derricks, and from converting the campus into an oil field and a place for conducting an oil business, to the injury and damage of the land as a campus for a university or an institution of learning and education. The bill alleges, among other things, that in the year 1886 the complainants and John S. Maltman and G. R. Shatto were the owners of large tracts of land adjoining the city of Los Angeles, situated on the city's western boundary, which said land has since become part of the municipality of Los Angeles by annexation; that during the year 1886 a number of persons, representing and being members of the religious organization known as the "Baptist Denomination in Southern California," devised and projected a plan for the establishment and maintenance of a university for educational purposes, to be located in or near the city of Los Angeles, state of California, to be under the control of the Baptist Denomination; that members, representatives, and agents of the said Baptist Denomination represented to complainants that they were authorized by said denomination to search out the most suitable location that could be secured for a campus, and land that could be obtained by donation to aid in the establishment of said university; that the agents and representatives of said

denomination requested and urged complainants to donate their interests in the land described in the bill of complaint for part of a campus for said university, and to this end they set forth the many benefits that would accrue to the owners of lands in the vicinity of such an institution, (in) drives, walks, trees, shrubs, and flowers, and college buildings, residences for professors, and the many sales of lots and lands that would be made to those preferring homes amid refinement and culture, where their children could have the advantages of a Christian education; that in furtherance of said plans, and to assist the establishment of said university, many subscriptions of money and lands were thus solicited and secured from owners of land in the vicinity of said campus; that to this purpose complainants and J. S. Maltman and G. R. Shatto agreed to subscribe, and did subscribe, as a gift for a campus, 15 acres of land, to be used exclusively as a campus for said proposed university; that the agents, representatives, and members of the said Baptist Denomination and others associated themselves in the establishment of said university, and organized for that purpose, under the laws of the state of California, a corporation known as the "Los Angeles University." Complainants allege that they joined in said subscription, and promised to give the interest owned by them in said land for a campus, relying upon the representations made, and believing that the same would be carried out, and that a university that would be a seat of learning under the control and patronage of the organization known as the "Baptist Denomination" would be erected on said land, and that the same would be used exclusively and only as a campus for said university, and for no other purpose, and for all time; that thereafter, on September 16, 1886, in compliance with the promise made and set forth in said subscription, complainants and John S. Maltman made a deed of grant conveying to said Los Angeles University the land described in the bill, comprising 7½ acres, being the south half of said campus; that there was no money consideration given or received for said deed, and no consideration whatever from the grantee for the land other than the promise to establish and maintain a university, and to use the said land exclusively as a campus therefor, and for all time; that one of the conditions of the conveyance, and a covenant set forth in said bill, was the following: "First, that the said land shall be used exclusively as a part of the campus of said university, and no buildings shall be erected thereon except those devoted to university purposes." It is further alleged that, after the execution of said deed, the defendant the Los Angeles University erected, or caused to be erected, one building on the said campus, and the said building has been used almost continuously for educational purposes and as a dormitory for teachers and pupils, but that there never was established a university, as promised, and according to the terms and conditions

of the articles of incorporation of said defendant the Los Angeles University; and there has never been conducted and maintained upon said premises by said defendant, its agents or lessees, more than an academic school for the education of children and students in academic grades and classes, and part of the time only primary schools have been conducted; and for about four years last past a nonsectarian boarding and military school for boys has been conducted by lessees of the said building and campus. It is also alleged that at all times since the conveyance of said land to the grantee, until on or about the 9th day of April, 1900, the whole of said land was used as a campus for such educational institution as was being conducted in the building erected thereupon; that on or about the 9th day of April, 1900, the defendants the College Oil Company and Richard Green, with the consent of, and by reason of and under some agreement, lease, or understanding with, the defendant the Los Angeles University, entered upon the south half of said campus, and that part thereof conveyed to defendants by the complainants and J. S. Maltman, with wagons, lumber, tools, and machinery, built a tool house, erected derricks, set up an engine and boiler and oil tanks, and on the 18th day of April, 1900, began, and at the time of filing the bill were, excavating, drilling, and digging the soil of and into said lands, seeking for petroleum there, to the great and irreparable injury of the land for a university campus or a campus for an educational institution; that the defendants intend to and have contracted and arranged for the drilling and digging of a large number of oil wells, the erection of a pumping plant and many derricks, oil tanks, pipes, tubing, and other apparatus used in the business of producing and selling crude oil, upon said campus, and will convert said campus into an oil field and a place for conducting an oil business, to the great and irreparable injury and damage of said lands as a campus for a university or an institution of learning and education; that the operations of the defendants interrupt the use and enjoyment of said lands for a campus, and that the complainants have never consented, and do not consent, to such use of said lands by defendants. Upon this bill of complaint, duly verified, the complainants moved for an injunction. An order to show cause was issued, and the defendants appeared and filed affidavits in opposition. It appears from these affidavits that the Los Angeles University was incorporated on the 22d day of June, 1886, for the purpose, as declared in the articles of incorporation, of securing and holding by purchase, gift, devise, bequest, or grant, real and personal property, and of selling, mortgaging, leasing, or otherwise disposing of the same, and of erecting buildings and establishing and maintaining a university for educational purposes. It is admitted that the defendants have commenced the operations described in the bill of complaint, but it is averred, among other things, that in the

maintenance of the university a debt of about \$16,000 has been incurred and is unpaid; that to secure the payment of such indebtedness the trustees of the university mortgaged all of its property, including the lands described in the bill of complaint; that within two years last past extensive explorations immediately adjacent to and on all sides of said lands has made it plain that the said land is underlaid by a valuable and extensive deposit of oil-bearing sand; that the proposed and begun extraction of oil from said land will not and would not irreparably or at all permanently injure said land for use as a college campus, but that it will enable the defendant the better to carry out the purposes of the donor; that observation of the course of oil operations in the vicinity shows that such operations are not likely to continue on the same ground for a long period; that by the extraction of the oil from the oil sands under the land in question it is proposed, and it will be possible, to pay off this indebtedness, and to release all of the property from the mortgage lien, and to procure valuable additional assets for the maintenance of an educational institution upon the premises; that drilling shows that the oil stratum in that region dips slightly to the southward; that experience proves that in oil-bearing strata the crude oil tends to drain towards pumping wells, and especially so if the strata dip in that direction, as in this case, and it is very probable that wells to the southward of the lands in question are continually draining away valuable portions of the oil contained in the strata under the lands described in the bill of complaint; that on the west and northwest, and adjacent to said land, wells have been bored, and are being continuously pumped, and that wells are being bored at a distance of about 80 feet eastward from the east line of said lands. It is alleged, upon information and belief, that complainants have no lands or property lying near to or anywhere so situated with reference to the lands described in the bill that they could in any wise be affected by any particular use of said land. A copy of the deed of conveyance mentioned in the bill of complaint is attached to one of the affidavits. From this deed it appears that the grant was made in consideration of the sum of \$1, lawful money of the United States of America, paid by the party of the second part to the parties of the first part, the receipt whereof was thereby acknowledged, and that they granted, bargained, sold, and conveyed the real property in controversy to the party of the second part. The habendum clause of the deed is as follows: "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to its legal successors, forever." The deed recites that: "This conveyance is made upon the express conditions and for the consideration hereinafter named, to wit: First. That said land shall be devoted exclusively as a part of the campus of said university, and no buildings shall be

erected thereon except those devoted to university purposes. Second. That at least one building, costing not less than ten thousand dollars, shall be erected on said campus and completed on or before September 1st, 1897. Third. That in case of abandonment of said premises for such university at any time before January 1st, 1894, or in case of the nonuser thereof, or in case said premises, or any part thereof, is devoted to purposes other than as above specified, then said premises shall immediately revert to the grantors herein, their heirs, executors, administrators and assigns; the intention being that the reversion herein mentioned shall not occur after January 1st, 1894, under any circumstances." Upon the hearing the court entered an interlocutory order granting the preliminary injunction prayed for in the bill of complaint. From this order the defendants prosecute the present appeal.

Argued before *Gilbert and Morrow*, Circuit Judges, and *Hawley*, District Judge.

Messrs. Bicknell, Gibson, & Trask, and *T. M. Stewart*, for appellants:

Appellees have no cause of action for injunction, as they own no land to be affected by any possible use that may be made of the land in question.

The restrictions were inserted for the benefit "that would accrue to the owners of lands in the vicinity." But the complainants do not show that they are the owners of any of the said lands, and it is affirmatively alleged that they are not.

Conditions or covenants restricting the use of lands are inserted for the benefit of grantors and their heirs, or for the benefit of holders of adjacent lands.

If the former, right to enforce the restriction is limited to the time of continuance of ownership of some part of the lands out of which the granted land has been carved, or to which the scheme of improvement correlates it.

Sanborn v. Rice, 129 Mass. 387; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 636; *Badger v. Boardman*, 16 Gray, 559; *Sharp v. Ropes*, 110 Mass. 381.

Ownership of other land is a recognized *sine qua non* of a qualified enforcer of such restriction.

Hano v. Bigelow, 155 Mass. 341, 29 N. E. 629; *Barron v. Richard*, 3 Edw. Ch. 100; *Master v. Hansard*, L. R. 4 Ch. Div. 724; *Dana v. Wentworth*, 111 Mass. 293.

Where there are numerous contributors to a charitable fund. "the contributors cannot maintain a bill to correct an abuse of the fund by the trustees, unless they are also *cestuis que trust*."

Perry, Tr. 733; *Ludlam v. Higbee*, 11 N. J. Eq. 342; *Clark v. Oliver*, 91 Va. 421, 22 S. E. 175; *Association for Relief of Respectable Aged Indigent Females v. Beekman*, 21 Barb. 565; *Story*, Eq. Jur. 1191.

The deed itself removed all restrictions January 1, 1894.

If any covenant is contained in this deed, it is only by implication, and such would

not, in accurate speech, be a subject for construction.

Covenants are to be construed as nearly as possible by the obvious intentions of the parties, which must be gathered from the whole context of the instrument, interpreted according to the reasonable sense of the words.

Devlin, Deeds, 882.

Every uncertainty in a deed is to be taken favorably for the grantee.

Elphinstone, Interpretation of Deeds, 94; Devlin, Deeds, 848.

Restrictive covenants relative to the use of buildings are to be construed most strictly against the covenant, and, unless the thing sought to be enjoined is plainly within its provisions, an injunction will not lie in enforcement thereof.

Clark v. Jammes, 87 Hun. 215, 33 N. Y. Supp. 1020; *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L. R. A. 393, 34 N. E. 556; *Eckhart v. Irons*, 128 Ill. 582, 20 N. E. 687.

A restriction in the use of land must be made with a due regard to public policy, and without any unlawful restraint of trade.

Whitney v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190; *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Sandborn v. Rice*, 129 Mass. 387.

Even if the restrictions were originally valid and still in force, the discovery of great wealth in the underlying strata, and, much more, the great change of conditions surrounding the land in question, would warrant equity in refusing an injunction.

Conger v. New York, W. S. & B. R. Co. 120 N. Y. 29, 23 N. E. 983; *Beach, Inj.* 474; 3 Pom. Eq. Jur. 1295, note; *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; 1 Story, Eq. 10th ed. 750; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Landell v. Hamilton*, 175 Pa. 327, 34 L. R. A. 227, 34 Atl. 666; *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741; *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 146; *Peabody Heights Co. v. Wilson*, 82 Md. 186, 36 L. R. A. 393, 32 Atl. 380; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691.

Land devised as the site of a city hospital may be sold and the proceeds devoted to current expenses of the hospital.

Weeks v. Hobson, 150 Mass. 377, 6 L. R. A. 147, 23 N. E. 215; *Atty. Gen. v. Middleton*, 2 Ves. Sr. 328; *Cook v. Duckensfield*, 2 Atk. 567; *Atty. Gen. v. Foundling Hospital*, 2 Ves. Jr. 42.

When property has been settled upon a charity, and lapse of time, or changes in the condition of the property or in the circumstances attending it, make it prudent and beneficial to the charity to alien the property and invest the proceeds in other funds, or in a different manner, it is competent for the court of chancery to direct such sale and investment, taking care that no diversion of the gift be permitted.

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5 Am. & Eng. Enc. Law, 2d ed. p. 914; *Stanley v. Colt*, 5 Wall. 169, 18 L. ed. 510; *Hinckley's Estate*, 58 Cal. 457; *Re John C. Mercer Home for Disabled Clergymen*, 162 Pa. 232, 29 Atl. 731; *American Academy of Arts & Sciences v. Harvard College*, 12 Gray, 596.

Mr. John W. Mitchell for appellees.

Morrow, Circuit Judge, delivered the opinion of the court:

It is contended by the appellants: First. That by the third conditional clause of the deed of September 16, 1896, the title of the grantees to the land in question became absolute and free from all limitations and restrictions on January 1, 1894, when the period for reversion therein provided had expired. Second. Assuming that the restriction contained in the first conditional clause of the deed continued as a limitation upon the use of the land, it is contended on the part of the appellants that the complainants cannot enforce the restriction in the absence of a showing that they are the owners or have an interest in land for the benefit of which the restriction was intended by the grantors and provided for in the deed.

The deed recites that the conveyance is made upon the "express conditions" and for the considerations thereafter named. Then follow the three clauses of the deed containing these "express conditions." These clauses provide: (1) That the land conveyed shall be devoted exclusively as a part of the campus of the university, and that no buildings shall be erected thereon except those devoted to university purposes; (2) that at least one building, costing not less than \$10,000, shall be erected on said campus on or before September 1, 1897; (3) that the premises described in the deed shall revert to the grantors if abandoned or devoted to purposes other than those specified at any time before January 1, 1894, but under no circumstances is a forfeiture to occur after that date. If these three clauses be construed as conditions, as they are declared to be in the deed, and as their technical terms would seem to indicate, it follows as a legal consequence that the title to the land became absolute in the grantee and free from all limitations and restrictions on January 1, 1894. The consequence of the nonfulfilment of a condition is the forfeiture of the estate. 2 Washb. Real Prop. 3; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 353, 1 L. R. A. 380, 16 Atl. 4; *Adams v. Valentine*, 33 Fed. 1; *Woodruff v. Trenton Water Power Co.* 10 N. J. Eq. 489, 508; *Episcopal City Mission v. Appleton*, 117 Mass. 326, 329; *Langley v. Chapin*, 134 Mass. 82. When, therefore, by the terms of the conveyance, the period of forfeiture has passed, the condition has been discharged, and the estate is no longer subject to its limitation or restriction. 1 Washb. Real Prop. 5th ed. 96. But may it not have been the intention of the grantors in this conveyance to create a condition in the third clause, where a forfeiture is specifically de-

clared, and a covenant running with the land in the first clause? Conditions are not favored in law, and are construed strictly, because they tend to destroy estates. 4 Kent, Com. 130; *Crane v. Hyde Park*, 135 Mass. 147; *McKelvey v. Seymour*, 29 N. J. L. 321, 327; *Watterson v. Ury*, 5 Ohio C. C. 347; *Re Wellington*, 16 Pick. 87, 90, 26 Am. Dec. 631. And if it be doubtful whether a clause in a deed be a covenant or a condition, the court will incline against the latter construction. 4 Kent, Com. 132; *Greene v. O'Connor*, 18 R. I. 56, 19 L. R. A. 202, 25 Atl. 692; *Adams v. Valentine*, 33 Fed. 1.

In *Post v. Weil*, 115 N. Y. 361, 366, 5 L. R. A. 422, 22 N. E. 145, the court of appeals of New York, in considering whether a clause of a deed should be construed as a condition or a covenant, said: "Mere words should not be, and have not usually been, deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate, unless from the proof such appears to have been the distinct intention of the grantor and a necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence us wholly in determining what the clause was inserted to accomplish; but in this, as in every other case, our judgment should be guided by what was the probable intention, viewing the matter in the light of reason."

Applying this rule to the first clause of the deed under consideration, we find sufficient reason in the evident purpose of the conveyance and in the situation of the parties, as disclosed by the surrounding circumstances, to construe this clause separately, not as a condition, but as a covenant. What, then, is the remedy for the nonfulfillment of a covenant? The delinquent party must respond in damages; but a court of equity can in a proper case enforce the specific performance of a covenant of this character. 3 Pom. Eq. Jur. § 1342; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4.

This brings us to the consideration of the question whether, in proceedings by injunction to enforce the specific performance of a covenant, it is necessary for the complainant to show that he is beneficially interested in the performance of the covenant. The general rule is that the complainant is not entitled to an injunction in any case unless it is shown that he has some vested right or interest that will suffer irreparable injury from the act which he seeks to restrain. *Branch Turnp. Co. v. Yuba County Supers.* 13 Cal. 190; *Bank of California v. Fresno Canal & Irrig. Co.* 53 Cal. 201, 203; *New York v. Mapes*, 6 Johns. Ch. 46; High, Inj. 3d ed. § 9. But there is a distinction to be observed, in enforcing covenants, between a case where the complainant seeks to prevent or abate a nuisance, and a case where the complainant has an interest or title to real estate, in favor of which there is a covenant securing a privilege or right binding in equity. In the latter case it is said that

the covenantee has the right to have the actual enjoyment of his property *modo et forma*, in accordance with the stipulation in that behalf, and that it is no answer to say that the act complained of will inflict no injury upon him. 2 High, Inj. § 1153; 1 Beach, Inj. § 480; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 216. But in such case it is clear that the complainant must show that he has some interest or title in the land to be protected. This right or interest is the very foundation of his action. He must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created; otherwise, he has no interest in the covenant and is a mere intruder.

In *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632, the suit was brought by the plaintiff in behalf of himself and eleven others, each the owner of a dwelling house and lot on a certain street in Boston, to restrain the defendant Nightingale, another house and lot owner on the same street, from converting his dwelling house into a restaurant. The bill set forth that, before the erection of the said dwelling houses, the land upon and adjoining the street designated belonged to one Hayward; that upon his decease his heirs agreed among themselves that the land should be divided into house lots, and, when conveyed, the grantees should take subject to the condition that no buildings should be erected thereon except for dwelling houses. A lot was conveyed to the defendant upon such condition. Defendant leased the premises to another, who had taken steps to convert the dwelling house into a restaurant. Plaintiffs sought an injunction against such use of the premises. The court, through Bigelow, Ch. J., said: "A court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy, as exceptions or reservations out of a grant not binding as covenants real running with the land. Nor is it at all material that such stipulations should be binding at law, or that any privity of estate should subsist between parties, in order to render them obligatory, and to warrant equitable relief in case of their infraction. A covenant, though in gross at law, may nevertheless be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege, or, as it is sometimes called, 'a right to an amenity,' in the use of an adjoining parcel by which his own estate may be enhanced in value or rendered more agreeable as a place of residence." After a further statement of the principles involved, it was held that the plaintiffs were entitled to equitable relief in the enforcement of the restriction contained in the conveyance to the defendant, as owners of the estates for whose benefit the restriction was originally designed; that the purpose of the restriction was to secure to each estate the benefit or advantage which would arise from the specific

mode in which the adjoining premises were to be improved and occupied, giving a right or privilege of amenity in each lot within the restriction to the owners of all the other lots within the designated limits. The question arose in this case whether the original grantors were not necessary parties to the proceedings. Upon this question the court said: "In strictness, perhaps, the right or interest created by the restrictions, being a qualification of the fee, did not pass out of the original grantors, and now remains vested in them or their heirs. But, if so, they hold it only as a dry trust, in which they have no beneficial use or enjoyment, the entire usufruct being in their grantees and their assigns now holding the estates, for whose use and benefit it was intended. Such being the case, then the latter are proper parties to enforce the restriction, and the former, not having any present interest in it, need not be parties to the proceeding."

This is the precise question in the present case, and determines that the complainant, having no present interest in the enforcement of the covenant under consideration, has no right of action against the defendants.

In *Sandborn v. Rice*, 129 Mass. 387, 396, there was a bill to enforce certain restrictions contained in conveyances by a common grantor. Concerning such a restriction the court said: "It often happens that owners of land, which they design to put into market in lots for dwelling houses, insert in the deeds of the several lots a uniform set of restrictions as to the purposes for which the land may be used, and as to the portions of it which may be covered by buildings. So far as these restrictions are reasonable in their character, they are upheld and enforced by courts of equity in favor of the original owner, so long as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to set the restrictions at naught."

In *Clark v. Martin*, 49 Pa. 289, each grantee of adjoining lots had covenanted not to build on the rear portion of his premises above a certain height. The complainant had become the purchaser of a lot adjoining that which the defendant had bought, subject to the condition, and it was held that he was entitled to an injunction against a violation of the covenant on the ground that the condition was imposed for the benefit of such adjoining lot. The court declared it to be plain "that the duty created by the condition and restriction is a duty to the owner of the adjoining lot, whoever he might be." In *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104, the grantor conveyed premises with the condition that, if spirituous or intoxicating liquors should be sold or kept for sale on the granted premises, the title to the premises should revert to and vest in the grantor, his heirs and assigns. The condition was

treated as a covenant, and enforced by injunction in favor of the assignee of the grantor, on the ground that the restriction was inserted in the deed for the benefit of the grantor as the owner of the land and of lots in the vicinity contiguous to the granted premises, and that whatever rights, interests, and benefits the grantor had by virtue of the restriction belonged to the complainant. In *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, it was held that plaintiff's right to equitable relief in the enforcement of a restriction as to the use of certain premises was because she was the owner and occupier of a part of the estate for the benefit and advantage of which the restriction was imposed, and therefore had a present right and interest in its enforcement. In *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655, the plaintiffs sought to recover possession of certain property upon the ground that the abandonment of its use as a park worked a forfeiture, and that they, as heirs of the grantor, were entitled to the reversionary title. The court construed the restriction in the deed of conveyance as securing a benefit of the grantors and their heirs by way of forfeiture or reversion, and that as the whole title to the park and the contiguous lots passed from plaintiff's ancestor in his lifetime, they inherited no right to either, and, having title to neither the park nor to any land for the benefit of which the park was created, they had no foundation upon which to base an action.

In these and other cases that might be cited, where the complainant has maintained his right to the remedy by injunction, he has shown that he had some interest or estate to protect for the benefit of which the covenant had been created. In the last case cited, the complainants failing to show such an interest, the complaint was dismissed upon the ground that the complainants had no right or interest upon which an action could be founded. And in reason and principle this must be the rule upon the subject. In general terms, the benefit of a condition in a grant is reserved to the grantor and his heirs without regard to the ownership of other property; but, where the grant contains a restriction in the nature of a covenant that has relation to a benefit to adjoining property, the restriction can only be enforced in favor of the title to such adjoining property.

In the case at bar it is alleged in the bill that complainants and others were the owners of large tracts of land adjoining the city of Los Angeles, including the land in question; that representatives of the proposed university urged upon the complainants the donation of a tract of land for part of the campus of the university, setting forth the many benefits that would accrue to the owners of land in the vicinity of such an institution, in drives, walks, trees, shrubs, and flowers, college buildings, residences for professors, and in the many sales of lots of land that would be made to those preferring homes amid refinement and culture, where

their children could have the advantages of a Christian education; and in furtherance of such plans, and to assist in the establishment of said university, many subscriptions of money and land were thus solicited and received from the owners of land in the vicinity of said campus, and to this purpose complainants and others, relying upon these representations, agreed to subscribe and did subscribe, as a gift, the land in question, to be used exclusively as a campus for said proposed university. But the complainants do not show in their bill, and it is not shown by affidavit or otherwise, that they are now the owners of or have any interest in any lands in the vicinity of the university buildings or the campus connected therewith, but, on the contrary, it is averred upon information and belief, in one of the affidavits, that the complainants have no such interest. The inference is, therefore, that the complainants are not in any way interested in the benefit arising from the restriction or limitation placed upon the

granted estate by the terms of the covenant contained in the deed, and that the complainants will not be damaged by the failure of the defendants to comply with the terms of the covenant. They are therefore not in a position to maintain this action. We are of the further opinion that it does not appear that the proposed explorations for oil on the land in question will be a substantial violation of the restriction contained in the covenant under consideration. The educational institution now upon the premises is to be continued, and the proposed operations upon the tract of land now in use as a campus will probably be of a temporary character. The general purpose of the original grant will not be defeated, but may be materially advanced in the pecuniary results to be derived from the development of the wealth supposed to be under the surface of the land.

The interlocutory decree will therefore be reversed, and the bill dismissed.

ARKANSAS SUPREME COURT.

Knox GIBSON, *Appt.*,

v.

Town of HARRISON.

(.....Ark.....)

1. Under statutory authority to prevent the running at large of dogs, a municipal corporation may exact a fee of \$1.50 for the privilege of keeping a dog, and in case of its nonpayment impose a fine upon the owner and provide for the killing of the dog.
2. A statement in an agreed statement of facts in a proceeding for violation of an ordinance regulating the keeping of dogs, that the sum exacted for the privilege of keeping them is intended as a tax for revenue, is not binding on the courts where the ordinance shows that it is a license fee.

(June 15, 1901.)

A PPEAL by defendant from a judgment of the Circuit Court for Boone County affirming a conviction by the mayor of the town of Harrison for failure to comply with an ordinance fixing a tax on dogs. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. W. Story and B. B. Hudgins, for appellant:

The ordinance under which appellant is prosecuted violates § 11, art. 16, of the Constitution of this state in that it does not distinctly state the object for which it seeks to impose the tax.

The citizen must be distinctly advised by

the ordinance or the law, as to the purpose for which he is required to pay the tax.

Vance v. Little Rock, 30 Ark. 435.

The appellee had no inherent power to levy taxes, and could only levy such as the legislature has plainly authorized it to levy.

Ibid.; *Ft. Smith & V. Bridge Co. v. Hawkins*, 54 Ark. 509, 12 L. R. A. 487, 16 S. W. 565; *Eagle v. Beard*, 33 Ark. 497; *Cooley*, *Taxn.* 2d ed. 678.

The dog is property, and now has such intrinsic and market value as renders him easily the subject of ad valorem taxation, as other personal property is taxed; and the ordinance violates art. 16, § 5 of the Constitution.

St. Louis S. W. R. Co. v. Stanfield, 63 Ark. 643, 37 L. R. A. 659, 40 S. W. 126; *Mullaly v. People*, 86 N. Y. 365; *St. Louis, A. & T. R. Co. v. Hawks*, 78 Tex. 300, 11 L. R. A. 383, 14 S. W. 691; *Lynn v. State*, 33 Tex. Crim. Rep. 153, 25 S. W. 779; *Citizens' Rapid Transit Co. v. Deu*, 100 Tenn. 317, 40 L. R. A. 518, 45 S. W. 790; *Washington v. Meigs*, 1 MacArthur, 53; *Cranston v. Augusta*, 61 Ga. 573.

Under the ordinance in question the owner of a dog, though he keeps him muzzled and securely confined in his kennel upon his own premises, is subject to fine and imprisonment for the nonpayment of the tax imposed; and the faithful guard dog that never leaves his post of duty day or night, that needs no regulation, must be ruthlessly taken from his own kennel and shot to death without due process of law, if his owner is absent, and

NOTE.—For ordinance providing for the summary destruction of dogs found running at large, see, in this series, *Hagerstown v. Witmer* (Md.) 39 L. R. A. 649, and cases in note on page 674; also *Walker v. Towle* (Ind.) 53 L. R. A. 749.

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For ordinance making a dog liable to be killed by any person unless registered and collared, see, in this series, *Jenkins v. Ballantyne* (Utah) 16 L. R. A. 689.

For property rights in dogs, see *Graham v. Smith* (Ga.) 40 L. R. A. 503, and note.

no one is left to answer for him. This is unwarranted invasion of the rights of property.

St. Louis S. W. R. Co. v. Stanfield, 63 Ark. 643, 37 L. R. A. 659, 40 S. W. 126; *Mullaly v. People*, 86 N. Y. 365; *Lynn v. State*, 33 Tex. Crim. Rep. 153, 25 S. W. 779; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 40 L. R. A. 518, 45 S. W. 790; *Washington v. Meigs*, 1 MacArth. 53; *Cranston v. Augusta*, 61 Ga. 573.

If this court could disregard the agreed facts as to the intent and purpose of the ordinance, and should find that the ordinance was a valid police regulation, and not a measure to raise revenue, then we contend it would still be void because it is shown that the amount charged is greatly in excess of what is necessary.

Taylor v. Pine Bluff, 34 Ark. 603; *Ft. Smith v. Ayers*, 43 Ark. 82; *Fayetteville v. Carter*, 52 Ark. 301, 6 L. R. A. 509, 12 S. W. 573.

Messrs. Crump & Bailey, for appellee: Uniformity of taxation applies to state taxation only.

Washington v. State, 13 Ark. 752; *Baker v. State*, 44 Ark. 137; *Little Rock v. Prather*, 46 Ark. 478.

If this ordinance is an exercise of the police power of the state it is not unconstitutional.

Carthage v. Rhodes, 101 Mo. 175, 9 L. R. A. 352, 14 S. W. 181; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693; *Cole v. Hall*, 103 Ill. 30; *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599; *Mitchell v. Williams*, 27 Ind. 62; *State v. Cornnall*, 27 Ind. 120; *Com. v. Markham*, 7 Bush, 487; *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; *Hendrie v. Kalthoff*, 48 Mich. 306, 12 N. W. 191; *Mowery v. Salisbury*, 82 N. C. 175; *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459; *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152; *Jemison v. Southwestern R. Co.* 75 Ga. 444, 58 Am. Rep. 476; *Cooley, Taxn.* 2d ed. 190, 601, 602, note 5; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 40 L. R. A. 520, 45 S. W. 790.

The amount of the tax is reasonable.

Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693; *Com. v. Markham*, 7 Bush, 487; *Fayetteville v. Carter*, 52 Ark. 301, 6 L. R. A. 509, 12 S. W. 573; *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 374, 19 S. W. 1053.

If the court should think this ordinance an exercise of taxing power, still we think it is valid.

Carthage v. Rhodes, 101 Mo. 175, 9 L. R. A. 352, 14 S. W. 181; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 699, 41 L. ed. 1170, 17 Sup. Ct. Rep. 693; *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599; *Jemison v. Southwestern R. Co.* 75 Ga. 444, 58 Am. Rep. 476; *Cooley, Taxn.* 2d ed. 4-6; *Little Rock v. Prather*, 46 Ark. 477; *Morey v. Brown*, 42 N. H. 373; *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 680, 30 Pac. 760; *State ex rel. Curtis v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310.

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Battle, J., delivered the opinion of the court:

On the 1st day of August, 1900, Knox Gibson was arrested, under a warrant issued by the mayor of the incorporated town of Harrison, for failing to pay a tax on a dog owned by him for the year 1900, after lawful demand for the tax. He was carried before the mayor, tried, convicted, fined \$5, and ordered to jail, or to be worked on the streets of Harrison until discharged in due course of law, in default of the payment of the fine and costs. He appealed to the Boone circuit court, where he was tried by the court sitting as a jury, convicted, and fined in the sum of \$5. He has appealed to this court.

His offense consisted in a violation of the ordinances of the incorporated town of Harrison in respect to dogs.

On the 10th day of May, 1899, an ordinance of the town was published, which is as follows:

"An Ordinance to Tax Dogs in the Incorporated Town of Harrison, Arkansas.

"There shall be collected on every dog owned and kept in the town of Harrison, over the age of six months, a tax of \$1.50 per annum; the year therefor ending December 31st.

"Every person owning or keeping such dog shall apply to the recorder of said town, and on payment of the sum of \$1.50 shall receive a receipt for said sum, and shall be furnished with a collar and a tag showing that said sum has been paid.

"Every person keeping a dog or dogs subject to this tax in said town of Harrison, without paying such tax, shall be subject to a fine of not less than \$5: provided, that no person shall incur this penalty until five days after they have been notified by the town marshal of their liability to pay said tax, and a failure thereafter to pay the same."

This ordinance was amended by ordinance published June 14, 1899, as follows:

"That where dogs are found about premises in said incorporation on which no tax has been paid as required by said ordinance, that it shall be the duty of the marshal of said incorporated town of Harrison to verbally notify the person in charge of the premises to come forward within three days and pay said tax, and unless said person charged of said premises shall disclaim any ownership in said dog by himself or any member of his family when so notified, or shall fail for three days after said notification to pay tax on said dog, he shall be guilty of a violation of this ordinance, and punishable as provided by said original ordinance.

"Be it further ordained that, if the owner of said premises or person in charge thereof shall disclaim any interest in said dog or claim thereto by himself or any member of his family when notified by said marshal, then it shall be the duty of the marshal to employ some competent person who will take charge of said dog and keep him in some convenient place in the town of Harrison for the period of twenty-four hours, and if during that time no person will pay the tax on

said dog, then it shall be the duty of the person so employed to kill said dog, and remove his carcass beyond the limits of said town.

"Be it further ordained, that it shall be the duty of the said marshal to contract with said person on the best and most reasonable terms that he can with reference to said impounding and killing said dogs at not exceeding 50 cents per head."

The ordinance was further amended in June, 1900, as follows:

"Be it ordained by the town council of the incorporated town of Harrison, that:

"Sec. 1. It shall be the duty of the recorder of said town to procure the proper number of tags and collars for the dogs subject to taxation in said town, and that he shall furnish the same to all who apply on or before the 1st day of July, 1900, for such tag and collar, at and for the sum of \$1, for each dog subject to tax in said town. After the said 1st day of July all persons shall be liable to pay the full amount of tax required by the original ordinance, to wit, \$1.50 for each dog subject to tax: provided, that where a dog is brought into town or becomes of the age for which tax is required after the said 1st day of July, 1900, he shall have fifteen days after said dog becomes subject to taxation in which to pay the said \$1.00, and failing to pay in said time he shall be required to pay said sum of \$1.50.

"Sec. 2. That the marshal shall, by and with the consent of the mayor, appoint some suitable person to collect the tax from those who fail to procure from the recorder the tag and collar aforesaid, or to take charge of and kill or otherwise dispose of said dog, for which he shall be allowed the sum of 50 cents for each tax so collected or each dog so killed or disposed of according to said ordinance."

The only evidence adduced in the trial of this cause in the circuit court was the foregoing ordinances and an agreed statement of facts as follows:

"*Town of Harrison v. Knox Gibson.* It is hereby agreed between the attorneys for the plaintiff and the attorneys for the defendant that at and before the issuance of the warrant of arrest in this case by the mayor of the incorporated town that the said Knox Gibson owned and kept in the limits of the town of Harrison a dog over six months of age; that he had failed to pay the tax provided for in the ordinance of said town; that he failed to pay the same on or before the 1st day of July, 1900; that he had been verbally notified for more than three days to come forward and pay the tax on said dog, which he had failed and refused to do.

"It is further agreed that the ordinance is intended to tax for revenue, and not to regulate the running at large of dogs; that the expense of procuring the collar and the tag thereon would not exceed the sum of 20 cents."

There is a discrepancy between the ordinances and the agreed statement of facts. In 54 L. R. A.

the agreed statement of facts it is stated that the ordinances were intended to tax for revenue, and not to regulate the running at large of dogs, and the ordinances show that they were intended to regulate, and that the \$1.50 or \$1 was imposed as a fee for the privilege of keeping a dog. This fee was not to be collected as a tax. If the owner failed to pay it after demand, he was subject to a fine of not less than \$5. Upon payment of the fee he was furnished with a receipt for the same, and a collar and tag, which was, manifestly, intended to be worn by the dog. It is made the duty of the marshal of the town, upon finding a dog upon any premises within the corporate limits, for the keeping of which no fee has been paid, to notify the person in charge of the premises to pay the tax; and such person, unless he, for himself and every member of his family, disclaims ownership of the dog, or pays the fee for keeping him, is punishable as provided by the ordinances. All dogs for which the fees are not paid, upon certain proceedings had, are required by the ordinances to be killed. All these requirements and regulations show the object of the ordinance to relieve the town of the worthless dogs, and to limit the right to keep dogs to those which the owners find sufficiently useful to justify them in paying the fee.

These ordinances, so far as it is necessary for us to consider them, are valid as police regulations. Section 5138 of Sandels & Hill's Digest authorizes the councils of all municipal corporations in this state "to prevent the running at large of dogs, and injuries and annoyances therefrom, and to authorize the destruction of the same, when at large, contrary to any prohibition to that effect." Under the power to prevent injuries and annoyances therefrom (the dogs), the town council of the incorporated town of Harrison had the authority to enact the ordinances in question.

Ordinances and statutes of the general character of those in question have been enacted in other states, and have been generally, if not universally, upheld by the courts. In the state of Kentucky the charter of the city of Frankfort delegated to its council authority to make by-laws for the comfort and security of its citizens. A penal ordinance for security against pestilent dogs not seeming, on trial, sufficient for the end, the council adopted the following supplemental provision: "That all persons owning or controlling dogs within the city of Frankfort are hereby required annually on the 10th day of April to apply to the city clerk to register, and procure a brass collar, duly stamped, for each dog, and pay to the clerk at the time of registry a tax of \$2 for every dog so owned and registered; which tax the clerk shall pay into the city treasury. Any person failing to comply with the provision of this ordinance shall, on conviction before the police judge, be fined the sum of \$5 for each day of failure and for each dog owned or controlled by him not registered as aforesaid. The marshal or any police officer shall forthwith kill any dog found upon the streets

without such collar as procured from the city clerk."

In *Com. v. Markham*, 7 Bush, 486, the court of appeals, in speaking of the "tax of \$2 for every dog," said: "But, though called a tax, yet it is, in our opinion, not a revenue levy in either purpose or operation. It was obviously intended as a police regulation for reducing the number of mischievous dogs, getting clear of the worthless, and securing the owners of the most valuable and harmless against unauthorized and wanton destruction; and, thus interpreted, the ordinance is a license law, \$2 the price of the license or 'tax' for the privilege, and the collar and stamp are passports for the security of registered dogs. Presuming that the owners of worthless or pestilent dogs would not pay such a tax for such a license, the expulsion or destruction of inferior or dangerous dogs, as well as protection to the useful class, was the constructive aim of this enactment by the council." *Mitchell v. Williams*, 27 Ind. 62; *Ex parte Cooper*, 3 Tex. App. 482, 30 Am. Rep. 152.

In *Sentell v. New Orleans & O. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, "a statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that in a civil action for killing a dog the owner cannot recover beyond the value fixed by himself in the last assessment preceding the killing," was held to be within the power of the state. Mr. Justice Brown, in speaking for the court, said: "They [dogs] have no intrinsic value,—by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited extent), nor for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness. As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the

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worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. Acting upon the principle that there is but a qualified property in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police power of the several states. Laws for the protection of domestic animals are regarded as having but a limited application to dogs and cats, and, regardless of statute, a ferocious dog is looked upon as *hostis humani generis*, and as having no right to his life which man is bound to respect." Again, he says: "Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy, and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog, or to fix the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the state. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved; but other remedies are not uncommon."

We have quoted at length from opinions in cases to show that the ordinances in question are valid police regulations, and the reason why they should be treated as such. But appellant says that in the agreed statement of facts, upon which the issues in the case were tried, the parties agreed that the sum required to be paid for the privilege of keeping a dog was a tax. That is true; but this statement in that respect was manifestly an expression of an opinion, and was not binding upon the court. The ordinances show that it was a license fee.

Judgment affirmed.

CALIFORNIA SUPREME COURT (In Banc).

Mark M. MEHERIN, Assignee, etc., of California Steamship Company, *Respt.*,

v.

Thomas AMBROSE, Impleaded with J. N. Saunders, Constable, etc., *Appt.*

(131 Cal. 681.)

1. A purchaser at execution sale cannot defeat an action to compel him to comply with his bid, on the ground that the sale was not wholly for cash, as required by statute.
2. A suit to compel a purchaser at execution sale to comply with his bid cannot be defeated because the statute, upon such failure, requires a resale of the property, making the purchaser liable for the costs and deficiency, where he induced the officer to forego that course, gave his check for the balance, and received and retained a certificate of sale.
3. The return of the officer selling property under execution, that it sold for a certain sum, is not conclusive in favor of the purchaser that the price was paid.
4. That the property had been sold at a former execution sale under another judgment will not absolve a purchaser at execution sale from complying with his bid.
5. The judgment debtor may maintain a suit against the purchaser at execution sale to recover the excess of the bid over the amount of the judgment, upon the neglect or refusal of the officer to bring the suit until it is about to be barred by the statute of limitations,—especially where the officer has surrendered the evidence of indebtedness and become insolvent, and the liability of the sureties is exhausted.
6. Under a statute requiring the officer selling property under execution to return to the execution debtor any excess in the proceeds of the sale over the judgment, in case the officer takes a check for such excess, which he wrongfully surrenders to the purchaser, the judgment debtor may as equitable assignee maintain an action to enforce payment of its amount, against the purchaser, although he has recovered judgment against the officer for the amount, which has proved unavailing because of his insolvency.
7. Receipt of the officer's deed is not a condition to liability to comply with a bid at execution sale by one who has received the officer's certificate of sale.
8. In case an officer selling property at an execution sale takes a check for the excess of the bid over the judgment, the right of the judgment debtor as an equitable assignee to enforce payment of the check is governed by the statute applicable to the limitation of actions on written instruments, and not by that applicable to actions not founded on instruments in writing.
9. A creditor of an insolvent debtor, who bids in the debtor's property at an execution sale for an amount in excess of the judgment, cannot set off his claim against the amount of his bid to which the debtor is entitled.

NOTE.—As to right to set off insolvent's obligation upon claim in hands of receiver or assignee or trustee for creditors, see *Merrill v. Cape Ann Granite Co.* (Mass.) 23 L. R. A. 313, and *note*.

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10. Any right which a creditor of an insolvent has to set off his claim against the surplus of his bid at an execution sale of the debtor's property must be exercised when he proves his claim in the insolvency proceedings against the debtor, and is waived by proving for and receiving a dividend on the whole amount of his claim.

11. A claim against an insolvent which has been proved in the insolvency proceedings has ceased to be an existing cause of action so as to be a valid counterclaim against a demand by the insolvent's assignee, where the statute provides that no creditor proving his debt shall be allowed to maintain any action therefor against the debtor.

(*McFarland, Garoutte, and Harrison, JJ., dissent.*)

(February 25, 1901.)

APPEAL by defendant Ambrose from a judgment of the Superior Court for Santa Barbara County in favor of plaintiff in an action brought to recover the balance alleged to be due on a bid for property sold at execution sale. *Affirmed.*

The case was first heard in department, and the judgment of the trial court was reversed, whereupon a petition for rehearing in banc was filed, after which the following opinions were handed down.

The facts are stated in the opinions.

Mr. A. Morgenthau, for appellant:

The sale was void because the money was not paid. Our statute provides that such sale must be for cash, and the sale referred to in the complaint was so advertised.

People ex rel. Kohler v. Hays, 5 Cal. 68; *Asken v. Ebberts*, 22 Cal. 264.

Unless the sale was for cash there was no sale.

Murtree, Sheriffs, 2d ed. § 993.

The return made by the constable is conclusive upon the California Steamship Company, and if false can only be corrected in the action where made.

Egery v. Buchanan, 5 Cal. 56.

To recover the purchase money for the sale of real property the deed should be tendered. The complaint should allege a tender of the conveyance.

Bohall v. Diller, 41 Cal. 533; *Kelly v. Mack*, 45 Cal. 303.

The statute of limitations cannot be avoided in a case where the facts are sufficient to put a person of ordinary intelligence and prudence on inquiry as to the truth.

Bills v. Silver King Min. Co. 106 Cal. 10, 39 Pac. 43; *Vigoureux v. Murphy*, 54 Cal. 346.

On petition for second rehearing.

Meers, John Garber and R. Percy Wright, also for appellant:

The sheriff or constable who receives a bid at a sale under execution is the only person who can maintain an action to recover the amount unpaid by a purchaser on his bid.

Armstrong v. Vroman, 11 Minn. 220, Gil.

142, 89 Am. Dec. 81; *Gaskell v. Morris*, 7 Watts & S. 32; *State v. Stelle*, 103 Ill. 467; 15 Enc. Pl. & Pr. pp. 497, 498; *Larned v. Carpenter*, 65 Ill. 543.

No one can maintain an action upon a promissory note unless he has the legal title to it, and one who has an equitable right to a part of the proceeds when collected cannot sue thereon.

Curtis v. Sprague, 51 Cal. 239.

The respondent has never acquired any interest, either legal or equitable, in the money which the appellant agreed to pay to the constable for the property offered for sale by him on October 24, 1891.

If the action in the case at bar could be maintained by the respondent to recover from the appellant the balance of the sum bid by him at the constable's sale on October 24, 1891, it was not commenced until long after the statute of limitations had become a bar to it.

The check for \$9,145, given by the appellant to the constable on October 24, 1891, was unlawful and void. The constable had no authority to receive anything but money in payment of the amount due on his bid.

Dazet v. Landry, 21 Nev. 291, 30 Pac. 1064; *People ex rel. Kohler v. Hays*, 5 Cal. 68; *Askeo v. Ebberts*, 22 Cal. 264; *The Haytian Republic*, 64 Fed. 215; *Ex parte State and State Bank*, 15 Ark. 263; *State v. Lawson*, 14 Ark. 114; *Dickenson v. Gilliland*, 1 Cow. 481; *Gasquet v. Warren*, 2 Smedes & M. 514; *Jones v. Thacker*, 61 Ga. 329.

The judgment debtor and the appellant could have entered into an express agreement that the constable should receive a check or a promissory note in payment of the amount due from the appellant in respect of his bid.

Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151.

Without such agreement, however, the check or note would have no lawful consideration to support it, and the certificate of sale given by the officer would be illegal and void.

Liggett v. Firestone, 96 Ind. 260.

If the statute permitted a sheriff or constable to accept a check or a bill of exchange in lieu of money, in payment of the amount bid at an execution sale, the respondent could not maintain an action upon the check given by the appellant.

To maintain an action upon a check, or on a bill of exchange, the plaintiff must be the holder of it, and have the legal right to receive the money due and unpaid thereon.

Byles, Bills, 3d ed. p. 410; 2 Parsons, Notes & Bills, p. 438; *National Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897; Pom. Eq. Jur. 2d ed. § 365.

Messrs. Grant Jackson and Mullany, Grant, & Cushing, for respondent:

In making and conducting sales under execution the officer acts as agent for the execution creditor to the extent of his judgment, and for the execution debtor to the extent of the surplus that may remain; and the contracts and proceedings by the officer with the purchaser are made and transacted 54 L. R. A.

for the benefit of the creditor and the debtor, respectively.

Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44; *Wilkins v. Wilson*, 51 Cal. 212; *Herman, Executions*, § 297; *Armstrong v. Vroman*, 11 Minn. 220, Gil. 142, 88 Am. Dec. 81; *Robinson v. Garth*, 6 Ala. 204, 41 Am. Dec. 47.

It was as much the duty of this officer to collect this balance of \$9,145 for the judgment debtor, whose property he sold therefor, as it was to collect the \$855 for the judgment creditor.

Cooper v. Galbraith, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; *Swortzell v. Martin*, 16 Iowa, 519; *Conway v. Nolte*, 11 Mo. 74; *McKnight v. Gordon*, 13 Rich. Eq. 222, 94 Am. Dec. 164; *Kilgore v. Peden*, 1 Strobb. L. 18.

Even where a resale can be made, it is optional with the officer whether he shall resell or not; and the purchaser is in no position to claim that his liability upon his bid should be substituted for a liability based upon the bid of another at a resale.

Armstrong v. Vroman, 11 Minn. 220, Gil. 142, 88 Am. Dec. 81; *Robinson v. Garth*, 6 Ala. 204, 41 Am. Dec. 47; *Herman, Executions*, § 211; 2 Freeman, Executions, § 313d; Cal. Code Civ. Proc. § 695.

In making a sale under execution, the officer professes to sell only the interest or estate of the judgment debtor in the premises. He is not bound to convey with a warranty; neither does the law imply one.

The rule *caveat emptor* applies.

Rorer, Judicial Sales, § 57; *Cameron v. Logan*, 8 Iowa, 434; *Hamsmith v. Espy*, 19 Iowa, 444; *Dean v. Morris*, 4 G. Greene, 313; *Coyne v. Souther*, 61 Pa. 457; *Lang v. Waring*, 25 Ala. 625, 60 Am. Dec. 533.

Even if the officer sold on credit at the instance of both the plaintiff and defendant, and a note was given for the purchase price, the failure of the title could not be set up as a defense to the note.

Kilgore v. Peden, 1 Strobb. L. 18; *Rorer, Judicial Sales*, § 60.

The officer owed the duty to collect this balance of the purchase price, to the judgment debtor, for whom this entire balance was to be collected.

Code Civ. Proc. § 691; *Cooper v. Galbraith*, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; *Swortzell v. Martin*, 16 Iowa, 519; *Conway v. Nolte*, 11 Mo. 74; *McKnight v. Gordon*, 13 Rich. Eq. 222, 94 Am. Dec. 164; *Kilgore v. Peden*, 1 Strobb. L. 18.

The plaintiff is the real party in interest, and is the proper party entitled to recover from Ambrose the balance of the purchase price of the property of plaintiff's assignor.

Baker v. Bartol, 7 Cal. 551; *Western Development Co. v. Emery*, 61 Cal. 611; *Kreutz v. Livingston*, 15 Cal. 344; *Morgan v. Overman Silver Min. Co.* 37 Cal. 535; *Daley v. Cunningham*, 60 Cal. 530; *Flint v. Cadenasso*, 64 Cal. 83; Code Civ. Proc. § 367.

On petition for rehearing.

The defendant Ambrose was not entitled,

under any circumstances, to set off the indebtedness of the insolvent debtor against the check given to the constable for the purchase price of the property bought at the sheriff's sale.

Bump, Bankruptcy, 11th ed. p. 484; Freeman, Executions, § 300.

Assuming that Ambrose was entitled to set off against the check an equal amount due him from the judgment debtor, yet this was a privilege that Ambrose might or might not avail himself of, and Ambrose did not exercise this right or privilege.

Ambrose, having proved his demand, and having established it for the full amount in the insolvency proceeding, has not only exhausted the right and obtained all the relief pertaining to the demand, but has prevented himself from prosecuting the same demand by plea of off-set in the present action.

Insolvent Act, § 45; James, Bankrupt Law, § 21; Bump, Bankruptcy, 11th ed. 491; *Brown v. Farmers' Bank*, 6 Bush, 198; *Russell v. Owen*, 61 Mo. 186.

Beatty, Ch. J., delivered the opinion of the court:

This is an action by the assignee of an insolvent corporation to recover from the defendants the unpaid balance of the sum bid by the defendant Ambrose for certain real property of the corporation which was sold under execution by the defendant Saunders. In the trial court Saunders made default, but Ambrose defended the action, and he now appeals from a judgment for the plaintiff, and from an order denying his motion for a new trial.

The facts involved in several of the points argued by counsel are somewhat complicated, and may be more conveniently stated in detail as the discussion proceeds, but it will be necessary at the outset to indicate the general nature of the case. The defendant Saunders, a constable, in October, 1891, sold under execution certain real property of the California Steamship Company. Defendant Ambrose was the purchaser, and the amount of his bid was \$10,000, of which he paid in cash \$855. For the balance of \$9,145 he gave Saunders his check on Donahue, Kelly & Co., and received from him a certificate of sale, which he thereafter retained. A duplicate certificate was duly recorded by Saunders. After getting his certificate of sale, Ambrose stopped payment of his check, and it was never paid, nor was any attempt ever made by Saunders to enforce payment. Within twenty days after said sale the steamship company was adjudged an insolvent, and in due course the plaintiff was appointed and qualified as assignee. Saunders having accounted for only \$855 of the sum bid at the execution sale, the plaintiff commenced an action against him and the sureties on his official bond, in which he recovered a judgment against Saunders for the balance of \$9,145, and against his sureties for \$1,000, the full penalty of their bond. That judgment was affirmed by this court, and the opinion there delivered (110 Cal. 463, 42 Pac. 966) states the most important

facts involved in the present litigation. On the trial of that action, in June, 1894, the plaintiff learned for the first time of the giving of the check by Ambrose to Saunders for the unpaid balance of his bid, of his subsequent stoppage of payment of the check, and of the redelivery of the check by Saunders to Ambrose, by whom it had been destroyed. On the affirmance of the judgment in *Meherin v. Saunders and His Sureties*, Ambrose paid the \$1,000 due from the sureties, but nothing more has ever been paid on said judgment. The execution against Saunders was returned unsatisfied, and he was then, and has since continued to be, totally insolvent. In the opinion delivered in *Meherin v. Saunders* it was intimated that Saunders had a right of action against Ambrose to recover the balance of his bid at the execution sale, as undoubtedly he had; but he never took any steps to enforce payment, and thereupon the plaintiff commenced this action on September 28, 1895, less than a month prior to the date when an action on the check would have been barred by the statute of limitations. The trial court credited the defendants with \$1,000, the amount paid by Ambrose on the judgment against the sureties of Saunders, and rendered a judgment in favor of the plaintiff for \$8,145, and interest from October 24, 1891, the date of the execution sale and of Ambrose's check. On his appeal from the judgment and order denying a new trial, the defendant Ambrose assails both the findings and the conclusions of the superior court, and also contends that the complaint fails to state a cause of action. As to the findings of fact, we think they were in every material respect fully sustained by the evidence. The finding that plaintiff was not informed that Ambrose had paid only \$855 on his bid prior to the trial of *Meherin v. Saunders* is contrary to the evidence, for it clearly appears that plaintiff received that information immediately after his appointment as assignee. The fact which first came to his knowledge during the trial of *Meherin v. Saunders* was not that Ambrose had failed to pay any more than \$855, but that he had given a check on Donahue, Kelly & Co. for the balance of his bid; that he had stopped payment of that check, and afterwards got it into his possession and destroyed it. As to this matter alone the findings are contrary to the evidence, but the facts found and the actual facts are alike immaterial. In all other particulars there is substantial evidence to support the findings, though as to some matters there is a sharp conflict. The remaining points urged by appellant will be considered in their logical order.

1. He contends that the complaint shows that no sale of the corporation's property was made. The statute, he says, furnishes the exclusive rule for execution sales, and an essential part of the rule is that every such sale must be for cash, whereas this sale was made, at least in part, upon a credit. This, I think, is an objection to the sale which it does not lie in the mouth of the

appellant to make, even if it were technically sufficient. But it is not sustained by the allegations of the complaint. They show that the sale was made as such sales are usually made, and in pursuance of the statutory notice. It was, therefore, a sale for cash; and Ambrose, by his bid, agreed to pay cash. There was no fault in the mode of conducting the sale, but merely a failure on the part of the appellant to perform his promise to pay. It is true that under the statute (Code Civ. Proc. § 695) the constable, upon the refusal of appellant to pay the full amount of his bid, might have resold the property, in which case appellant would have been liable for the costs of the resale, and for any deficiency in the price realized, but the officer was induced by the appellant to forego this course. He accepted a check in lieu of cash upon the implied, if not the express, representation of appellant that it was the equivalent of cash. He issued and recorded a regular certificate of the sale. He applied the cash actually received to the satisfaction of the judgment under which the property was sold, and of other judgments, executions upon which he had in his hands. He made his return accordingly, and thereby made himself accountable to the steamship company for the full amount of appellant's bid. *Meherin v. Saunders*, 110 Cal. 463, 42 Pac. 966. Under these circumstances, it is too late for the appellant to say that there was no liability upon his part to pay the sum covered by his check. Besides, his liability is not a mere statutory liability, if there were any merit in that contention, but is a common-law liability arising out of an express promise to pay, based upon a good and valuable consideration.

2. The second proposition of appellant is that the California Steamship Company is concluded by the return of the constable to the effect that the property was sold for the sum of \$10,000. If this proposition were conceded, it is difficult to see what bearing it would have on the present controversy; for the plaintiff, so far from contesting that part of the return, is insisting upon it, and is seeking only to recover the unpaid balance of the price bid. But I suppose the appellant means to claim that the return is conclusive in his favor that he paid the \$10,000 in full. If so, the authorities he cites do not sustain his contention. They are to the effect that the return of an officer upon an execution is—with some important exceptions—conclusive upon the parties until vacated. But appellant was not a party to the action in which the execution issued, and is neither bound by the return nor protected by it. Whether he paid the bid or not is a question to be decided upon evidence *aliunde*.

3. The proposition is not distinctly advanced by appellant, but he seems to claim that he incurred no liability by his bid, because without his knowledge the property in question had been previously sold to another purchaser on execution under another judgment against the steamship company. It is

true, the property had been sold a few days prior to the sale to appellant, but under a judgment which was a junior lien, so that the appellant by his subsequent purchase obtained the superior title. It would have made no difference, however, if the first sale had been under a prior lien; for the rule of *caveat emptor* applies to execution sales, and there would still have remained a right of redemption in the steamship company after the first sale. As it was, the purchaser at the first sale got only a right to redeem from the second sale, and this fact may account in some measure for the full price bid by the appellant.

4. It is contended that there is no privity of contract between the judgment debtor and the purchaser at the execution sale, such as is essential to sustain an action by the former to recover from the latter the unpaid surplus of his bid over and above the amount required to satisfy the execution. Upon this point counsel for respondent are challenged by appellant to cite a case in which a judgment debtor has ever recovered such surplus or balance in the absence of an express agreement between the debtor and purchaser. No case exactly in point is cited in response to this challenge, but the principles which support the position of the respondent are unquestionable. The right of the officer who conducts the sale to sue for the unpaid purchase money is not disputed, but it is claimed that he, and he alone, can maintain the action. Ordinarily, no doubt, the officer is the proper party to bring the action; for it is only by collecting the full purchase price that he can fulfil the commands of the writ. He stands in the position of a trustee as to the proceeds of the sale for all parties interested,—for the execution creditors, to the extent of their interest, and for the judgment debtor as to the surplus. He also has an interest in the fund to the extent of his fees and commissions. For these reasons such an action by the sheriff was sustained by the supreme court of Alabama. *Robinson v. Garth*, 6 Ala. 204, 41 Am. Dec. 47. But in that case the court said (p. 209): "We do not doubt that those for whom the sheriff acts, and who are interested in the money to be recovered, may also maintain the action," etc. The principle of that decision was that the sheriff, being the trustee of an express trust, could and ought to sue for the benefit of his *cestuis*, but that his right to sue did not exclude a similar right in the beneficiaries. In this case the trustee has utterly failed and neglected to sue, and the right of action was about to be barred by the statute when the beneficiary commenced this suit, making the trustee a party defendant, and alleging all the facts constituting his equitable right. He shows that the trustee is insolvent, that he has surrendered and permitted the destruction of the written instrument upon which the action could be most clearly sustained, that the liability of his sureties is exhausted, and, in short, that, without action on plaintiff's part, a large portion of the price of his insolvent's land will be irre-

coverably lost. It cannot be doubted that, if Saunders had sued in his own name and recovered the amount of appellant's check, he would have held the proceeds as trustee for plaintiff, and that every cent of it would have been assigned to the plaintiff by any insolvency court having jurisdiction of Saunders' estate, to the exclusion of his general creditors. It cannot be doubted that, if Saunders had commenced the action in his own name, the interest of plaintiff would have entitled him to intervene and take control of the litigation, upon the ground that he was the real party in interest, and more especially by reason of the insolvency of Saunders. These things being so I cannot understand why, upon showing the neglect of Saunders to sue, the plaintiff could not commence the action himself, making Saunders a party. The result is that the same parties are before the court that would have been before the court if Saunders had done his duty by commencing the action, and plaintiff had exercised his clear legal right by intervening. All the facts were fully disclosed by the pleadings, and the court was in a position to do full and complete justice in the premises. There is another sufficient answer to the technical objection of want of privity. By § 691 of the Code of Civil Procedure it is made the duty of the officer holding the execution, in the absence of other specific direction of the court, to return to the judgment debtor any excess in the proceeds of the sale over the judgment and accruing costs. In this case there was no specific direction as to the surplus, which was exactly represented by appellant's check. This check was not cash, and the judgment debtor could not have been compelled to take it. But that objection could have been waived, and, if waived, it would have been the duty of Saunders, under the statute, to transfer the check. It is, indeed, true that the plaintiff never formally demanded a transfer of the check (he never knew of its existence until it had been surrendered and destroyed), and he never waived his right to the cash; but his present action is founded upon the obligation arising out of the nonpayment of that check, and he is entitled to be treated as the equitable assignee. Equity deems that to be done which ought to be done. Saunders ought to have sued on the check, or to have assigned it to the plaintiff so that he could sue. Not having sued himself, he will be deemed to have assigned his right of action to plaintiff. Of this view he cannot complain, and still less can the appellant complain. The necessary privity of contract in this case is worked out by operation of law.

5. It is contended that the plaintiff cannot maintain this action because he does not show that he is willing or able to procure for the appellant the constable's deed. To sustain this proposition, counsel cites *Bohall v. Diller*, 41 Cal. 533, and similar cases. Such cases have no application here. A purchaser at execution sale must pay when the certificate of sale is delivered. He gets his deed in due course upon demand of the of-

ficer. Appellant received his certificate of sale at the date of the sale, and the whole amount of his bid was then payable.

6. If we are correct in holding that plaintiff can maintain this action as equitable assignee of defendant's check, or as the real party in interest, because of the default of his trustee, the plea of the statute of limitations is disposed of. The action was commenced within four years from the date of the check.

7. At the date of the execution sale the California Steamship Company was indebted to the appellant in about the sum of \$27,000, upon which the appellant had commenced an action and issued attachments, which he had caused to be levied on the property which he afterwards purchased. The subsequent adjudication of the company's insolvency, made within thirty days after the commencement of that suit, dissolved the attachment, and appellant thereupon proved up his claim for the full amount in the insolvency court. This was done subsequent to his purchase at the execution sale, and after he had stopped payment of his check. In proving his claim in the insolvency proceedings he made no deduction on account of the unpaid balance of his bid at the execution sale, but asked and obtained the allowance of the whole of his original claim, undiminished, and when a dividend was declared by the assignee he claimed and received the sum apportionable to the full amount of his original demands. The dividend was only a fraction over 4 per cent of the company's indebtedness, however, and the amount still due the appellant is largely in excess of the unpaid portion of his bid at the execution sale. Upon these facts the appellant contends that the trial court erred in refusing to set off his claim upon the insolvent company against the present claim of plaintiff. To this assignment of error the respondent makes three answers: First, that Ambrose never had a right to set off his claim against the steamship company; second, that, if such right ever existed, he waived it at the time he should have exercised it; and, third, that he is estopped to claim a right of set-off by his claim and acceptance of the dividend in the insolvency proceeding on the whole amount of the original indebtedness of the steamship company. I think the position of the respondent must be sustained on every point.

This case presents a question very different from that which arises in the ordinary case of cross demands or mutual credits. The real question is not whether cross demands may be compensated by setting off one against the other, but is, rather, a question whether a creditor of an insolvent can by his unlawful act defeat the clear and undoubted policy of the insolvency laws, and give himself a preference over other creditors; whether, in other words, he can, against the will of the insolvent debtor, and in violation of his legal rights, secure a preference which could not be secured by their voluntary and concurrent action. Under the provisions of § 55 of the insolvency act, it is

perfectly clear that if a debtor in contemplation of insolvency should make over to one of his creditors a valuable asset in consideration of the release of his demand,—the creditor having reason to know the debtor's condition,—the transaction would be set aside as a fraud upon the other creditors. And, if this is so,—if the insolvent cannot give a preference, when he desires to do so, by a voluntary transfer of his property,—it certainly must be allowed that the creditor cannot secure the same preference by unlawfully taking or withholding the property and offering to credit its value. This, however, is precisely what Ambrose is seeking to do in this action. The steamship company did not make a voluntary sale of its property on credit to Ambrose, or to anyone. The property was seized upon by an officer of the law who was empowered to sell enough of it to satisfy his execution, or to sell the whole of it for cash, and after satisfying the execution to return the surplus to the owner. If this course—the course enjoined by the law—had been pursued, the constable would not have taken Ambrose's check for \$9,145 in lieu of cash, but would have taken the cash itself and paid it over to the company, by whom it would have been turned over to its assignee as a part of the fund for the satisfaction of the claims of its general creditors, including Ambrose. By imposing upon the constable, and violating the right of the steamship company to receive the cash, Ambrose seeks to put himself in the attitude of a debtor of the corporation, with a right to extinguish his indebtedness by a set-off, dollar for dollar, where other creditors must be content with a modest dividend. To sustain him in this position is to allow him to take advantage of his own wrong, and to hold that the policy and plain directions of the law can be defeated by a violation of the law. The doctrine of set-off is pre-eminently an equitable doctrine, and is none the less so by reason of its embodiment in our statutes. Upon a claim of set-off, equity will work out the result that would have followed if that had been done which ought to have been done. If Ambrose had paid the full amount of his bid, as he ought to have done, the plaintiff, as assignee of the insolvent corporation, would have had \$9,145 to divide evenly between him and the other creditors. The result of this judgment is to bring about exactly that condition, while to allow the claim of set-off which he asserts would be to give him the whole \$9,145, and leave the other creditors no part of it.

But, even if it were conceded that a right of set-off could exist under such circumstances, it is certain that the time to exercise it was when Ambrose proved his claim in the insolvency proceedings. If the cross demands were of such a nature that one compensated the other, he had no valid claim for more than the balance. But he claimed and was allowed the whole of his original demands, undiminished; and this allowance of his claim was, like a similar allowance in probate proceedings, the equivalent of a

judgment,—a judgment to be paid in due course of administration. To make this claim and secure its allowance was, therefore, a solemn admission on his part that he had no right to set off the unpaid balance of his bid at the execution sale, but that he must discharge that liability in full, and content himself with the dividend apportionable to the full amount of his original demands. I think it clear that he was well advised in making this admission, and pursuing the course that he did. But, whether well or ill advised in this matter, he certainly went too far to recede when he claimed and accepted a dividend on the whole amount of his original demands. If the right of set-off existed, and the two claims compensated each other, he was entitled to a dividend on a balance of only about \$20,000, but he claimed and accepted a dividend on over \$29,000. That is to say, about one third of what he received was money to which he had no right, and it was money of which the other creditors were wrongfully deprived. For the purpose of drawing a dividend in the insolvency proceeding he acts upon the theory that there is no set-off, and that the cross demands are uncompensated. Having in this way appropriated to himself money that on his present theory belonged to other creditors, can he be allowed now to shift his ground, and upon a totally inconsistent theory withhold the fund out of which the other creditors would receive a dividend? It is to my mind clear that he cannot. He is estopped.

These views are, I think, amply sustained by authority, and even by the letter of our statutes. A counterclaim capable of being set off in an action must be in itself an existing cause of action. Was appellant's claim against the steamship company an existing cause of action when he sought to avail himself of it as a counterclaim? Section 45 of the insolvency act furnishes the answer to this question: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the debtor, but shall be deemed to have waived all right of action and suit," etc. The case of *Brown v. Farmers' Bank*, 6 Bush, 198, is on all fours with this case. I quote the following from the opinion of the court of appeals: "And to the set-off so pleaded the plaintiff filed a reply, setting forth that before he brought this action the defendant had, in the proper proceedings which were pending in bankruptcy, presented and proved and verified for adjudication and allowance against the estate of each of said bankrupts the whole amount of each of said debts, without giving or allowing any credit on either of them for the \$200.04 in controversy, and that said debts, having been proved in bankruptcy, were beyond the defendant's control. . . . In our opinion, proving the entire debts in the proceedings in bankruptcy, without offering to abate the claims by the amount of said deposit, was a waiver of the right to do so, and an election to proceed in said claims alone in the proceedings in bankruptcy, and that the

subsequent assertion of part of the same debts by plea of set-off in this action was equivalent to the prosecution of an original suit upon the claims against the prohibition of the bankrupt law." *Russell v. Owen*, 61 Mo. 186, is a case of the same complexion, and this is from the opinion of the court: "The chief question for determination in this case is whether a creditor who, in making proof of his claim before the register in bankruptcy, omits to show that the bankrupt has an unsatisfied claim against him, can, when sued by the assignee for the amount of such unsatisfied and omitted claim, plead as a set-off the amount allowed by the register as a balance due to him. This question must receive a reply in the negative. . . . When a party defendant pleads a set-off, he, in effect, brings an action for the amount of that set-off, but by presenting and proving his claims before the register the creditor is to be deemed as waiving 'all right of action or suit against the bankrupt.' It would be clearly contrary, therefore, to the evident intent of the above-recited sections to allow a creditor to do that indirectly which the law precludes him from doing directly,—to accomplish by way of set-off that which he would be debarred from asserting in a direct action. The same view of this point is taken elsewhere. (*Brown v. Farmers' Bank*, 6 Bush, 198.)" And see notes to § 21, James, Bankrupt Law; Bump, Bankruptcy, 9th ed. 684, 11th ed. 491.

The superior court did not err in denying the right of set-off.

Judgment and order affirmed.

We concur: **Van Dyke, J.; Temple, J.; Henshaw, J.**

McFarland, J., dissenting:

I dissent, and think that the judgment should be reversed. Apart from the very close questions of law which arise in the case, by which, of course, it must be determined, it is proper to remark that it would be a great hardship to compel appellant to pay the large amount of money and interest claimed to be due respondent on the bid at the constable's sale. Appellant had advanced to the California Steamship Company large sums of money, at one time amounting to \$86,000. At the time of the constable's sale the company owed appellant about \$28,000. He paid \$855 on his bid; he also paid \$1,000 on the judgment recovered against the constable and his sureties; he also paid several hundred dollars on a former sale of the same property; and he not only loses all of this, with the exception of a very small percentage coming from the effects of the insolvent corporation, but must now pay in addition the amount of the present judgment, which is for \$11,136.47 and interest. I think that it can be gleaned from the evidence that the bid of \$10,000 was understood by the judgment debtor, by the constable, and by the appellant to be fictitious, except as to the amount necessary to pay off the judgment lien, \$855, 54 L. R. A.

which sum appellant paid to the constable, and that the \$10,000 was bid with the consent of all parties merely to enhance the apparent value of the property; appellant supposing that it would be deducted from the large amount of indebtedness from the company to himself. It is alleged in the complaint that the constable never demanded payment of the check given him by appellant for \$9,145. The judgment debtor, before it went into insolvency, never made any objection to the nonpayment of the balance of the bid. Payment of the check was immediately stopped by notice of appellant, no demand was ever made on the bank on which it was drawn for its payment, and the check was destroyed. No proceedings were taken under § 695, Code Civ. Proc., to have the property resold. This action was not commenced until nearly four years after the date of the bid. There is no finding as to the actual value of the property, and no evidence going very directly to that point, but there is evidence tending to show that it had no value approaching the amount of the bid. Under these circumstances, the appellant should not be compelled to pay this large sum of money unless strict law inexorably demands it, and I do not think that there is such a demand.

As to the law governing the case, without considering the many other points made by appellant, I will merely say:

1. That in my opinion there was no privity of contract between the respondent and the appellant as to the alleged cause of action, and therefore respondent cannot maintain this action. There are many authorities supporting this view, but it will be sufficient to notice the cases of *Galpin v. Lamb*, 29 Ohio St. 529, and *Adams v. Adams*, 4 Watts, 160, and the cases referred to in the opinions in those cases. In *Galpin v. Lamb* the syllabus, which is a correct statement of the point decided, is as follows: "A judgment creditor cannot maintain an action against a purchaser of real estate at sheriff's sale to recover damages for the breach of the contract of sale." Of course, a judgment debtor is in the same position touching this point as a judgment creditor. In the opinion the court says: "The contract of purchase is made with the officer, as representing all the interests involved in the suit in which the judgment or decree of sale is rendered. He and the purchaser are the only parties to the contract of purchase, and he alone can maintain an action against the purchaser to recover the purchase money. The parties to the judgment or decree have different interests and stand in different relations to the property; some holding the relation of debtor, and others that of creditor. But, however numerous the parties or diverse their interests, the officer represents them all, and none of the parties stand in such relation to the contract of the purchaser as to entitle them to maintain an action on it." In *Adams v. Adams* the syllabus is as follows: "For a breach of contract between a sheriff and his vendee of land no action will lie in the name of anyone but

the sheriff." In the opinion the court says: "The sheriff, in making the contract of sale with James Adams, was not acting as the agent of the plaintiff, nor yet of anyone else. He is considered the principal himself in such cases, and the legal as well as real party making the contract of sale. Although it be true that he acts in the character of a trustee, yet it must be borne in mind that it is as an officer of the law that he does so, and that it is from the law he derives all his power and authority; and, in sales of property made by him as sheriff under this authority, he alone has the right to receive the money arising therefrom, and is responsible for the legal appropriation of it, unless it is brought by him into court for that purpose. It would inevitably produce great confusion and clashing of suits to permit other persons besides the sheriff in their own names to maintain suits against a sheriff's vendees for breaches of their contracts made with him. It would also be inconsistent with every principle of analogy in the law." I have seen no cases where the point was directly involved which are in conflict with the above authorities.

2. Under any view, the action, in my opinion, is barred by the statute of limitations. The alleged action is based upon the bid made by appellant at the sale, and not upon a written instrument, and it cannot be brought within any category of actions not barred in at least three years.

Garoutte, J., dissenting:

I concur generally in the views of Mr. Justice McFarland, but would add an additional suggestion. Though the concession is opposed to all the authorities, let it be assumed that the constable took this check from Ambrose as agent or trustee of the plaintiff,—an act clearly beyond the scope of his authority. Upon this concession, the plaintiff then had either one of two courses open to him: He could ratify the constable's act and take the check, or he could repudiate it and hold him liable for the money he should have received at the sale. Here plaintiff elected to follow the latter course, and recovered judgment against the constable for the full amount of the unpaid purchase price. Having done so, he lost all rights he may have had to the check, and forever afterwards it became the property of the constable. Plaintiff had no right to sue the constable for the unpaid purchase price, and also claim title to the check. These two remedies were absolutely inconsistent with each other, and the adoption of one was a bar to the prosecution of the other. If the plaintiff had taken an assignment of the check from the constable in the first instance, he could not thereafter have sued the constable for the unpaid purchase price; and having first sued the constable for that purchase price, he never thereafter was entitled to an assignment of the check. Conceding that when the first action was brought he did not know that the check was in existence, still that fact is immaterial, for he did know that the purchase price had

not been paid. The foregoing views we believe to be supported by the language of the principal opinion, wherein it is said: "This check was not cash, and the judgment debtor could not have been compelled to take it. But that objection could have been waived, and, if waived, it would have been the duty of Saunders, under the statute, to transfer the check. . . . Equity deems that to be done which ought to be done. Saunders ought to have sued on the check, or to have assigned it to the plaintiff so that he could sue. Not having sued himself, he will be deemed to have assigned his right of action to plaintiff. Of this view he cannot complain, and still less can the appellant complain. The necessary privity of contract in this case is worked out by operation of law." Conceding the foregoing quotation to contain a sound exposition of the law, then the plaintiff, after having brought his action against the constable for the full amount of the purchase price and recovered judgment, would never be declared by the law to be the equitable assignee of the check. It was thereafter the property of the constable, and the plaintiff had no right or title in it. This action cannot be maintained for a moment unless upon the theory that it is an action upon the check. The statutes of limitation absolutely forbid it. The check being the property of the constable, the action must fail.

Harrison, J., dissenting:

The complaint herein is based solely upon the obligation of the appellant to pay the amount of his bid, and upon the right of the plaintiff, as the assignee of the judgment creditor, to recover that amount from him. After setting forth the facts showing the capacity in which the plaintiff brings the action, and the circumstances attending the bid, and its nonpayment, it is alleged that the plaintiff is the owner of and entitled to recover the whole amount "due to the defendant Saunders, as such constable, from the defendant Ambrose on said bid;" and the court finds, as the fact upon which it rendered judgment against the appellant, that the plaintiff is entitled to have and recover the amount "so due and payable to the defendant Saunders, as such constable, from the defendant Ambrose, on said bid, and now due to this plaintiff, as such assignee in insolvency." The plaintiff's entire cause of action rests, therefore, upon the appellant's refusal to pay the amount of his bid. The complaint is framed upon the theory that the amount bid was due from the appellant to the officer, and that by reason of the officer's neglect and default the plaintiff is entitled to maintain a direct action against the appellant for its recovery. I think it is very clearly shown in the opinion of Mr. Justice McFarland that there is no privity between the officer and the judgment creditor, by which the latter is authorized to maintain an action against the purchaser for the amount of his bid; but, if it be conceded that such privity does exist, the creditor can have no greater right of

action than could the officer. The plaintiff has no other cause of action against the appellant than such as existed in favor of his assignor, the steamship company; and that company's right of action, if any existed, accrued October 24, 1891, at the time when the appellant purchased the property at the constable's sale. If the plaintiff's right to maintain the action is to be sustained upon the ground that he is the real party in interest, his right of action can be no greater than that of him who conducted the transaction under which he derived his interest, and by virtue of which he claims to be the interested party. If the appellant would not have been liable to Saunders under the facts alleged and found herein, the plaintiff can have no right of recovery against him. It is very evident that Saunders could not have maintained any action against the appellant for the recovery of the amount of his bid unless it was commenced within two years after the date of the bid; and it is equally clear, upon the facts alleged and shown herein, that at the time the present action was commenced Saunders could not have maintained any action against the appellant upon the check. Not only is it alleged in the complaint that he made no demand for the payment of the check, and that he declined to collect it, but it is also shown that when he received it he inclosed it in an envelope and deposited it in the bank "for safe-keeping" and afterwards, and before the commencement of this action, withdrew it and surrendered it to the appellant. He had the same right to surrender the check to the appellant as he would have had to refuse to receive it at the time of the bid. Having thus voluntarily parted with it, he could not thereafter maintain any action upon it, and his only right of action against the appellant would have been for the recovery of the amount of his bid.

The only reason assigned in the opinion of the Chief Justice for sustaining the action, as against the plea of the statute of limitations, is that the plaintiff is the equitable assignee of the check. No adjudicated case is cited in support of this proposition, nor are any rules applicable to the principles governing equitable assignments invoked in its support. The action herein is not upon the check, and the allegations in the complaint, as well as the evidence offered at the trial, and the findings of the court in reference thereto, do not assert any right in the plaintiff by virtue of the check, but are clearly evidentiary statements of the transaction, inserted merely for the purpose of showing that the appellant had not paid the full amount of his bid. Not only does the complaint fail to set forth any right of action upon the check, but, as if with the intention not to do so, avoids any claim to the check by reason of its having been received by the officer. After alleging that he accepted it "in lieu of the balance of the purchase price" bid by the appellant, the complaint sets forth that the officer deposited it in the bank of Lompoc, "where, as this plaintiff is informed and believes, 54 L. R. A.

the said check has ever since been, and is now, deposited and remains." Although it was shown at the trial that the check had been withdrawn from the bank and surrendered to the appellant before the commencement of the present action, the above allegation shows that, although the plaintiff then believed that it still remained in the custody of the bank, he made no effort to get possession of it or to make it the basis of his action, but relies upon the liability of the appellant for the amount of the purchase money, and thus destroys his right to be regarded as the equitable assignee of the check. An officer making a sale has no right to accept anything but money from the bidder, or to give credit to the purchaser. If he does so, however, he acts in his individual capacity, and not as an officer, and is liable in his individual capacity equally as if he had in fact received the money. The judgment creditor may affirm the act of the officer in accepting the check or other obligation of the purchaser, instead of money, and thus be estopped from questioning the sufficiency or correctness of the officer's act, but unless he does so accept it he does not acquire any right or title thereto. To say that because he might have accepted the check it may be assumed that he did accept it, upon the ground that equity deems that to be done which ought to be done,—especially when he makes no claim that he was willing to accept it,—is to apply this rule in a manner for which I think no authority can be found. The act of the plaintiff in bringing the former action against the officer, in which he charged him with having received the money upon the bid and obtained judgment therefor, is conclusive against any claim that the plaintiff waived the officer's obligation to receive money upon the bid, and that he was willing to accept the check in its stead. His election of remedies at that time precludes him from maintaining the present action, as is shown in the opinion of Mr. Justice Garoutte.

If the remedy provided in § 695, Code Civ. Proc., in case the purchaser refuses to pay the amount bid by him, is not exclusive, the officer's right of action is limited to a suit for the recovery of the amount of the bid. Such an action is a pure common-law action, resting upon the common-law liability of the purchaser upon his bid, and presents no room for invoking the principles of equity, and the rights of the creditor derived by virtue of his privity with the officer can be no greater than those of the officer; but whether the obligation of the appellant is by virtue of the statute, or rests upon his common-law liability, is immaterial. His obligation is not "founded" upon an instrument of writing, and any action to enforce such obligation must be commenced within two years after his liability accrued. *Chipman v. Morrill*, 20 Cal. 130; *McCarthy v. Mount Teate Land & Water Co.* 111 Cal. 328, 43 Pac. 956; *Thomas v. Pacific Beach Co.* 115 Cal. 136, 46 Pac. 899.

As the present action was not commenced until more than two years after the right of action accrued, the defendant's plea of the statute of limitations should have been sustained.

Rehearing denied.

Re Estate of Henry K. WINCHESTER, Deceased.

(.....Cal.....)

1. A valid bequest may be made by name to an unincorporated educational society, which has an existing organization composed of certain known members, governed by a constitution and by-laws, and having officers chosen to conduct its business affairs and carry out its objects.
2. A bequest to an unincorporated educational society may be received by a corporation subsequently formed by its members to carry out the objects of the former society.

(June 25, 1901.)

A PPEAL by the executors of the will of Henry K. Winchester, deceased, from a judgment of the Superior Court for Santa Barbara County decreeing a partial distribution to one of the legatees named in the will. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Richards & Carrier, for appellants:

An unincorporated society cannot take by will.

Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. 590; *Jones v. Green* (Tenn. Ch.) 36 S. W. 729; *Greene v. Dennis*, 6 Conn. 301, 16 Am. Dec. 58; *McCord v. Ochiltree*, 8 Blackf. 16; *Grimes v. Harmon*, 35 Ind. 246, 9 Am. Rep. 690; *Acklen v. Franklin*, 7 La. Ann. 415; *Hardesty's Succession*, 22 La. Ann. 333; *State Use of Methodist Episcopal Church v. Warren*, 28 Md. 352; *Church Extension of M. E. Church v. Smith*, 56 Md. 393; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 380, 67 Am. Dec. 160; *White v. Howard*, 46 N. Y. 144; *Mars v. McGlynn*, 88 N. Y. 357; *Holland v. Peck*, 37 N. C. (2 Ired. Eq.) 255; *Methodist Episcopal Church v. Adams*, 4 Or. 83; *Stonestreet v. Doyle*, 75 Va. 366, 40 Am. Rep. 731; *Heiss v. Murphy*, 40 Wis. 276.

Respondent is not helped by its subsequent incorporation.

If there was no person *in esse* capable of taking when the testator died, the coming into being, three years afterwards, of a person who might have taken had it existed at

NOTE.—For other cases in this series as to validity of gift to unincorporated charity, see *Hadden v. Methodist Soc. of Ireland* (N. J. Eq.) 32 L. R. A. 625, and *note*; *Lane v. Eaton* (Minn.) 38 L. R. A. 669; and *McHugh v. Me-Cole* (Wis.) 40 L. R. A. 724.

As to effect of subsequent incorporation to make valid gift to unincorporated association, see *Lougheed v. Dykeman's Baptist Church & Soc.* (N. Y.) 14 L. R. A. 410, and *note*.
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the date of testator's death, cannot affect the question.

White v. Howard, 46 N. Y. 144; *Hardesty's Succession*, 22 La. Ann. 333; *Philadelphia Baptist Asso. v. Hart*, 4 Wheat. 1, 4 L. ed. 499.

Mr. William G. Griffith, for respondent:

The bequest to the Santa Barbara Natural History Society is a charitable bequest, and should be so considered in determining the question of its validity.

Jackson v. Phillips, 14 Allen, 574; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327; 5 Am. & Eng. Enc. Law, 2d ed. p. 929.

If this respondent, before incorporation, had received a gift or bequest, it would have received it in trust for the objects and purposes for which the society existed, and would have been as responsible for the proper execution of that trust as a private corporation.

Re Ticknor, 13 Mich. 43.

A bequest to an unincorporated society for charitable uses is good and enforceable, unless rendered invalid by local laws.

Burbank v. Whitney, 24 Pick. 146, 35 Am. Dec. 312; *Washburn v. Sewall*, 9 Met. 280; *Bartlett v. Nye*, 4 Met. 378; *Dexter v. Gardner*, 7 Allen, 243; *Burr v. Smith*, 7 Vt. 241, 29 Am. Dec. 154; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Jackson v. Phillips*, 14 Allen, 588; *Potter v. Chapin*, 6 Paige, 649; *Chambers v. Higgins*, 20 Ky. L. Rep. 1425, 49 S. W. 436; *American Tract Soc. v. Atwater*, 30 Ohio St. 77, 27 Am. Rep. 422; *Re Ticknor*, 13 Mich. 43; 2 Kent, Com. p. 288, note A; 5 Am. & Eng. Enc. Law, 2d ed. p. 918; *Beach, Wills, Pony Series*, § 128; *Boone, Corp. Pony Series*, § 52.

If the intention of the testator is clear, the court will not allow the bequest to fail because of the want of capacity in the legatee to take and execute the trust, but will appoint trustees for that purpose.

Willard, Eq. Jur. § 580; *Story, Eq. Jur.* § 1169; *Jones v. Habersham*, 107 U. S. 189, 27 L. ed. 406, 2 Sup. Ct. Rep. 336; *St. Peter's Church v. Brown*, 21 R. I. 367, 43 Atl. 642; *Re Upham*, 127 Cal. 90, 59 Pac. 315.

Admitting that an unincorporated society is incapable of taking a charitable bequest, courts of equity have often given effect to such bequests as executors devises, upon the incorporation of the society subsequent to the death of the testator.

McIntire Poor School v. Zanesville Canal & Mfg. Co. 9 Ohio, 203; *Miller v. Chittenden*, 4 Iowa, 252; *Zimmerman v. Anders*, 6 Watts & S. 218, 40 Am. Dec. 552; *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 7 L. ed. 617; *St. Peter's Church v. Brown*, 21 R. I. 367, 43 Atl. 642.

An unincorporated society can take a bequest, leaving out of consideration the elements of a charity.

Re Ticknor, 13 Mich. 43; *Boone, Corp. Pony Series*, § 52.

Chipman, C., filed the following opinion:
Henry K. Winchester died testate Febru-

ary 21, 1895. In his will he provided as follows: "I give to the Santa Barbara Natural History Society of Santa Barbara, California, the sum of two thousand dollars." At the time of his death, and until June 28, 1898, this society was an unincorporated organization, on which latter date the members of the society duly incorporated under the laws of this state. The incorporated society petitioned the court for a decree of partial distribution, which was granted by the court, and from this decree the executors appeal on the judgment roll alone.

The court found the following facts: That the petitioner "was organized as a society in the year 1876, and ever since continued to be, up to the time of its incorporation as hereinafter mentioned, a regularly organized, unincorporated society, governed by a constitution and by-laws adopted by the members thereof, having regularly elected officers, and holding regular meetings, and having for its object to advance the study and promote knowledge of the various branches of natural history by holding meetings, providing for lectures, and establishing a museum of natural history specimens, and was known as and called the 'Santa Barbara Natural History Society,'" that "on June 28, 1898, the members of said society formed a corporation under the laws of this state, the petitioner herein, and said society has ever since continued to be, and now is, a duly-organized corporation, known as and called the 'Santa Barbara Society of Natural History,'" the purposes were declared to be similar to those for which the original society was formed, although stated in different terms; and, among other things, it was provided that the society "shall hold in possession real estate, and funds contributed as annual dues and by voluntary subscriptions." It was also found that all of the devises and bequests to charitable or benevolent societies, taken collectively, do not exceed one third of the estate; that distribution to various legatees has heretofore been made, amounting in all to 89.38 per cent of the amount to which said legatees were entitled, but no part of said legacy of \$2,000 has been paid; that petitioner rented a building from the executors at the monthly rental of \$12.50, no part of which has been paid; that said legacy is subject to an inheritance tax. As conclusions of law, the court found that the bequest is a valid bequest to charitable uses, binding upon the estate of deceased; that petitioner was, as it existed at the time said will was executed and at the date of the decease of the testator, and has ever since continued to be, and now is, capable of taking said legacy; and it was decreed that the executors pay to petitioner 89.38 per cent of said legacy of \$2,000, after deducting \$325, the amount due as inheritance tax and interest. The rental due from petitioner to said executors was decreed to be \$325.

Appellants present two questions: First, Can an unincorporated society, other than a mutual benefit association, take a bequest by will in this state? Second. If it cannot, 54 L. R. A.

can it, upon incorporating subsequently to the death of the testator, claim the legacy which while unincorporated it could not take?

Appellants concede that the promotion of the knowledge of natural history is a charitable object, and it is also conceded that in the courts of last resort in several states bequests directly to unincorporated societies having charitable objects in view are upheld, but it is contended that the better reason is with the decisions in those states denying the power of such societies to take charitable bequests. Appellants say: "We do not claim that unincorporated societies are incapable of taking because of 'the indefiniteness of the beneficiaries.'" "This," as respondent says, "is an essential element of a charity. The public at large was to have been benefited by the promotion of the knowledge of natural history. But the trustee must be such that he can be held accountable." It is also conceded that where no trustee is named the court may appoint one. "But in this case," it is claimed, "the testator has designated a trustee. And this trustee, being an unincorporated society, cannot be held to a performance of the trust. And yet to take the bequest from the trustee named, and to give the fund to others, would be to exercise that prerogative power under the rule of *cy pres*, . . . which is denied to our courts,"—citing *Hinckley's Estate*, 58 Cal. 497. I have given the position of appellants thus fully, as it narrows the inquiry very much. Appellants err in assuming that the unincorporated society, being named as the grantee, thus becoming in a certain sense the trustee, cannot be held to a performance of the trust. Mr. Perry says: "These bodies or quasi corporations [referring to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations] have been considered so far under the control of a court of equity that they would be compelled to execute the duties of the trust imposed upon them, and could be dealt with for a breach." 2 Perry, Tr. § 730.

Appellants also err in assuming that the case involves the necessity of invoking the rule of *cy pres* to the full extent as applied in England, in order to uphold the bequest. The legatee at the testator's death, and long prior thereto, was an existing organization, composed of certain known members, governed by a constitution and by-laws, and having officers chosen to conduct the business affairs of the society and to carry out its objects. The society had a name by which it was known, and under which its purposes were effectuated, and the bequest was made to the society by this name. Of the intention of the testator there can be no question. He intended to aid the study of natural history through this particular society, by giving to it the amount of money named in his will. The use being charitable, the purpose and the donee certain and definite, equity will not allow the trust to fail for want of a trustee to enforce it, should such interposition of the court become neces-

sary. In *Re Upham*, 127 Cal. 90, 59 Pac. 315, the testator bequeathed the residue of his estate "to the legally qualified and constituted trustees or managers of the Good Templars Orphans' Home of Vallejo, . . . in trust for the use and benefit of the orphan children of said institution." It was contended that, because the home was unincorporated, there were no trustees named capable of taking. The court said: "These trustees seem to be appropriate persons to take charge of this charitable fund, and manage it for the purposes of the trust; but even if it should be held that, in a strict legal sense, they are not capable of taking, yet the charity would not fail for that reason. A court will not allow a charitable trust to fail for want of a legal trustee." *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327, and *Schmidt v. Hess*, 60 Mo. 591, are cited approvingly. In the first of these cases it was said: "If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead." In the Missouri case the grantor deeded certain land to the Lutheran Church for purposes of a burial ground, and delivered the deed to his son-in-law. The trustees of the Evangelical Lutheran Trinity Church brought the action to have vested in themselves, as such trustees, the title to the property. Evidence was admitted to identify the claimants with the church to which the grantor was attached, and which it was his intention to aid. It was said in the opinion: "Although, in consequence of the non-incorporation of the church for whose benefit the grant was made, there was no one *in esse* at the time of making the donation capable of being the recipient of the trust, yet, the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation." *American Tract Soc. v. Atwater*, 30 Ohio St. 77, 27 Am. Rep. 422, is an instructive case. A bequest in trust for the benefit of the parents of the testator was created. He directed that upon the death of his parents the trust should cease, and that his trustee should distribute certain remaining funds as follows: "To apply the same so that it may be used for the interests of religion, and for the advancement of the Kingdom of Christ in the world, as follows, to wit: He shall pay to the treasurer of the American Tract Society the sum of one thousand dollars." Similar directions were made as to three other societies. The court points out that the testator conceived a scheme for advancing Christ's Kingdom in the world, and carried it out by directing the money to be paid to the various societies, and that as soon as the money arrived at their treasuries the scheme was accomplished and the will fulfilled. The court said: "It is not

as though he bequeathed to a trustee for the purpose of advancing the Kingdom of Christ. He bequeaths to these societies, because they are advancing the Kingdom, which is the precise object he wants to accomplish. He first states the object he wishes to effect, and then states how he proposes to effect it. He is willing to pay the money direct to them. To them he trusts that they will forward his cherished idea. As said, the societies themselves are the direct beneficiaries of the trust, although, if they should attempt to use their money for purposes altogether foreign to those for which they exist, doubtless they might be restrained to those purposes,—not by reason of anything in the will, but because they should be restrained to the purposes for which they were created." Again, it was said: "The testator has created these societies an agency to carry out his scheme. He has given them power over the application of his bounty, and the exercise of that power relieves the bequest of all objections made on account of vagueness or uncertainty." Again: "Although the testator uses the names of the treasurers, this is only his mode of designating the societies to which he desires his money to go." In *Carter v. Balfour*, 19 Ala. 814, the will read: "I give one thousand dollars to be paid at my wife's death, and to be divided in equal proportions *viz.*: The Baptist Societies for Foreign and Domestic Missions and the American and Foreign Bible Societies. And at my sister Emily's death, if the boy Mike, given to her during her lifetime, be alive, he shall be sold to the best advantage, and the proceeds of the sale equally divided between the societies above named." It was insisted that these bequests must fail because the societies were merely voluntary associations, unincorporated and incapable by law of taking bequests, and that there is no trustee to take for them, and, further, that the object was too vague. The opinion proceeds: "I think these descriptions sufficiently specific, and, if societies can be found which were organized and known by those named at the time of the testator's death, they should be considered the societies referred to by the will, and capable of taking the bequests, whether incorporated or not. In making the gifts to the societies by their names, I think it clearly and necessarily inferable that the gifts were intended to be made to them in their aggregate capacity, and for the purposes for which they were organized, and that the testator could not have intended the gifts for the individual members of the societies, or he would have made the bequest to them by their individual names in the ordinary way. It must be presumed that the testator knew for what object the societies were formed and that he intended to have the funds applied to that object." The opinion then shows that these bequests would be sustained independently of the statute of Elizabeth, and, after an examination of the authorities, concludes: "But I think the weight of American authority is decidedly in favor of such bequests." The learned jus-

tice who wrote the opinion reviews the cases pro and con, and devotes especial attention to the leading case holding adversely, namely, *Philadelphia Baptist Asso. v. Hart*, 4 Wheat. 1, 4 L. ed. 499, and his conclusion was that the same court has partially, if not altogether, overruled the *Philadelphia Baptist Asso. Case*. It was expressly held in the Alabama case that there was no occasion for invoking the doctrine of *cy près*, and it was said: "The bequests should be paid only to the societies specified in the will, or their authorized agents. If the societies, or either of them, did not exist at the time of the testator's death, or cannot now be found, organized and known as above stated, then the bequest to such society or societies should be considered and disposed of as lapsed legacies." We do not deem it necessary to refer further to the cases, of which there are many, holding similar views. See 5 Am. & Eng. Enc. Law, 2d ed. p. 918. We are satisfied with the reasoning that has led to the upholding of bequests such as the one before us. Indeed, we think the decision may rest alone on the conclusion reached in *Re Upham*, 127 Cal. 90, 9 Pac. 315. The fact that in that case the bequest was to the

trustees of the orphans' home, and not directly to the orphans' home, makes no difference. In either case the intention would be the same, and the capacity to take would be the same.

We do not decide, nor is it necessary to so hold, that the subsequent incorporation of the society would add anything to its capacity to take at the death of the testator. The bequest would have been binding on the estate had there been no incorporation. But as the society now has a corporate existence, and the present members are the same as the members of the unincorporated society, and the objects are the same, there can be no objection to its receiving the gift. *Preachers' Aid Soc. v. Rich*, 45 Me. 552. We discover nothing in *Grand Grove, U. A. O. of D. v. Garibaldi Grove, No. 71*, 130 Cal. 116, 62 Pac. 486, necessarily in conflict with the views herein expressed. We advise that the judgment be affirmed.

We concur: **Gray, C.; Haynes, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment is affirmed.

COLORADO COURT OF APPEALS.

**Michael KOPPLEKOM et al., Pliffs in Err.,
v.
COLORADO CEMENT PIPE COMPANY.**

(.....Colo.....)

The owner of an uninclosed lot adjacent to a highway in a thickly populated part of a city, who leaves unguarded thereon a heavy section of cement pipe of unstable equilibrium, which, because of its large diameter, is an attractive plaything for children to roll about, and who knows that they resort there for that purpose, is liable to a child who, not having arrived at years of discretion and judgment, is injured by the pipe toppling over onto him while he is playing with it.

(May 18, 1901.)

NOTE.—For cases in this series as to liability for maintaining upon private premises dangerous attractions for children generally, see *Rodgers v. Lees* (Pa.) 12 L. R. A. 216; *Barney v. Hannibal & St. J. R. Co.* (Mo.) 26 L. R. A. 847; *Penso v. McCormick* (Ind.) 9 L. R. A. 313; *Missouri, K. & T. R. Co. v. Edwards* (Tex.) 32 L. R. A. 825; *Holbrook v. Aldrich* (Mass.) 36 L. R. A. 493; *Biggs v. Consolidated Barb-Wire Co.* (Kan.) 44 L. R. A. 655; *O'Leary v. Brooks Elevator Co.* (N. D.) 41 L. R. A. 677; *Siddall v. Jansen* (Ill.) 39 L. R. A. 112.

As to liability of railroad company for injuries to children by turntables, see notes to *Ft. Worth & D. City R. Co. v. Robertson* (Tex.) 14 L. R. A. 781; *Walsh v. Fitchburg R. Co.* (N. Y.) 27 L. R. A. 724; and *Delaware, L. & W. R. Co. v. Reich* (N. J. L.) 41 L. R. A. 831.

As to leaving car where children may be injured by it, see *Robinson v. Oregon Short Line & U. N. R. Co.* (Utah) 13 L. R. A. 765; *Roddy v. Missouri P. R. Co.* (Mo.) 12 L. R. A. 746; 54 L. R. A.

ERROR to the District Court for Arapahoe County to review a judgment in favor of defendant in an action brought to recover damages for the death of plaintiffs' child, which was alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **C. M. Kendall, T. E. Watters,** and **Wim Wylie**, for plaintiffs in error:

The case clearly comes within the principle of the *Turntable Cases*.

Union P. R. Co. v. McDonald, 152 U. S. 270, 33 L. ed. 438, 14 Sup. Ct. Rep. 619; *Lynch v. Nurdin*, 1 Q. B. 29; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745.

If the defendant had taken the slight

Gay v. Essex Electric Street R. Co. (Mass.) 21 L. R. A. 448; *Kaumeier v. City Electric R. Co.* (Mich.) 40 L. R. A. 385; and *George v. Los Angeles R. Co.* (Cal.) 46 L. R. A. 829.

As to injuries to child by cross ties in street, see *Kramer v. Southern R. Co.* (N. C.) 52 L. R. A. 359.

As to dangerous ponds or excavations causing death of child, see, upholding liability, *Pekin v. McMahon* (Ill.) 27 L. R. A. 206; denying liability, *Moran v. Pullman Palace Car Co.* (Mo.) 33 L. R. A. 755; *Dobbins v. Missouri, K. & T. R. Co.* (Tex.) 38 L. R. A. 573; *Omaha v. Bowman* (Neb.) 40 L. R. A. 531; *Stendal v. Boyd* (Minn.) 42 L. R. A. 288; *Ritz v. Wheeling* (W. Va.) 43 L. R. A. 148; *Cooper v. Overton* (Tenn.) 45 L. R. A. 591; *Arnold v. St. Louis* (Mo.) 48 L. R. A. 291; and *Heimann v. Kinnare* (Ill.) 52 L. R. A. 652.

As to injury to child from dangerous machinery left in alley near private premises, see *Osage City v. Larkins* (Kan.) 2 L. R. A. 56.

trouble of laying this cement pipe on its end, instead of on its side, no amount of effort on the part of these children could have budged it an inch; but, laid as it was, on its side, in a place where children play, it was a temptation that few children would resist, to roll it along on the ground.

Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L. R. A. 635, 56 Pac. 4; *Schmidt v. Cook*, 4 Misc. 85, 23 N. Y. Supp. 799.

No appearance for defendant in error.

Wilson, P. J., delivered the opinion of the court:

This suit was brought to recover damages on account of the death of a minor child of the plaintiffs, alleged to have been caused through the negligence of the defendant company. A demurrer was interposed to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action; and, this being sustained, the plaintiffs stood upon their complaint, and brought the case here for review. The complaint substantially alleges that the defendant, in the prosecution of its business as a manufacturer of cement pipe, was possessed of certain lots or parcels of land in a thickly-populated portion of the city of Denver, and upon a portion thereof had stored a large quantity of cement piping; that said parcel of land adjoined the public streets, and there was no fence or guard dividing the same therefrom, and that the same, and the piping stored thereon, was in constant view from the street; that among the pieces of piping so exposed, and near to the public highway, was one of the diameter of $4\frac{1}{2}$ feet, only 2 feet in length, and of the weight of from 500 to 700 pounds; that said piece was at the time of the accident, and for a long time previous thereto had been, lying on its side in such manner that it could be rolled easily over the surface of the ground, and that by reason of its great diameter, excessive weight, and short length, was, when so lying, topheavy, and easily turned from its side to its end, and that the piping so exposed was a temptation to children who had not arrived at years of discretion and judgment to play therewith, and that children did frequently play with it, and that it was, by reason of the facts stated, a dangerous instrument, all of which the defendant well knew; that upon the date of the accident in question, while the child of plaintiffs, in company with eight or ten others, all residing in the immediate neighborhood, and all too young to realize the danger that they incurred, was playing with this short and heavy piece of piping, the son of plaintiffs being inside of the piping and being rolled over the surface by the other children, the piping suddenly fell from its side to its end, catching his body underneath, and inflicting injuries which caused almost immediate death.

The defendant making no appearance, we have not been favored by its counsel with 54 L. R. A.

their views as to the particular defects in the complaint which, in their opinion, render it insufficient. Whether they claim it to have appeared upon the face of the complaint that the plaintiffs did not have a cause of action, or that it failed to state some matter necessary to have been stated in order to have constituted a cause of action, we are not advised. We have made as thorough an examination of the complaint as we could without the critical assistance of counsel, and, in our opinion, it does state a cause of action, and was not subject to demurrer on the general ground of its insufficiency. That the plaintiffs would have a right to recover if the allegations of the complaint be accepted as true, or should be sustained upon trial, is, we think, without question. The case comes clearly within the principles laid down by the United States Supreme Court in the *Turntable Case*, which has been universally accepted as authority. *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745. A few of the well-considered and leading cases which have affirmed and followed the doctrine there announced are *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L. R. A. 635, 56 Pac. 4; *Schmidt v. Cook*, 4 Misc. 85, 23 N. Y. Supp. 799; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Cooley, Torts*, chap. 10, p. 303. The complaint alleges the danger in leaving the piping exposed as it was, and in fact it may be said, as was said in the *Turntable Case*, the fact of the fatal injuries being received therefrom by the son of the plaintiffs in this case shows the danger. It also alleges that this unprotected exposure was a temptation to children of immature years to play with the piping, and that defendant knew this to be the case, and knew that the young children of the neighborhood were in the habit of playing with it. By these averments the complaint charged negligence upon the part of the defendant sufficient, if true, to support a recovery by plaintiffs in accordance with the rule announced by Circuit Judge Dillon in the *Stout Case* in his charge to the jury, which was expressly approved by the supreme court on appeal. He said: "But if the defendants did know or had good reason to believe, under the circumstances of the case, that the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence." [2 Dill. 294, Fed. Cas. No. 13,504.] If it be said that the complaint itself shows that the piping was upon private premises, that the children were trespassers, and that they were not upon the land by invitation or consent of defendant, it may be answered, as it

was by Chief Justice Cooley in *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, and approved by all of the authorities that we have cited: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." Or as was tersely and pithily expressed in the Minnesota case [*Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393]: "What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years." Or, as was forcibly said by the Kansas supreme court in *Price v. Atchison Water Co.* 58 Kan. 551, 50 Pac. 450: "To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express." If an owner sees fit to keep on his premises something that is an attraction and allurement to the natural instincts of childhood, the law, it is well settled, imposes upon him the corresponding duty to take reasonable precautions to prevent the intrusion of children, or to protect from personal injury such as may be attracted thereby. The case of *Schmidt v. Cook*, 4 Misc. 85, 23 N. Y. Supp. 799, was very similar to this. In that the child was injured by the falling of a flagstone, which was leaning against a fence, and with and about which she was playing. It was contended that the complaint should have been dismissed on account of the contributory negligence of the child, because it was her own act that caused the rock to fall. The court held that the contention was contrary

to the principle announced in the *Turntable Case*. Contributory negligence sufficient to defeat a recovery does not appear from the facts stated in the complaint. It might, it is true, be made to appear by the evidence at the trial, it being shown that the child was possessed of sufficient judgment and discretion to have realized the danger of playing with the piping in the manner in which it did; but that question is not presented here. In applying the rule that he who seeks to recover damages for a personal injury suffered from the negligence of another must not himself be guilty of negligence that substantially contributed to the result, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition. *Reynolds v. New York C. & H. R. R. Co.* 58 N. Y. 248; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619. It is not the contributory act, merely, but the contributory negligence, of a plaintiff that will prevent his recovery; and the care and caution required of a child being according to its maturity and capacity only, this must be dependent upon and be determined by the circumstances of each particular case. *Schmidt v. Cook*, 4 Misc. 85, 23 N. Y. Supp. 799; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745. Another leading case cited approvingly by the United States Supreme Court upon the question as to liability for injuries suffered by a child, even when it was a trespasser, is *Lynch v. Nordin*, 1 Q. B. 29.

We think that we have said all that is necessary to express our views plainly and in such a manner that they may be easily understood, upon the only question presented. The principles upon which we base them have been most elaborately discussed in the authorities which we have cited. For the reasons given, the judgment will be reversed, and the cause remanded, with leave to the defendant to further plead, as it may be advised.

Reversed.

DELAWARE SUPREME COURT.

Jacob A. DANIELS, *Piff. in Err.*,
v.

STATE of Delaware.

(2 Penn. 586.)

- *1. It is not error for the court to refuse to instruct the jury under a request which assumes the existence of a fact to be established by evidence.
2. The rule stare decisis has for its object the salutary effect of uniformity, certainty, and stability in the law.

*Headnotes by BOYCE, J.

NOTE.—For evidence and instructions as to character of accused, see *State v. Hull* (R. I.) 20 L. R. A. 609, and note, especially cases as to weight and effect of such evidence on page 618; 54 L. R. A.

3. The decisions of the court of oyer and terminer and the court of general sessions were not reviewable by the supreme court prior to the adoption of the Constitution of 1897, and they will not be departed from by the supreme court unless it be satisfied that they are clearly erroneous.
4. The doctrine of stare decisis applies with peculiar force to decisions respecting real property, vested rights, and those matters of general commercial importance which tend to influence future business transactions; but questions where the decisions do not constitute a business rule—as where personal liberty is involved—will be met by con-

See also *Carr v. State* (Ind.) 20 L. R. A. 863; *State v. Barr* (Wash.) 29 L. R. A. 154; *Cooper v. Phipps* (Or.) 22 L. R. A. 836; and *Jackson v. Jackson* (Md.) 84 L. R. A. 773.

considerations which favor certainty and stability in the law.

5. The question respecting the proper relation of character evidence to the other evidence in the case does not involve any of those essentially important rights and interests favored by the doctrine of precedents.
6. While character evidence is not a defense, it is a circumstance in the antecedent conduct and habits of the accused, its purpose being to strengthen the legal presumption of innocence.
7. Character evidence is to be weighed and estimated by the jury according to the weight of the testimony by which it is supported, in connection with that to which it is opposed.

(January 16, 1901.)

ERROR to the Court of General Sessions for Newcastle County to review a judgment convicting defendant of lewdly and lasciviously playing with an infant child. *Reversed.*

The facts are stated in the opinion.

Messrs. William S. Hilles and Josiah Marvel, for plaintiff in error:

Evidence of the prisoner's good character is always admissible. In doubtful cases,—as, where there is a conflict of testimony on material and essential points, or where the evidence for or against the accused is pretty nearly balanced,—former good character, if proved, is entitled to due weight, and should incline the scales in favor of the prisoner.

State v. Manluff, *Houst. Crim. Rep. (Del.)* 208.

It has been held that proof of good character is available only in doubtful cases, for the purpose of showing that the accused had not a wicked or evil intent at the time the act complained of was committed; that the reputation for good character, however excellent and irreproachable, should not be allowed to weigh against positive, direct, and uncontradicted evidence.

State v. Vines, *Houst. Crim. Rep. (Del.)* 424; *State v. Smith*, 9 *Houst. (Del.)* 588, 33 *Atl.* 441; *State v. Davis*, 2 *Penn. (Del.)* 139, 45 *Atl.* 394.

Such doctrine is not a correct statement of the law.

Sir William Russell discusses the matter as follows: It has been usual to treat the good character of the party accused as evidence to be taken into consideration in doubtful cases only. It is, however, submitted, with deference, that the character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case.

2 *Russell, Crimes*, 785; *Reo v. Stannard*, 7 *Car. & P.* 673; 1 *Wharton, Crim. Law*, §§ 643, 644.

Whatever may have been said in some of the earlier cases to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence

leaves the commission in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Edgington v. United States, 164 *U. S.* 361, 41 *L. ed.* 467, 17 *Sup. Ct. Rep.* 72; *United States v. Kenney*, 90 *Fed.* 257; *Felix v. State*, 18 *Ala.* 720; *Maclin v. State*, 44 *Ark.* 115; *People v. Ashe*, 44 *Cal.* 292; *Bacon v. State*, 22 *Fla.* 51; *Epps v. State*, 19 *Ga.* 102; *Jupitz v. People*, 34 *Ill.* 516; *Wagner v. State*, 107 *Ind.* 71, 57 *Am. Rep.* 79, 7 *N. E.* 896; *State v. Northrup*, 48 *Iowa*, 583, 30 *Am. Rep.* 408; *Com. v. Leonard*, 140 *Mass.* 473, 54 *Am. Rep.* 485, 4 *N. E.* 96; *People v. Garbutt*, 17 *Mich.* 9, 97 *Am. Dec.* 162; *State v. Sauer*, 38 *Minn.* 438, 38 *N. W.* 355; *Coleman v. State*, 59 *Miss.* 484; *State v. O'Connor*, 65 *Mo.* 374, 27 *Am. Rep.* 291; *Remsen v. People*, 43 *N. Y.* 6; *State v. Henry*, 50 *N. C.* (5 *Jones, L.*) 65; *Stewart v. State*, 22 *Ohio St.* 477; *Hanney v. Com.* 116 *Pa.* 322, 9 *Atl.* 339; *State v. Edwards*, 13 *S. C.* 30; *Linoecum v. State*, 29 *Tex. App.* 328, 15 *S. W.* 818; *People v. Hancock*, 7 *Utah*, 170, 25 *Pac.* 1093; *State v. Daley*, 53 *Vt.* 442, 38 *Am. Rep.* 694; *Klehn v. Territory*, 1 *Wash.* 584, 21 *Pac.* 31.

Where good character is a fact in a case, it should be weighed in connection with the other evidence, and it may alone suffice to create a reasonable doubt in the minds of the jury.

Gillett, *Indirect & Collateral Ev.* § 298; 3 *Greenl. Ev.* § 25; *Rice*, *Ev.* §§ 371-375.

An honest man may, through malice or otherwise, be charged with crime, and his life or liberty be endangered by fallacious circumstances or perjury, and he may be able to produce no evidence to prove his innocence except his own oath. If, in such case, a blameless life and unstained character are of no avail,—are a mere make-weight in a doubtful case,—his condition is a sad one. But, fortunately for the upright man so situated, we have got beyond all doubt upon this subject, and have firmly established the doctrine that evidence of good character is to be regarded as a substantive fact, like any other fact tending to establish the defendant's innocence, and ought to be so regarded both by court and jury.

Hanney v. Com. 116 *Pa.* 322, 9 *Atl.* 339. **Messrs. Robert C. White**, Attorney General, and **Peter L. Cooper, Jr.**, Deputy Attorney General, for defendant in error.

Boyce, J., delivered the opinion of the court:

Jacob A. Daniels, the plaintiff in error, was tried and convicted in the court below upon the charge of unlawfully and lewdly and lasciviously playing with Viola Yeatman, a female child under the age of sixteen years. There are seven assignments of

error. The second, third, and fifth are directed to the refusal of the court to charge the jury as requested by the second and third prayers, and to the instruction by the court to the jury instead, respectively; and they were considered together in the argument. They present the main subject of controversy in this case. This being so, it renders a discussion of the remaining errors assigned unnecessary, although we may say that, upon a careful consideration of each of them in connection with the evidence produced and the law applicable to the case, they should not be sustained.

The third error assigned is directed to the third prayer requested, which was properly refused by the court in that it assumed a fact.—i. e., “the defendant being a man of good character,”—which, under the evidence in this case, was a question exclusively for the determination of the jury. It remains, therefore, to consider: (1) The refusal by the court to instruct the jury, as requested by the second prayer, to wit: “The jury should take into consideration the evidence of the witnesses as to the good character of the defendant as of any other substantive fact tending to establish the defendant’s innocence or guilt, and if, after considering it in connection with all the other evidence in the case, they have a reasonable doubt of this guilt they should return a verdict of not guilty.” (2) The instruction which was given by the court to the jury instead, to wit: “We have also been asked to charge you as to the matter of good reputation. We will say that, when good character is proved, and the evidence is doubtful,—hanging in the scales, as it were,—so that you do not know which way to decide it, in such a case good reputation, when proved, should inure to the acquittal of the defendant. But when the testimony is positive and distinct, and the offense is clearly and satisfactorily proved, good reputation is of little value. Good men sometimes fall, and men who have borne a good reputation, and have never before, perhaps, done a bad act, even these sometimes, in the erratic working of human nature, commit crimes; so that we say that evidence of good reputation is only available in cases of doubt. Even then it must be proved to your satisfaction.” It is the correctness of this instruction as a rule of law that is disputed. We will first review the reported cases in this state bearing upon the subject. And it may be said that there has not been an unvarying, uniform rule with regard to the weight and value of character evidence in the courts of this state. The doctrine that “proof of good character is available only in doubtful cases,” and that “the reputation for good character, however excellent and irreproachable, should not be allowed to weigh against positive, direct, and uncontradicted evidence,”—following the evident intent and meaning of the instruction given to the jury in the case of *State v. Manluff*, Houst. Crim. Rep. (Del.) 208, 217,—was for the first time unequivocally and unmistakably laid down in the case of *State v. Vines*, Houst. Crim. 54 L. R. A.

Rep. (Del.) 424, 431. The case of *State v. Williamson*, Houst. Crim. Rep. (Del.) 155, 164, seems to be the first reported case in this state in which the jury were instructed by the court upon the subject of character evidence. And the instruction given is not so clear in its meaning and effect as the instructions upon the same question contained in the two cases which have just been cited. The language of the court is as follows: “If, however, the jury should not be satisfied from the evidence beyond a reasonable doubt that such was the case, they should acquit the prisoner, for he would be entitled to the benefit of any reasonable doubt they might have that such were the facts of the case; and, should they entertain such doubt the proof of his good character should determine that doubt, and the question of his guilt or innocence of the crime charged against him, in his favor.” The language employed in the charge would seem to indicate that the evidence of good character was submitted to the jury together with the other evidence, without any qualification or disparagement, and that the jury were left untrammelled to determine upon the whole evidence in the case whether or not they entertained “a reasonable doubt.” It is true that they were told that, “should they entertain such a doubt, the proof of his good character should determine that doubt.” Without criticising the instruction or commenting upon its uselessness, because of the familiar rule in criminal law that “a reasonable doubt” inures to the acquittal of the accused, it will be observed that the instruction as given did not restrict the evidence of good character and its availability to “doubtful cases.” In an earlier case than any which we have as yet cited,—being the case of *State v. Horskin*, Houst. Crim. Rep. (Del.) 116,—it is said in the statement of the case that “the character of the prisoner as a peaceable and quiet man was proved by several witnesses called in reply.” The court did not allude to this evidence in the charge, the concluding part of which is as follows: “The evidence, however, was before them, and it was for them alone to decide what were the facts and circumstances proved in the case. . . . They should give the prisoner, however, the benefit of any reasonable doubt they might have in the case.” The evidence of good character, therefore, seems to have been submitted to the jury, in connection with the other evidence, as any other fact or circumstance in the case. In the case of *State v. Horner*, 1 Marv. (Del.) 504, 516, 26 Atl. 73, 41 Atl. 139, decided in 1893, the court departed from the general language used in the first two cases cited above, and also that used in the subsequent cases which were followed substantially by the court below, to express the rule with regard to character evidence. The court said: “If, from the testimony as presented by the other witnesses, you are in doubt as to the guilt of the accused, then you may take into consideration the evidence of the witnesses as to their good character;” thus excluding

from the consideration of the jury the evidence of such character until they should first determine whether they had a doubt as to the guilt of the accused upon the other evidence, which is the effect of the instruction given by the court below upon the evidence of good character in the present case. But the court added: "And you may consider whether it is more likely, under all the circumstances of this case, that Jerry Sullivan should be testifying to untruths, than that the defendants, being men of good character, should be guilty of the offense with which they are charged;" thus manifestly leaving the jury under this branch of the instruction to consider the evidence of good character in connection with the testimony of the principal witness, without that discrimination contained either in the first part thereof or in the instruction given by the court below in the present case. And the jury were left to consider the evidence of good character as a circumstance in the case in connection with the testimony of the principal witness, and to determine whether it was more likely that the latter had testified falsely than that the defendants, if the jury should find that the evidence sustained their good character, should be guilty of the offense charged. It therefore appears from a close examination of the reported decisions in this state that the rulings of the court respecting character evidence have not been altogether uniform. Yet it is, nevertheless, true that the charge of the court below has the authority of precedent. *State v. Manluff*, Houst. Crim. Rep. (Del.) 208, 217; *State v. Smith*, 9 Houst. (Del.) 588, 597, 33 Atl. 441; *State v. Brown*, 2 Marv. (Del.) 401, 36 Atl. 458; *State v. Davis*, 2 Penn. (Del.) 139, 142, 45 Atl. 394. And because of these former decisions in support of the instruction which was given in this case, the deputy attorney general, representing the state, invoked the doctrine of *stare decisis* against a reversal of the case at bar.

Before the adoption of the Constitution in 1897, vesting this court with the jurisdiction to issue writs of error to the court of oyer and terminer and to the court of general sessions, and to determine all matters in error, the last-named courts were each, within their respective criminal jurisdictions, courts of last resort, possessing original and final jurisdiction in all those criminal matters, vested in them without any supervisory or appellate control of a higher court. And the decisions of said courts, touching the weight and availability of character evidence, which were followed by the court below, constitute the only barrier to an examination *de novo* of the relation of such evidence to the other evidence in the case. The salutary effect of uniformity, certainty, and stability in the law, and the perplexing difficulties and inconvenience to the public were it otherwise, are the chief reasons for the doctrine of precedents. And we may say that the decisions heretofore deliberately made by our criminal courts, recognized and confirmed as many of them have

been by subsequent decisions made therein, appeal to this tribunal with its enlarged jurisdiction with peculiar force, and they should not be disregarded lightly, nor will this court depart from any of these unless it be satisfied that they are clearly erroneous, and that to sustain them would be to perpetuate error. The doctrine of *stare decisis* has recently been discussed and applied by this court in the case of *Truston v. Fitt & S. Co.* 1 Penn. (Del.) 483, 42 Atl. 431. The court, by Ridgely, J., said: "The maxim of *stare decisis* has generally been strictly applied where titles to real estate have been acquired or commercial usages have been established under decisions of the court.

... But where a decision contravenes a plain principle of law, or where, in such decision, the law has been misunderstood or misapplied, and a reversal will not disturb property rights already acquired, or make innovations on established commercial usages, it may then become the duty of the judges to reverse an erroneous decision of the same court." Chancellor Kent says: "Even a series of decisions are not always conclusive evidence of what is law, and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule and the extent of property to be affected by a change of it." 1 Kent, Com. 476. The rule *stare decisis* seems to apply with peculiar force to decisions which have determined questions respecting real property and vested rights, and it embraces as well those matters of general commercial importance which tend to influence future business transactions. It has been said that the doctrine has greater or less force according to the nature of the question decided. Those questions where the decisions do not constitute a business rule—*e. g.* as where personal liberty is involved—will be met only by the general consideration which favors certainty and stability in the law. *Downer v. Miller*, 15 Wis. 612.

An examination into the question respecting the proper relation of character evidence when admitted to any other evidence in the case, although a rule touching such evidence has been established by former decisions in our criminal courts, does not involve any of those essentially important rights and interests, whether public or private, which are especially favored by *stare decisis*; and this court is not bound to adhere to the rule which was followed by the court below, if, upon an investigation, it be found to be manifestly erroneous in that it contravenes a plain principle of the law of evidence. And therefore we may proceed to consider the main question now before us: Is proof of good character a fact or circumstance in the particular case for the consideration of the jury in connection with all the other evidence produced, or is it available only in cases where the jury are in doubt of the guilt of the accused upon the other evidence? It may be said at the outset that character evidence is not a defense. It is a circumstance

in the antecedent conduct and habits of the accused, the object and possible effect of which, when proved, is to strengthen the presumption of innocence with which the law clothes every person charged with the commission of a crime; and such evidence will vary in force and value according to the other facts and circumstances surrounding each particular case. *Harrington v. State*, 19 Ohio St. 264; *People v. Ashe*, 44 Cal. 288. Historically speaking, the admissibility of evidence of good character, or "reputation," as it is sometimes called, was at first restricted to capital cases only, but it is now settled law that the accused may put his character in issue or not in all criminal prosecutions where punishment for the offense charged is the purpose thereof. 2 Starkie, Ev. 7th Am. ed. 304; 3 Greenl. Ev. § 25. And in the earlier cases the weight of such evidence was limited to cases of doubt as to the guilt or innocence of the accused upon the other evidence. This doctrine, adhered to by the court below in this case, obtains in a few of the jurisdictions in this country; and it has been said that the practice of so charging juries, both here and in England, undoubtedly grew up when judges were accustomed to express their opinions to juries upon the weight and effect of testimony. *Com. v. Leonard*, 140 Mass. 473. 54 Am. Rep. 485, 4 N. E. 96; *State v. Henry*, 50 N. C. (5 Jones, L.) 65. Text writers in this country, as well as in England, are quite in accord in criticising this doctrine as a rule of law, maintaining that it is illogical, and not consonant with sound reasoning. Mr. Greenleaf, in his treatise on Evidence, says: "The admissibility of this evidence has sometimes been restricted to doubtful cases, but it is conceived that, if the evidence is at all relevant to the issue, it is not for the judge to decide before the evidence is all exhibited whether the case is in fact doubtful or not, nor, indeed, afterwards; the weight of the evidence being a question for the jury alone." 3 Greenl. Ev. § 25. Sir William Russell says: "It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that, where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration, but that, when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient, which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail, but the more correct course seems to be not in any case to withdraw it from consideration, but to leave the jury to form their conclusion up- 54 L. R. A.

on the whole of the evidence whether an individual whose character was previously unblemished has or has not committed the particular crime for which he is called upon to answer." 2 Russell, Crimes, 704. And the celebrated English lawyer (afterwards an eminent jurist), Mr. Sergeant Talfourd, commenting upon this passage from Russell on Crimes, said: "We may be permitted to add that, according to the language frequently adopted by judges in their charges, it may be proved that character is, in no case, of any value. They say that in a clear case character has no weight, but if the case be doubtful—if the scale hangs even—the jury ought to throw the weight of the character into the scale, and allow it to turn the balance in the prisoner's favor; but the same judges will tell juries that in every doubtful case they ought to acquit, stopping far short of the even balance, and that the prisoner is entitled to the benefit of every reasonable doubt. In clear cases, therefore, the character is of no avail, and in doubtful cases it is not wanted. It is never to be considered by the jury but when the jury would acquit without it. The sophism lies in the absolute division of cases into clear and doubtful, without considering character as an ingredient which may render that doubtful which would otherwise be clear. There may certainly be cases so made out that no character can make them doubtful, but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt; nay, in which character will actually outweigh evidence which might otherwise appear conclusive. It is in truth a fact varying greatly in its own intrinsic value. . . . according to the proofs to which it is opposed, but always a fact, fit, like all other facts proved in the cause, to be weighed and estimated by the jury." Dickinson. Quarterly Sessions. 6th ed. 563; Wharton. Crim. Ev. 9th ed. § 66. Without multiplying citations from law writers, further reference is made to Best, Ev. by Chamberlayne, 7th Am. ed. § 362; Bishop, Crim. Proc. 3d ed. § 115; 5 Am. & Eng. Enc. Law, 2d ed. p. 867; 11 Enc. Pl. & Pr. 346; and Gilbert, Indirect & Collateral Ev. 298.

There is also an overwhelming weight of authority to be found in the adjudicated cases in support of the doctrine which, as we have shown at much length, is maintained by the text writers. In the case of *State v. Daley*, 53 Vt. 442, 38 Am. Rep. 694, the court, quoting from 1 Sarkie. Ev. 75, that character evidence "ought never to have any weight except in a doubtful case," said: "If this is law, all such evidence might as well be excluded; for, if the case is doubtful before its introduction (and that is the undoubted meaning of the quotation), the respondent is entitled to an acquittal without it; if the jury have a reasonable doubt of the prisoner's guilt, it is their duty to acquit, hence the evidence becomes unnecessary; and, if Mr. Starkie is correct in his proposition where the case is not doubtful upon the oth-

er evidence, it is not entitled to any weight, and so would be needlessly in the case." And Judge Cooley, in the case of *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, quoting the same passage from Mr. Starkie, said: "Such instructions are well calculated to mislead. Good character is an important fact with every man. . . . In every criminal trial it is a fact which the defendant is at liberty to put in evidence, and, being in, the jury have a right to give it such weight as they think it entitled to." In the case of *State v. Henry*, 50 N. C. (5 Jones, L.) 66, the court said: "It is not a rule of law that in a plain case the jury must not consider the evidence of the prisoner's good character, and that it is only 'in a doubtful case that he has a right to have it cast into the scales and weighed in his behalf.' . . . The true rule is that the testimony is to go to the jury and be considered by them, in connection with all the other facts and circumstances, and, if they believe the accused to be guilty, they must so find, notwithstanding his good character." A dictum in the case of *People v. Stewart*, 28 Cal. 396, to the effect that, "after the evidence is all in, the court may, as a matter of law, instruct the jury that evidence as to previous good character is not entitled to any weight except in doubtful cases," was rejected in the case of *People v. Ashe*, 44 Cal. 238, the court saying: "The good character of the prisoner, when proved, is itself a fact in the case. It is a circumstance tending, in a greater or less degree, to establish his innocence, and is not to be put aside by the jury, in order to ascertain if the other facts and circumstances, considered by themselves, do not establish his guilt beyond a reasonable doubt." In the case of *Com. v. Hardy*, 2 Mass. 303, it was held that "in doubtful cases a good general character, clearly established, ought to have weight with a jury, but it ought not to prevail against the positive testimony of credible witnesses." And in the celebrated case of *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, a distinction was drawn between accusations of "great and atrocious criminality" and those of "smaller offenses," and it was said, "against facts strongly proved, good character cannot avail," but in smaller offenses, such as "pilfering and stealing," "where the evidence is doubtful, proof of character may be given with good effect." Both of these decisions were disapproved in the case of *Com. v. Leonard*, 140 Mass. 473, 54 Am. Rep. 485, 4 N. E. 96, and the court said: "It is not now the law, we think, that evidence of character can only be considered by the jury where the other evidence is doubtful. . . . and we think it [the old practice of charging juries that evidence of character was of little or no weight except in doubtful cases] ought not to have been made a rule of universal application; 54 L. R. A.

that is, a rule of law." Without citing at length from other numerous adjudicated cases, we refer to a few of them: *State v. Northrup*, 48 Iowa, 583, 30 Am. Rep. 408; *Com. v. Wilson*, 152 Mass. 12, 25 N. E. 16; *Harrington v. State*, 19 Ohio St. 264; *Felix v. State*, 18 Ala. 720; *State v. House*, 108 Iowa, 68, 78 N. W. 859; *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1092; *Remsen v. People*, 43 N. Y. 8; *Maclin v. State*, 44 Ark. 115; *State v. Sauer*, 38 Minn. 438, 38 N. W. 355; *Edgington v. United States*, 164 U. S. 361, 41 L. ed. 467, 17 Sup. Ct. Rep. 72; *Rowe v. United States*, 38 C. C. A. 496, 97 Fed. 779.

The doctrine of the instruction, which, because of the preponderance of the adjudicated cases by our courts respecting evidence of good character, was consistently and naturally followed by the court below, is sophistical and illogical; and its inconsistency is clearly demonstrated by the distinguished law writers and jurists whom we have quoted, perhaps at too great length. The effect of the doctrine is first to exclude from the jury the consideration of the evidence of good character, although permitted to go before them as competent testimony, until they shall have determined whether they are in doubt as to the guilt of the accused upon the other evidence, in which event the jury are told, as in this case, that "good reputation, when proved, should inure to the acquittal of the defendant," the misleading character of which is obvious; and it is coupled with another objection equally misleading and erroneous,—it is, "when the testimony is positive and distinct, and the offense is clearly and satisfactorily proved, good reputation is of little value." The effect of the instruction is to make character evidence unnecessary and useless under the first branch thereof, and of no avail under the latter part. Such evidence, therefore, might as well be excluded altogether. We think that it is something more than "a mere makeweight in doubtful cases;" and that proof of an unblemished character may, under all the facts and circumstances of the particular case, create a doubt in the minds of the jury, when without it they would have no doubt; and that it is, at least, a circumstance in every case, when proved, to be weighed and estimated by the jury according to the weight of the testimony by which it is supported in connection with that to which it is opposed.

The serious matter of reversing a series of former decisions in order to reach a correct rule of law is our justification for the time and space which we have occupied in our effort to present sound and convincing reasons therefor.

We are unanimously of the opinion that there was error in the instruction as given, and we therefore reverse the judgment, and remand the case to the court below.

GEORGIA SUPREME COURT.

John B. DANIEL, *Piff. in Err.*,
v.
COUNTY OF PUTNAM.

(.....Ga.....)

*There is no authority of law for officials in charge of the financial affairs of a county to purchase vaccine matter, and make the cost of the same a charge against the county.

(May 23, 1901.)

ERROR to the Superior Court for Putnam County to review a judgment in favor of defendant in an action brought to recover the value of certain vaccine matter furnished by plaintiff for defendant's use. *Affirmed.*

The facts are stated in the opinion.

Messrs. Turner & Preston, for plaintiff in error:

The state is not authorized by the constitution to levy taxes and expend money for this purpose under its power to tax for the support of the state government and public institutions. But it is covered by that section which provides that counties may levy taxes and expend public funds to pay for quarantine.

The word "quarantine" should not be taken in its original meaning, which simply related to the detention of persons who had been exposed to contagious diseases for a period of forty days, but in its modern acceptance, covering every scientific means for the prevention of the spread of such diseases.

Where a county contracts within its legitimate competency it may be sued on such contract.

Dent v. Cook, 45 Ga. 323; *Bartow County Comrs. v. Newell*, 64 Ga. 699; *Walker v. Sheftall*, 73 Ga. 806; *Pennington v. Gammon*, 67 Ga. 456; *Cabaniss v. Hill*, 74 Ga. 845; *Smith v. Floyd County*, 85 Ga. 420, 11 S. E. 850; *Fulton County v. Amorous*, 89 Ga. 614, 16 S. E. 201; *Early County v. Powell*, 94 Ga. 680, 20 S. E. 10; *Peed v. McCrary*, 94 Ga. 488, 21 S. E. 232; *Neel v. Bartow County Comrs.* 94 Ga. 216, 21 S. E. 516; *Cook v. DeKalb County*, 95 Ga. 218, 22 S. E. 151.

Mr. S. T. Wingfield, for defendant in error:

Counties have no common-law liability.

1 Code, § 341; *Millwood v. DeKalb County*, 106 Ga. 743, 32 S. E. 577; *Turner v. Fulton County*, 109 Ga. 633, 34 S. E. 1024; 4 Am. & Eng. Enc. Law, p. 359.

County authorities have no powers except those expressly granted.

Phipps v. Morrow, 49 Ga. 38; *Millwood v. DeKalb County*, 106 Ga. 743, 32 S. E.

*Headnote by FISH, J.

NOTE.—On the general question of the special powers and liabilities of municipalities in time of epidemics, including the matter of vaccination, see note to *Thomas v. Mason* (W. Va.) 28 L. R. A. 727.
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577, 4 Am. & Eng. Enc. Law, p. 359; *Houston County v. Kersh*, 82 Ga. 255, 10 S. E. 199; *Turner v. Fulton County*, 109 Ga. 633, 34 S. E. 1024.

No constitutional rights are, or can be, involved in this case, as was done in the case reported in *Smith v. Floyd County*, 85 Ga. 420, 11 S. E. 850, because no private property was taken or damaged by the county, as a public corporation, for the public use.

Millwood v. DeKalb County, 106 Ga. 743, 32 S. E. 577; *Bailey v. Fulton County*, 111 Ga. 314, 36 S. E. 596.

The furnishing of vaccine matter to the different counties is peculiarly and properly a duty of state government, (1) from the reason and necessities of the case; and (2) because such is the declared policy of our law.

Act 1793, Prince, Dig. p. 273; Act 1836, Prince, Dig. p. 277; Act 1843, Cobb, Dig. p. 377; Act 1865, p. 88, codified in Political Code from §§ 1472-1476; *Central R. Co. v. State*, 104 Ga. 831, 42 L. R. A. 518, 31 S. E. 531.

A tax to support the state government clearly carries with it the right to levy a tax to pay for vaccine matter to be furnished to the different counties of the state, (1) because the procuring and furnishing this matter are clearly an important function of state government; and (2) because the law makes this the duty of the state through its governor.

1 Code 1895, § 1475.

Fish, J., delivered the opinion of the court:

The plaintiff brought an action in the statutory form against Putnam county upon an open account for "vaccine points" furnished the defendant. At the trial he offered an amendment to his petition, in which he alleged: "The goods, the value of which is sued for, were certain vaccine points furnished to and for the use of the county of Putnam through and by the orders of the commissioners of roads and revenues of said county, and which were actually received and used by and for the benefit of the county; and the contract which said county authorities made to pay for said goods so purchased was one authorized to be made by the Constitution of the state and the laws passed in conformity therewith, and was within the legal competency of the county; and said debt so created is one for which the county may levy and collect taxes to pay, and therefore the county is liable to suit therefor." The court refused to allow the amendment, and sustained a motion to dismiss the petition on the ground that it did not set forth a cause of action. Without stopping to inquire whether the amendment should have been allowed, and granting, for the sake of the argument, that it should have been, the case really turns upon whether taking the petition and the

amendment together, a cause of action was stated. The counties of this state can only raise revenue by taxation for certain specified purposes. They can only levy taxes within the limitations of and for the purposes specified in the Constitution. Article 7, § 6, ¶ 2, of the Constitution (Civil Code, § 5892) provides: "The general assembly shall not have power to delegate to any county the right to levy a tax for any purpose, except for educational purposes in instructing children in the elementary branches of an English education only; to build and repair the public buildings and bridges; to maintain and support prisoners; to pay jurors and coroners, and for litigation, quarantine, roads, and expenses of courts; to support paupers and pay debts heretofore existing." Under this paragraph of the Constitution, did the commissioners of roads and revenues of Putnam county have authority to bind the county by a contract with the plaintiff for the purchase of "vaccine points," to be furnished by him "for the use of the county" in preventing the spread of the smallpox within its borders? Clearly they could not bind the county by the creation of a debt for the payment of which it has no power to levy a tax. It is perfectly plain that they had no power to bind the county in this matter, unless the word "quarantine," as used in the above-quoted paragraph of the Constitution, is broad enough in its meaning to include the purchase of vaccine matter to be used in preventing the spread of the smallpox. The plaintiff recognizes this, and contends that the vaccine matter which he furnished to the county authorities was purchased and used by them for "quarantine" purposes. We do not think that this is a sound contention. To quarantine persons infected with or who have been exposed to the smallpox is one way of preventing the spread of the disease in a community; to vaccinate people who are not infected with the disease, in order that they may become immune therefrom, is another way of accomplishing the same purpose. But vaccination is one thing, and quarantine is another. To quarantine persons means to keep them, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community. Persons who are merely vaccinated, and then allowed to go when and where they please and to mingle freely with the other members of the community, are in no sense of the word quarantined. The preventive measure adopted in their case tends to protect them both from contracting the disease and from being quarantined. It is true that the object sought to be accomplished in each instance is the same,—the prevention of the dissemination of the disease in the community; but the means resorted to for this purpose in the one instance is different from the means resorted to in the other. The Constitution gives to the authorities of a county the power to raise money by taxation for

defraying expenses incurred in using one of the methods of prevention, but gives them no power to thus raise money to pay expenses incurred in resorting to the other method. Neither does the statutory law undertake to authorize county authorities to purchase vaccine matter for the purpose of vaccinating people residing in such county, and thus checking or preventing an epidemic of smallpox. "The ordinary of each county, or the corporate authorities of any town or city in this state, within the limits of which the smallpox has appeared, or may appear, are authorized and empowered to provide a suitable hospital for those so afflicted, and to furnish them with medical or other attention that in their judgment those so afflicted may require." Pol. Code, § 1472. "Such ordinary or corporate authorities may also provide proper quarantine regulations to prevent the spread of said disease: provided, that no person shall be forced to leave his or her home to go to the hospital aforesaid, when they are properly provided for and guarded at their own expense; said court shall not pay any expense of any case so situated." Id. § 1473. "Said ordinary or corporate authorities shall make, or cause to be made, a proper and just account of all expenses accruing from such quarantine and other attention, either medical or nursing, of all they may have under control, and who submit to the regulations of said court or corporate authorities." Id. § 1474. These sections contain all the power conferred upon county authorities in reference to providing and enforcing measures to prevent or check an epidemic of smallpox. It will be seen that they deal only with the subject of quarantine. The ordinary is empowered to provide a hospital for those afflicted with the smallpox, and to furnish them (not the members of the community at large) with medical or other attention that, in his judgment, those so afflicted may require. He is not authorized to furnish people outside of the hospital, and not afflicted with the disease, with medical or other attention. He cannot furnish vaccine matter and employ physicians to vaccinate the outsiders. He can provide regulations to prevent the spread of the smallpox, but the regulations must be quarantine regulations. He is required to make or cause to be made a proper and just account of all expenses accruing from such quarantine and other attention, either medical or nursing, of all that he may have under control, and who submit to the regulations which he has provided. While he has power, by the enforcement of regulations prescribed for the purpose, to keep the people at large away from the smallpox hospital and from other places where persons afflicted with the disease may be confined under guard, it cannot be said that he has the people of the county generally under control; and the expenses of quarantine and other attention, either medical or nursing, which he is authorized to incur, and of which he must render a proper and just account, are limited to the cases of those

whom he may have under control, and who submit to the quarantine regulations.

The law has not, however, left the counties of this state powerless to procure vaccine matter to be used in preventing or checking the spread of the smallpox. Section 1475 of the Political Code provides: "The governor is authorized and required to procure the necessary quantity of genuine vaccine matter, either by purchase or manufacture, at such reasonable compensation as he may contract for, and have the same transmitted to the ordinaries of each county in this state for immediate use." So far as we have been able to ascertain, the scheme of the law in this state has never been for each separate county to bear the expense of furnishing vaccine matter for the purpose of preventing the spread of smallpox within its limits, but it has been for the necessary vaccine matter to be paid for by the state. Originally the state also undertook to pay all reasonable and necessary expenses incurred in preventing the spread of smallpox within its borders, by reimbursing local communities which had incurred expenses for this purpose. See act of December 14, 1793 (Acts 1793, vol. 1, p. 392; Prince, Dig. p. 270); preamble to act of December 26, 1831 (Acts 1831, p. 245; Prince, Dig. p. 276); report of legislative committee and resolutions adopted December 4 and approved December 6, 1834 (Acts 1834, pp. 308-311); act of December 26, 1836 (Acts 1836, pp. 29, 30); act of December 29, 1836 (Acts 1836, p. 181). This policy was changed by the act of December 9, 1843, which repealed "all laws and parts of laws requiring the expenses incurred on account of smallpox and other pestilential diseases to be paid from the state treasury," and required the governor to "cause a supply of vaccine matter to be purchased and kept on hand at different and convenient places throughout the state, to be furnished to the people gratis, for inoculation," the same to be paid for "out of the contingent fund." Acts 1843, p. 168. By the act of December 13, 1862, the state returned to its old policy of paying the reasonable and necessary quarantine expenses incurred by county and corporate authorities. That act also contained substantially the same provisions as those which we have quoted from our present Political Code, including the section requiring the governor to procure the necessary quantity of genuine vaccine matter, and have the same transmitted to the proper county authorities for immediate use. Acts 1862-63, pp. 33, 34. The act of April 17, 1863, after providing how claims arising under the act of 1862 should be established and settled, declared that that act should no longer be of force, except for the purpose of settling claims that might have arisen under it. Acts 1862-63, p. 162. The act of February 5, 1866, substantially re-enacted the provisions of the act of 1862, except the section of the latter act requiring the state to pay the necessary quarantine expenses incurred by county and municipal authorities, and empowered the inferior courts or municipal authorities to levy an extra tax sufficient to

defray all just and equitable debts contracted under its provisions. Acts 1865-66, p. 88. The same provisions that are contained in the Political Code are found in the Codes of 1868 and 1873, and the Code of 1868 also contained a section requiring the quarantine expenses incurred by the counties and municipal corporations to be paid from the state treasury; the codifiers having apparently overlooked the fact that these provisions of the act of 1862 were repealed by the act of 1863. This mistake was corrected in the Code of 1873. When the Constitution of 1877 was framed the law still required the governor to procure a sufficient quantity of genuine vaccine matter, and furnish the same to the ordinary of each county in the state as necessity might demand. In view of this fact, and the history of our legislation in reference to the prevention of smallpox, it seems very evident that the word "quarantine," as used in the paragraph of the Constitution which provides for what purposes counties may levy taxes, was not intended to have any more than its usual and legitimate meaning, and that it cannot be held that a purchase of vaccine matter, to be used to prevent the spread of smallpox in a county, was made for "quarantine" purposes, within the meaning of the word "quarantine" as used in the Constitution. The county of Putnam had no power to incur a debt for the vaccine points which the plaintiff claims to have furnished it. Consequently, if its commissioners of roads and revenues made such a purchase from the plaintiff, the county is not bound by their act. It follows that the court below committed no error in sustaining the motion of the defendant to dismiss the plaintiff's action.

Judgment affirmed.

All the Justices concur.

WESTERN & ATLANTIC RAILROAD
COMPANY *et al.*, *Plffs. in Err.*,

v.

City of ATLANTA *et al.*

(113 Ga. 537.)

*1. Save and except as to those things which are by the common or statute law declared to be nuisances, *per se*,

*Headnotes by LITTLE, J.

NOTE.—For cases in this series as to necessity of notice and hearing before condemnation of property as a nuisance, see *Teass v. St. Albans* (W. Va.) 19 L. R. A. 502; *People ex rel. Copcutt v. Yonkers* (N. Y.) 23 L. R. A. 491; *Yonkers Bd. of Health v. Copcutt* (N. Y.) 23 L. R. A. 485; *Harrington v. Providence* (R. I.) 38 L. R. A. 305, with note as to power over nuisances affecting safety, health, or personal comfort; and *Valparaiso v. Bosarth* (Ind.) 47 L. R. A. 487.

As to municipal power to define, prevent, and abate nuisance, see *Grossman v. Oakland* (Or.) 36 L. R. A. 503, and note; and *Wygant v. McLauchlan* (Or.) *post*, —.

or which are in their very nature palpably and indisputably such, neither the municipal authorities of any city of this state, nor any department thereof which has been given the power to abate nuisances, has the legal right summarily to compel the abatement of a particular thing or act as a nuisance, without reasonable notice, to the person alleged to be maintaining or doing the same, of the time and place for hearing and determining whether such thing or act does in law constitute a nuisance.

2. Jurisdiction to abate nuisances existing in the cities of this state having a population of 20,000 or more, in a summary manner, except as to things or acts of the nature first above indicated, resides alone in the police court of the city where it is claimed such nuisance exists.

(May 22, 1901.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of defendants in a proceeding to enjoin the removal of the floor of complainant's railroad station for the purpose of replacing it with one of different material. *Reversed.*

The facts are stated in the opinion.

Messrs. Payne & Tye, Dorsey, Brewster, & Howell, and Arthur Heyman, for plaintiffs in error:

Private property cannot be destroyed without due process of law.

See Code, §§ 5700, 6030.

Due process of law means notice of time and place of hearing and an opportunity to be heard.

10 Am. & Eng. Enc. Law, pp. 293, 269-305; Cooley, Const. Lim. pp. 433-436; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

Whether or not private property is maintained in a manner to make it a nuisance is a judicial question, and must be judicially determined before it can be abated.

Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; *Weil v. Ricord*, 24 N. J. Eq. 169; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; Dill. Mun. Corp. § 374; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 23 N. E. 880; *Pruden v. Love*, 67 Ga. 190; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; 1 Am. & Eng. Enc. Law, pp. 83-94.

The city authorities of Atlanta have no power to define what a nuisance shall be, but only to abate what are considered nuisances under the general law.

See City Code, §§ 169, 172. See also *Ison v. Manley*, 76 Ga. 804; *Coast Line R. Co. v. Cohen*, 50 Ga. 451.

Under the general law a nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance.

Code, § 3861. See also *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Ruff v. Phillips*, 50 Ga. 130.

To make a thing a nuisance the evil complained of must not be merely probable or theoretical, but must be certain and inevitable.

See *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Ruff v. Phillips*, 50 Ga. 54 L. R. A.

130; *Harrison v. Brooks*, 20 Ga. 537; *Bacon v. Walker*, 77 Ga. 337; *State ex rel. Hackensack Bd. of Health v. Bergen County Freeholders*, 46 N. J. Eq. 173, 18 Atl. 645; Wood, Nuisances, p. 76; *Montezuma v. Minor*, 75 Ga. 484.

The determination that a nuisance exists under any particular circumstances is a judicial question, and must be judicially ascertained.

See *Tiedeman, State & Federal Control*, 732; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 209; *Yates v. Milwaukee*, 10 Wall. 505, 19 L. ed. 986; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Standing water, slimy soil, and disease-producing germs have not been considered, by the legislative and judicial department of this state, to create an emergency.

Broomhead v. Grant, 83 Ga. 451, 10 S. E. 116; *Ruff v. Phillips*, 50 Ga. 130; Code, § 4764; *Norwood v. Dickey*, 18 Ga. 532; *Montezuma v. Minor*, 73 Ga. 484.

The words "summary proceedings" designate those proceedings before judicial tribunals which are of an immediate, speedy, or peremptory nature. Proceedings are said to be summary when they are short and simple in comparison with regular or formal proceedings, from which they usually differ in that the aid of a jury is dispensed with.

21 Am. & Eng. Enc. Law, p. 497.

The Code, §§ 4090-4098 (Code 1895, §§ 4760 et seq.), furnished a summary remedy for the abatement of nuisances, public or private.

Powell v. Foster, 59 Ga. 790; *Norwood v. Dickey*, 18 Ga. 530. See also following cases: *Tift v. Griffin*, 5 Ga. 185; *Mothershead v. De Gize*, 82 Ga. 197, 8 S. E. 62; *Jones v. Americus, P. & L. R. Co.* 80 Ga. 803, 7 S. E. 117; *Gladden v. Cobb*, 73 Ga. 235; *Cochran v. Swann*, 53 Ga. 39; *Columbus Iron Works Co. v. London*, 53 Ga. 433.

The preservation of the health is a governmental function.

Love v. Atlanta, 95 Ga. 129, 22 S. E. 29.

This duty may be placed upon a city, but does not become a municipal franchise giving the city vested rights, or making it liable for an abuse of the power by its officers.

Ibid.; *Nisbet v. Atlanta*, 97 Ga. 653, 25 S. E. 173; *Bagley v. Columbus Southern R. Co.* 98 Ga. 626, 34 L. R. A. 286, 25 S. E. 638.

Being a governmental function, the legislature could not part with the power to change the law whenever it became necessary or seemed wise to do so.

Albany v. Savannah, F. & W. R. Co. 71 Ga. 158.

Equity will interfere to prevent an abuse of power by public officers when it would not interfere in ordinary trespass.

See *Butler v. Thomasville*, 74 Ga. 575; *Wells v. Atlanta*, 43 Ga. 67; *Graham v. Dahlonga Gold Min. Co.* 71 Ga. 296; *Southwestern R. Co. v. Wright*, 68 Ga. 311, 64 Ga. 783; *Albany Bottling Co. v. Watson*, 103 Ga. 508, 30 S. E. 270; Dill. Mun. Corp. 4th ed. § 908; *Montgomery v. Louisville & N. R. Co.* 84 Ala. 127, 4 So. 626; *Uren v. Walsh*, 57 Wis. 98, 14 N. W. 902; *Morgan v. Miller*,

59 Iowa, 481, 13 N. W. 643; *Church v. Joint School Dist. No. 12*, 55 Wis. 399, 13 N. W. 272. Also *Pike County Inferior Ct. Justices v. Griffin & W. P. Pl. Road Co.* 11 Ga. 246; *Decatur County Comrs. v. Humphrey*, 47 Ga. 567; *Cunningham v. Rome R. Co.* 27 Ga. 499; *Bates v. Houston*, 66 Ga. 198; *Augusta v. Georgia R. & Bkg. Co.* 98 Ga. 161, 26 S. E. 499; *Athens v. Hemerick*, 89 Ga. 674, 16 S. E. 72; *Perry v. Norwood*, 99 Ga. 300, 25 S. E. 648; *Collier v. Elliott*, 100 Ga. 363, 28 S. E. 117; *Georgia S. & F. R. Co. v. Harvey*, 84 Ga. 372, 10 S. E. 971; *Cohen v. Bank of Georgia*, 81 Ga. 723, 7 S. E. 811; *Whitaker v. Hudson*, 66 Ga. 43; *Atlanta v. Gate City Gaslight Co.* 71 Ga. 107.

Messrs. James L. Mayson and William P. Hill, for defendants in error:

The granting and continuing of injunctions must always rest in the sound discretion of the judge, according to the circumstances of each case.

Code, § 4920; *Whitaker v. Hudson*, 65 Ga. 43; *Barfield v. Putzel*, 92 Ga. 442, 17 S. E. 616.

The petition and evidence in this case did not show that the probable damages were irreparable, or that all the defendants were insolvent, or other similar circumstances, and hence the injunction was properly refused.

Code, § 4916; *Hatcher v. Hampton*, 7 Ga. 49; *Catching v. Terrell*, 10 Ga. 576; *Summerville Macadamized, Graded or Pl. Road Co. v. Augusta Land Co.* 56 Ga. 527; *Dill. Mun. Corp.* 4th ed. p. 1092; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65; *Moore v. Smedley*, 6 Johns. Ch. 28.

Under the facts of this case, the remedy was by certiorari.

Code, § 4634; *Montezuma v. Minor*, 70 Ga. 191; *Cole v. Kessler*, 64 Iowa, 59, 19 N. W. 843.

The special authority granted to the board of health by the charter of Atlanta was not affected by prior or subsequent general law.

Craig v. Webb, 70 Ga. 191.

Where a duty is imposed or discretion vested in a person or body, the exercise of this discretion is final.

Cooley, Const. Lim. 4th ed. pp. 51-54, and note on p. 138; *Green v. Savannah*, 6 Ga. 11; *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537; *Danielly v. Cabaniss*, 52 Ga. 212; *Oliver v. Americus*, 69 Ga. 169; *Queen v. Atlanta*, 59 Ga. 318; *Brunswick v. Fahm*, 60 Ga. 109; *Dill. Mun. Corp.* § 328; *Tiedeman, Pol. Power*, §§ 122, 122a, 122b; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 182; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 660.

Under the charter and ordinances of the city of Atlanta, the board of health had the same power to abate nuisances as the mayor and general council, and this latter body had the power to abate them summarily.

Montezuma v. Minor, 70 Ga. 191, 73 Ga. 54 L. R. A.

484; *Americus v. Mitchell*, 79 Ga. 807, 5 S. E. 201; *Dunbar v. Augusta*, 90 Ga. 390, 17 S. E. 970; *Savannah v. Mulligan*, 95 Ga. 323, 29 L. R. A. 303, 22 S. E. 621; *Dupree v. Brunswick*, 82 Ga. 729, 9 S. E. 1085; *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 30 S. E. 850; *Schoen Bros. v. Atlanta*, 97 Ga. 701, 33 L. R. A. 804, 25 S. E. 380.

This power has very ancient authority to support it.

3 Bl. Com. 5; *Baten's Case*, 9 Coke, 53a; *Penruddock's Case*, 5 Coke, 101; *Palmer v. Poultney*, 2 Salk. 458; *Hall's Case*, 1 Mod. 76; *Cooper v. Marshall*, 1 Burr. 263; *Sedgw. Stat. & Const. Law*, pp. 434-436; *Tiedeman, State & Federal Control*, p. 762; *Cooley, Const. Lim.* 4th ed. 748; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513.

It is likewise very generally approved by the courts of last resort of the different states.

Ferguson v. Selma, 43 Ala. 398; *Harvey v. Dewoody*, 18 Ark. 252; *Liebig Mfg. Co. v. Wales* (Del. Ch.) 34 Atl. 902; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Monroe v. Hoffman*, 29 Ia. 651, 29 Am. Rep. 345; *State v. Schlenmer*, 42 La. Ann. 1166, 10 L. R. A. 135, 8 So. 307; *State v. Missouri P. R. Co.* 33 Kan. 176, 5 Pac. 772; *Sprigg v. Garrett Park*, 89 Md. 406, 43 Atl. 813; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *Ferronbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *Manhattan Mfg. & Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251; *Cos v. Schultz*, 47 Barb. 64; *Yonkers Bd. of Health v. Copcutt*, 71 Hun, 149, 24 N. Y. Supp. 625; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *New York Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 39 N. E. 833; *People v. Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 351; *Kennedy v. Bd. of Health*, 2 Pa. St. 366; *Smith v. Elliott*, 9 Pa. 345; *Fields v. Stokley*, 99 Pa. 306, 44 Am. Rep. 109; *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep. 173.

Where a municipality had the power to summarily abate nuisances, and failed to do so, it was liable for damages arising therefrom.

Parker v. Macon, 39 Ga. 725.

Hence, the defendant city, in the present case, was obliged to act or take upon itself the consequences of inaction.

See also *Smith v. Atlanta*, 75 Ga. 110.

Little, J., delivered the opinion of the court:

The Western & Atlantic Railroad Com-

pany and others presented a petition to the judge of the superior court of Fulton county, in which it was alleged that on February 7, 1901, certain employees of the city of Atlanta, acting under the direction of its board of health, began to forcibly take up and remove the floor of the building in that city known as the "Union Passenger Depot," which is used as a railway station by all the railroads passing through or having terminals in said city. The board of health based its action on the ground that the floor sought to be removed was a nuisance endangering the public health. The petition also alleged that the floor, which was of wooden plank, was in good sanitary condition, and in the same condition in which it was when the building was erected, and when the property was leased to the plaintiffs by the state, whose property it was and is, and that they had always kept the floor in good repair, substituting new plank for the old whenever necessary; that the board of health had ordered them to remove the floor, and place in its stead an asphalt floor, or one pleasing to the board, but because it was unnecessary, and would be very expensive, and for other reasons specified, they did not comply with this order; that not until January, 1900, was there any complaint calling the attention of the plaintiffs to the sanitary condition of the floor; that about that time surface water in the streets, caused by excessive rainfalls, partially flooded the floor, and the plaintiffs, supposing that this gave rise to the complaint, and desiring that the remedy adopted should conform to the views of the city authorities, requested the city engineer to prepare plans for the draining of the surface water, which he did, and these plans were carried out in the construction of sewers, after which nearly all the planks in the floor were removed, and new plank substituted, and since that time the floor has not been flooded. The petition further alleged that the board of health had no jurisdiction over the question as to whether the condition of the floor was a nuisance or not; that this is a judicial question, and the plaintiffs were entitled to be heard before their property could be condemned and abated as a nuisance; that there was no legal notice of any action proposed to be taken by the board of health necessary to condemn the floor as a nuisance; that, after the repairs above mentioned were made, no action of any kind was taken by the board of health declaring the condition of the floor as it existed on February 7, 1901, to be a nuisance; and that under the law applicable to the city of Atlanta the board of health has no power to determine the question as to what constitutes a public nuisance, Atlanta being a city of more than 20,000 inhabitants, and jurisdiction as to what constitutes a nuisance being vested in another tribunal. It was alleged that thus removing the floor of the building will result in great inconvenience to the traveling public, and in irreparable damage to the plaintiffs, and that the individuals doing the damage were insolvent. The defendants, in their answer, denied the

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allegations of the petition as to the sanitary condition of the floor, and set out their reasons for treating it as a nuisance. They contended that under the existing conditions at the depot a suitable floor could not be made of wooden plank. They averred that under the charter of the city the board of health is vested with authority to abate nuisances summarily and without resort to judicial proceedings, and that this authority is not affected by the general law; that, in accordance with authority granted by the charter, the mayor and general council of the city adopted an ordinance providing that the board of health "shall have full power and authority to require the owner or occupant of a lot in the city to remove or remedy anything on said lot which, in the opinion of the board, may endanger the public health, and on failure of the owner or occupant to remove or remedy the same the board shall direct the chief sanitary inspector to do so at the cost of said owner or occupant;" and that the removal of the depot floor was undertaken in accordance with the authority thus granted. It was denied, however, that the board was proceeding arbitrarily, and without notice to the plaintiffs. The answer averred that more than a year before the action complained of the board ordered the plaintiffs to remove the floor because of its unsanitary condition, and the plaintiffs, through their representatives, appeared before the board, and admitted that the floor was in this condition, and that a plank floor could not be kept in sanitary condition, and agreed that if, by December 1, 1900, no definite plans for the construction of a new depot should be agreed on, they would proceed without further delay to construct a permanent floor of granitoid, asphalt, or other material, satisfactory to the board of health; that the board, after the thorough investigation then had, adjudged that the condition of the floor was a nuisance, and directed the chief sanitary inspector to make cases in the recorder's court against the plaintiffs, and to abate the nuisance, unless it was remedied; that shortly before December 1, 1900, and at different times afterwards, the board of health communicated with the plaintiffs as to the condition of the floor, urging compliance with this agreement, and received assurances from the plaintiffs' representatives in charge of the depot (known as the "board of control") that the agreement would be carried out, and at their instance more time was granted them, the last extension granted being until February 2, 1901, but no further action was taken by the plaintiffs, except to request a delay until February 7th, and on that date the defendants, deeming it useless to delay further, undertook to remove the floor, and replace it with a permanent floor of such character as would be sanitary, and prevent the accumulation of water in and about the building. The evidence submitted on the question as to whether the condition of the depot floor was a nuisance endangering the public health was conflicting. The court admitted in evidence, over the objections of the

plaintiffs, a resolution of the board of health, adopted February 2, 1900, declaring the condition of the depot floor to be a nuisance; an agreement by the board of control, representing the plaintiffs, the substance of which is stated in the answer of defendants; certain correspondence passing between the board of health and representatives of the plaintiffs; the minutes of the plaintiffs' board of control; and testimony as to what took place at a meeting of the board of health, and as to the action taken by the board. An injunction was refused, and the plaintiffs excepted, not only to the order refusing an injunction, but also to the overruling of objections made by them to the evidence as above set forth, which last ground, in view of the ruling made in the case, need not be considered. The assignment of error as to the refusal of an injunction is that it was against the equity of the case, and was in violation of the 14th Amendment of the Constitution of the United States, in that it deprived the plaintiffs of their property without due process of law, and that under the facts and law of the case the court had no discretion except to grant the injunction as prayed.

No detailed statement of the evidence contained in the record is deemed to be necessary, but reference to such parts of it as becomes material will be considered in the discussion of the legal propositions by which the case is controlled. We shall undertake to establish two propositions as being sound in law, and controlling in this case. The first is that neither the municipal authorities of any city in this state nor any department of a city government has the legal right summarily to abate a nuisance, without first having given reasonable notice to the person maintaining the thing or doing the acts alleged to be a nuisance of the time and place of hearing the question whether such thing or the doing of such acts constitute a nuisance, and the determination by such body that the thing so maintained or the acts done in law constitute a nuisance, and this rule of law applies to all acts and things alleged to be nuisances except those which are by the law expressly declared to be nuisances, or which are indisputably so *per se*; and that this is true notwithstanding the municipal authorities, or any department thereof, have, by the charter of the town or city, been given the power to abate nuisances in such city. The second proposition is that under the law in force in this state jurisdiction to abate nuisances existing in a city of 20,000 population or more, except the specific acts done or thing maintained are declared by the common or statute law to be a nuisance, or which are indisputably so *per se*, resides in the police court of such city. We are aware that in entering the domain of the discussion necessary to support the proposition first above stated we will encounter seemingly contrary rulings in many adjudicated cases, and in treatises by learned text writers. On the other hand, the principles there announced are, we think, supported by reason, and due regard to the right of protection to

the property of the citizen, favored by all courts, and the distinct current of the general authorities, and are recognized by our statutes. We eliminate entirely from the discussion reference to the rights of a private person to abate a public or private nuisance by his own act, for the reason that the principles of law which establish his right and fix his responsibility in so doing are not involved in this case, because when, according to the admitted fact, certain members of the board of health of the city of Atlanta undertook to remove the floor of the Union passenger station on the ground that it was a public nuisance maintained by the lessees thereof, which menaced the health of the city, this undertaking was for and in behalf of a recognized governmental department of the city, and the principle involved does not turn upon the question whether those members of the board of health who instituted such proceedings had or had not legal authority from the board so to do. It is sufficient for the purposes of this discussion that they assumed to do what was done in the name of that body. Nor do we think that the fact that the Union passenger station was the property of the state of Georgia, which had been leased to one of the plaintiffs, would prevent the lawful abatement of a nuisance existing in such station building and maintained by the lessees. Reference was made in the argument to the legal principle that the state is not included in the operation of a general law unless included *eo nomine*. The proposition is sound, but not applicable to the facts of this case. Assuming that the floor of the building which was sought to be removed as a nuisance was the property of the state, it is uncontested that such removal was attempted to be had for the purpose of replacing the plank floor with a permanent, and more costly one, at the expense of the lessees; and, had this purpose been accomplished, no loss or deprivation of property would have been occasioned to the state. With these suggestions as a passing reply to the point made, we proceed to the discussion of the first proposition stated above.

By an act of the general assembly, approved February 28, 1874 (Acts 1874, p. 116), a new charter was established for the city of Atlanta, in which, by § 67, the mayor and general council of the city were authorized to constitute one proper and fit person from each ward as a board of health, and it was made the duty of said board to report to the mayor and general council all nuisances which were likely to endanger the health of any portion of the city, and the mayor and general council were given power, upon the report of the board of health, to cause such nuisances to be abated, and its recommendations were to be carried out in a summary manner at the expense of the party causing the nuisance, etc. By § 71 it is provided that the board of health of the city of Atlanta may exercise the same power as is now vested in the mayor and general council of said city relating to the abatement of such nuisances as are likely to endanger the health of the city to such

extent and under such regulations as may be prescribed by the mayor and said general council. Perhaps, by the original and amended charter of the city, further plenary powers in this respect were conferred, and we will assume, for the sake of the argument, that the board of health was invested both by the charter and municipal ordinances with the power to inquire into, and, concurrently with the mayor and general council, to abate, nuisances. It may also here be noticed that the manner of such abatement was to be summary, and by the officers of the police department of the city, under proper order. It must not be understood, however, that the use of the term "summary" means or implies that it shall or may be done without proper investigation of the facts, or that it may be done without notice, or an opportunity to be heard by the person who, it is alleged, committed the acts, or whose property is sought to be affected. A summary proceeding is thus defined by Mr. Bouvier: "A form of trial in which the ancient, established course of legal proceedings is disregarded, especially in the matter of trial by jury," etc. And this eminent lexicographer, citing Blackstone and Chancellor Kent, together with a number of adjudicated cases, says, referring to such a proceeding, that in no case can a party be tried summarily unless such proceedings are authorized by legislative authority, except, perhaps, in cases of contempt; for the common law is a stranger to such a mode of trial. Mr. Black defines a summary proceeding to be "any proceeding by which a controversy is settled, case disposed of, or trial conducted in a prompt, simple manner without the aid of a jury. . . . Proceedings are said to be summary when they are short and simple in comparison with regular proceedings; that is, with the proceedings which alone would have been applicable either in the same or analogous cases if summary proceedings had not been available." So, then, the power given to abate nuisances in a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure; and the abatement of a nuisance by the municipal authorities, after investigation and determination that a nuisance exists, on their order, by a police officer, is a summary proceeding. Indeed, it seems to be contemplated by the definitions referred to that a summary proceeding involves some kind of a trial; so that, when the board of health was invested with power to abate nuisances in a summary manner, they were not necessarily invested with the power to do so in the absence of any trial or inquiry into the facts without notice. The weight of authority and our own statute is to the effect that, as to nuisances of the character which the board of health alleges the floor of the passenger station to have been, it cannot lawfully be done without notice, and a judgment of the tribunal or department invested with power to abate. In the case 34 L. R. A.

of *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, the Supreme Court of the United States ruled two propositions: First, that the question of nuisances or obstructions must be determined by general and fixed law; second, that it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure a nuisance in such a summary mode (referring to the case), and enforce the decision at their own pleasure. In the case under consideration in that court it appeared that the legislature of Wisconsin had authorized the common council of the city of Milwaukee by ordinance to establish dock and wharf lines along certain rivers, to restrain and prevent encroachments upon said rivers and obstructions thereto; and the city, by an ordinance, had declared a particular wharf to be an obstruction to navigation, and a nuisance, and ordered it to be abated. An injunction was applied for to enjoin the city from interfering with the wharf ordered to be abated. In the course of his opinion in that case Mr. Justice Miller says: "The mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." In the case of *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203, it appears from the report that by the charter of the city of Camden the common council was authorized to establish a board of health, and to define its powers and duties. That such council was authorized in its charter "to abate or remove nuisances of every kind at the expense of those maintaining the same, and to compel the owner or occupant of any lot, house, building, shed, cellar, or place wherein may be carried on any business or calling, or in or upon which there may exist any matter or thing which is or may be detrimental in the opinion of the sanitary committee or board of health, . . . to the health of the inhabitants of the city, . . . to . . . abate the same . . . under the direction of the city council," etc. Under this power the council passed an ordinance establishing a board of health, and provided that, whenever the board of health should deem it advisable for the public health of the city forthwith to abate or remove any nuisance in the city, it was authorized and directed to cause the same to be abated at the expense of the owner. It further appeared that at a meeting of the board of health on a particular day a resolution was passed that a lot of a citizen on a certain

street be declared to be a nuisance, and the owner was directed to fill it up to grade. The order not being complied with, the city did the work at considerable cost, and, the owner refusing to pay it, an action was instituted to recover it. Referring to this declaration of the board of health that the lot was a nuisance, Chief Justice Beasley said: "Giving, therefore, to this resolution the utmost legal effect that can be ascribed to it, by conceding to the sanitary board a judicial capacity in the premises, still its action must be regarded as entirely void, inasmuch as it appears that it had not acquired jurisdiction over the plaintiffs in error. The proceeding was *coram non judice*, and as such was not merely voidable, but was an absolute nullity." Judge Dillon, in his great work on Municipal Corporations, in referring to nuisances, and to the power to prevent and abate them, says: "It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority, and its summary exercise, may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such." 1 Dill. Mun. Corp. 4th ed. § 374. Mr. Wood, in his treatise on the law of Nuisances (vol. 2, § 744, p. 977), says: "A municipal corporation which is empowered to declare what shall be nuisances is not thereby authorized to declare that to be a nuisance which is not so in fact. Things which may or may not be nuisances, where their character in this respect depends upon circumstances, cannot be so declared in advance. The question when the thing may or may not be a nuisance must be settled as one of fact, and not of law." "To determine what is by the law a nuisance is an exercise of judicial power." *State v. Noyes*, 30 N. H. 204. In the case of *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693, it was ruled that things which were not nuisances *per se* must lawfully be ascertained to be such, and the municipal authorities could not arbitrarily declare a thing a nuisance, or destroy valuable property which is lawfully erected or created, without such lawful ascertainment; and except in exceptional cases, or where the thing is clearly a nuisance itself, it should be judicially determined. In *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301, it was ruled that intoxicating liquors could not be taken away or removed, under an ordinance declaring such liquors kept within the town limits to be a nuisance, before it had been judicially declared that the ordinance had been violated. But, as conclusive of the question, so far as this state is concerned, we have only to refer to a provision of our law which has been in force since 1833, and which is found in Civil Code, §§ 4760-4763. The first of these

sections provides that a nuisance may be abated by the order of two or more justices of the peace in the county where it exists, founded upon the opinion of a jury, and the order shall be executed by the sheriff of the county, or his deputy. A further provision declares that, if the nuisance complained of exists in a town or city under the government of a mayor, etc., such nuisance may be abated, with the advice of the aldermen or council, by order of the mayor; and, referring to this provision, § 4763 expressly declares that reasonable notice shall be given to the parties interested of the time and place of the meeting of such justices and freeholders, or such mayor, intendant, aldermen, etc. These provisions constitute a general law of this state. It is, however, claimed that the charter of the city of Atlanta was enacted subsequently to the passage of the act which contains these provisions, and, that being so, the provisions of the charter have the legal effect of rendering inapplicable the provisions of the statute to the city of Atlanta; and the case of *Montezuma v. Minor*, 70 Ga. 191, is relied on for the proposition that the special authority granted to the board of health by the charter of Atlanta was not affected by prior or subsequent general laws. Without conceding that the case referred to is authority for the proposition that the charter of Atlanta was not affected by a subsequent law,—which proposition will be discussed in another part of this opinion,—we must, in fairness, accept the ruling made in that case as sustaining the proposition that a prior general law providing for the abatement of nuisances does not prevent the legislature from subsequently conferring such power on the municipal authorities of a city. In that case, as we understand the facts, the authorities of the town of Montezuma sought to abate as a nuisance a mill pond from which was operated a grist mill. To this attempt the defense was interposed by the owner that, if it was a nuisance, the same could not be abated by the authorities of the town, because under the act of 1833, referred to above, the ordinary of the county alone had jurisdiction, and that the affidavit of two or more freeholders was a condition precedent to the right of the ordinary to summon a jury and adjudge whether the mill and adjacent water were in fact a nuisance. This court ruled that, the act incorporating the town of Montezuma, being subsequent to the act of 1833, by its terms devested the jurisdiction of the ordinary, and vested the power to abate nuisances within its limits in the authorities of the town; and that under the charter of the town the municipal authorities had full power to abate a nuisance on the report of the board of health, although such nuisance consisted of a mill and machinery run by water. But how does the ruling there made affect the validity of the act of 1833 as to the requirement of notice to the parties interested of the time and place of the meeting of the mayor and council, at which the question of the existence of the nuisance is to be deter-

mined? The only change in this general law which the *Minor Case*, 70 Ga. 191, effected was that the ordinary was deprived of the jurisdiction which the general law conferred on that officer within the limits of the town of Montezuma. It only effected a substitution of one governmental agency for another, leaving the act of 1833 otherwise of full force and effect, and especially that part of it which declares that reasonable notice shall be given to the parties interested of the time and place of meeting of the mayor and aldermen. No change in this provision was caused by the act incorporating the town of Montezuma, and no change was effected in this provision, as we think, by the act creating a new charter for the city of Atlanta. It was a summary proceeding to abate a nuisance when done by the ordinary and a jury. It is none the less a summary proceeding when, after notice, the nuisance is ordered to be abated by the mayor or board of health.

Another proposition is relied on by the defendant in error to sustain its theory of the law of the case, to wit, that, where a duty is imposed, or a discretion vested, in a person or body, the exercise of this discretion is final. The proposition, as stated, is undoubtedly sound; but, while it is so, it is fundamental law that the performance of the duty, and the exercise of the discretion, in a case where personal liberty or private rights are involved, cannot legally be had in the absence of a notice to the person interested, that he may have an opportunity to contest the facts in relation to which such person or body is to exercise its discretionary power. The case of *Americus v. Mitchell*, 79 Ga. 807, 5 S. E. 201, is not at all in conflict with the proposition which we are endeavoring to sustain. In that case it appears that the municipal authorities were seeking to abate as a nuisance a mill pond within the limits of the city, and by the answer it appears that there was a judgment of the mayor and aldermen condemning the pond as a nuisance. A bill was filed seeking to enjoin the authorities from proceeding to destroy the dam which collected the water in the pond, on the ground that it was not a nuisance; and this court ruled that, under the charter and ordinances of the city, the mayor and council, on the recommendation of the board of health, had full power, in a summary manner, to abate nuisances, and that it was for that body to determine whether it was a nuisance or not. If they came to the conclusion that it was, they had the right to abate it in a summary manner. No point was made by the owner of the mill that he had no notice of the proceedings which were had under which his property was declared to be a nuisance. It is evident, however, that such proceedings were had from the fact that there was a judgment of condemnation by the mayor and aldermen. The only complaint was that this judgment was wrong. The effect of the ruling made is that a court of equity will not interpose to enjoin the execution of the judgment rendered on the ground that

the finding was wrong. This case does not, in our judgment, construe the section of our Code requiring notice to the persons interested differently from the view which we now take of it. In *Dunbar v. Augusta*, 90 Ga. 390, 17 S. E. 907, cited by counsel for defendant in error, Chief Justice Bleckley said, in his opinion rendered in the case, that it was evident that the board of health did in fact consider and decide that the corn was dangerous to the public health, and that the chief, if not the only, reason suggested against the binding force of that decision is that it was made without notice to the owners of the property. As meeting this point fully and entirely, this eminent jurist said: "But, according to the authorities, notice was not essential except for the purpose of rendering the decision conclusive; the nuisance in question, if one at all, being a nuisance at common law." We are not contending that where the particular thing or the act sought to be abated is made a nuisance by statute, or is characterized as such by the common law, any inquiry or notice is necessary, because the question as to whether it is in fact a nuisance is already determined; but when the act or thing is not made so by the common or statute law,—as in this case,—the question whether it is or is not a nuisance is a judicial one, to be passed upon by the tribunal having power to abate it, after notice to the party interested. The case of *Savannah v. Mulligan*, 95 Ga. 323, 29 L. R. A. 303, 22 S. E. 621, is cited on this point by the defendant in error in support of its contention, but the ruling made in that case, we think does not require a different construction of the statute providing for notice than the one we have given to it. In that case Mulligan instituted an action against the city to recover the value of a feather bed, pillows, and a mattress destroyed by a sanitary inspector under orders of its health officer. This court ruled there that, unless the property destroyed was itself a nuisance endangering the public health or safety, it was wrongfully destroyed; but that if it did so endanger the public health, it might be destroyed by the authorities lawfully, and without paying the owner its value, if the charter of the city conferred on it the power to abate such nuisances. The decision referred to the provisions incorporated in § 1456 of the Political Code, as follows: "Analogous to the right of eminent domain is the power from necessity vested in corporate authorities of cities, towns, and counties to interfere with, and sometimes to destroy, the private property of the citizen for the public good, such as the destruction of houses to prevent the extension of a conflagration, or the taking possession of buildings to prevent the spreading of contagious diseases." By the facts of the case it was shown conclusively, said Chief Justice Simmons, who delivered the opinion, "and beyond question, that the property destroyed was in fact a nuisance endangering the public health, having been used as bedding by a person who had scarlet fever, a highly contagious disease;

and the mayor and aldermen of the city, under its charter, had ample authority to abate the nuisance" in question. It may be well to consider at this point for a moment the power of municipal authorities to abate certain nuisances without any proceedings whatever except to order their abatement. These are, we think, not only such things as are by the law declared to be nuisances, but also those which are indisputably so *per se*. In each of these cases, a necessity exists to destroy private property in order to protect the public. Vicious animals, which are accustomed to attack a man, are nuisances, and under certain circumstances may be killed without any proceedings whatever, either by a private person or by order of the municipal authorities. It is a public nuisance for one who is infected with an infectious or contagious disease to expose himself in a public place. To take a horse infected with glanders into a public place is such. Mr. Tiedeman, in his work on Municipal Corporations, § 120, citing *Ferguson v. Selma*, 43 Ala. 398; *Nolan v. Franklin*, 4 Yerg. 163; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165,—declares that, where the property or act is *per se* a nuisance, the power of the municipality is unquestioned, though its exercise may involve the destruction of private property. In his work on Limitations of Police Power (§ 122g) the same author declares that in certain cases of extreme necessity the private individual may, without the aid of the government, abate or remove the nuisance (referring to a public nuisance); in other cases the government, through its proper department, must interfere. In the *Mulligan Case*, 96 Ga. 323, 29 L. R. A. 303, 22 S. E. 621, the property destroyed was a nuisance *per se*, which threatened the health of the people generally. Being a nuisance *per se*, there was no necessity for any inquiry; hence no need of notice. The further cited case of *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 30 S. E. 850, has, we think, but little application to the point now under discussion. Morris questioned the constitutionality of the act of the general assembly which had conferred upon the city of Columbus authority to require vaccination, and the court simply ruled that, in the exercise of the police power, the general assembly may confer upon the authorities of the city power to make and enforce an ordinance requiring all persons within the limits of the corporation to submit to vaccination, whenever an epidemic of smallpox is existing or may be reasonably apprehended. The only question of fact which could arise in that case was whether the occasion for the enactment of such an ordinance had arisen. And on an entirely different principle from any which we have invoked the municipal government must, of course, be the final and conclusive arbiter as to the existence of such conditions. It is our opinion that the provisions of our Code require, when a municipal corporation is seeking to abate a nuisance, such as it was alleged the 54 L. R. A.

floor of the Union passenger station was in this case, that the parties interested be given reasonable notice of the time and place of hearing at which the fact whether the property complained of is or is not a nuisance shall be inquired into and determined; that without such notice, and a judgment on the facts by the body invested with power to abate the nuisance, it is unlawful to enter thereon, and remove or destroy it as a nuisance. If the thing, as we have said, is declared by law to be a nuisance, or if it is unquestionably a nuisance,—such as a rabid dog, infected clothing, the carcass of a dead animal on a private lot, the presence of a smallpox patient on the street,—it may be abated by the municipal authorities at once, by order, from the necessity of the case, and to meet an emergency which exists to at once protect the health and lives of the people.

2. We now proceed to the consideration of the second question presented, namely, upon what department of the municipal government, under the laws of this state, devolves jurisdiction to abate nuisances in a city having a population of 20,000 or more? The provisions of the act of 1833, which are incorporated in § 4760 of the Civil Code, declare that any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health and safety, or tends to corrupt the manners and morals of the people, may be abated, etc. And it is only such nuisances as these that the act of 1833 refers to when, as codified in § 4762, it declares they may be abated by order of the mayor or aldermen when they exist in incorporated towns. It will be noted that a nuisance injurious to the public health is expressly brought within its provisions, and that to this class of nuisances the entire act refers, including, as we have previously shown, a requirement that reasonable notice shall be given to interested parties of the meeting of the mayor and aldermen to pass on the same before the order is issued. This act of 1833 is a public law, but, as seen in the *Minor Case*, 70 Ga. 191, it was ruled by this court that, notwithstanding it was a public law in force in 1871, the provisions in the charter of the town of Montezuma, passed by the legislature in that year, rendered inapplicable as to the abatement of nuisances in that town so much of the act as provided that, where the nuisance complained of was a grist mill, it should be abated by the ordinary and a jury of the county. Practically, this is the effect of the ruling made in that case. Other than to the town of Montezuma, and other towns and cities in which its operation has been specially suspended by charter provisions, this act remains in full force. By an act approved December 4, 1889, the general assembly amended the charter of the city of Atlanta, and, among other particulars, the caption of the act recites that it is "to confer upon the recorder's or mayor's court of said city the jurisdiction now devolving upon the mayor and general council in the trial and abatement

of certain nuisances as provided by the law of the state as contained in "certain sections of the Code of Georgia." The amending act declares "that the jurisdiction now vested in the mayor and general council of said city under and by the laws of this state as contained in the Code of . . . 1882 in §§ 4094 to 4100, inclusive, in respect to the trial and abatement of nuisances, as set forth in said Code and sections, be, and the same is hereby, devolved upon and vested in the recorder's or mayor's court of said city. "Said recorder's or mayor's court shall have the same jurisdiction, power, and duty as to the trial and abatement of said nuisances as the mayor and general council of said city has heretofore had, and said mayor and general council are hereby relieved of jurisdiction and duty to try, hear, or abate such nuisances, provided and except that nothing in this act contained shall divest the mayor and general council and board of health of said city of jurisdiction as to nuisances affecting health, as now provided by law." So that this act, by its terms, conferred upon the recorder's or mayor's court of the city of Atlanta all the jurisdiction as to the trial and abatement of nuisances contained in the act of 1833 in respect thereto, and those which were conferred on the authorities of the city of Atlanta by its charter. except jurisdiction as to nuisances affecting health. It will here be noted that this enactment was subsequent to the adoption of our present Constitution, which declares that "no special law shall be enacted in any case for which provision has been made by an existing general law." The act of 1833 was, as we have seen, a general law. The act of 1889 amending the charter of the city of Atlanta was a special law. The general act provided that nuisances in a town or city should be abated by the mayor and aldermen, etc. The special act conferred jurisdiction to abate such nuisances (or a class of them) in the recorder's or mayor's court. The special act recognized as applicable to the city of Atlanta the provisions of the act of 1833. Now, admitting, under the authority of the *Minor Case*, 70 Ga. 191, that prior to the adoption of the Constitution of 1877 the general assembly could, by the terms of a special act, vary the terms of a general law as to the abatement of nuisances in a particular city, it is difficult to perceive how, under the provisions of the Constitution, the terms of a general law could be thus varied in 1889. As illustrating the serious import of that question, attention is called to the case of *Connor v. Hall*, 89 Ga. 257, 15 S. E. 308. After the passage of this amendment to the charter in 1889, Hall filed a petition in the recorder's court asking for an order to abate an alleged nuisance (a fence across an alley). This application was resisted, and a plea to the jurisdiction of the recorder was filed. After an adjudication that the nuisance existed, and an order by the recorder that it be abated, the defendant sued out a certiorari to the superior court, alleging that the judgment was contrary to the law and the evi-

dence. The certiorari was overruled, that judgment was excepted to, and the case brought here. This court, after ruling on a point not material to be considered in this connection, ruled that, as no question as to the jurisdiction of the recorder was raised, it was not apparent that the judge of the superior court erred in affirming the judgment of the recorder. Subsequently the defendant in that judgment filed an application to enjoin its enforcement on the ground that the recorder had no jurisdiction to try the same, and that the judgment rendered by him was void. The allegation of a want of jurisdiction in the recorder rested on the unconstitutionality of this act of 1889, because it was in conflict with the provision of the Constitution to which we have just referred, and thereupon the plaintiff proposed to show that the erection of the fence was not a nuisance. The trial judge rejected this evidence, and ruled that the question of jurisdiction was settled by the former judgment, which was conclusive of every question that was or might have been made, and denied the application. In ruling upon the correctness of that judgment this court said that, when it appeared that a person was cited before the recorder's court to show cause why he should not abate a nuisance; that he appeared, and among other defenses pleaded to the jurisdiction of the court; that the plea was overruled, and the case tried upon its merits, and he was ordered to remove the nuisance, and thereupon took the case to the superior court by certiorari, and did not assign error upon the judgment overruling the plea to the jurisdiction,—there was no error in refusing to grant such person an injunction to prevent the city marshal from enforcing the judgment by removing the nuisance. *Connor v. Hall*, 91 Ga. 62, 16 S. E. 266. It would thus seem that the constitutionality of this amendment to the charter of Atlanta was at least doubted. Subsequently to these decisions (the latter having been rendered October 31, 1892) the general assembly passed a bill which was approved December 12, 1892, to amend the provision of the Code which, as part of the act of 1833, declared that, if the nuisance existed in a town or city, it might be abated and removed by order of the mayor, etc. This amendment was proposed in a bill introduced by Mr. King, one of the then representatives of the county of Fulton. Journal House Rep. 1892, p. 61, and which afterwards became a general law, was in the following words: "But if the nuisance complained of exists in a city having twenty thousand population or more the police court of such city, whether known as mayor's or recorder's court, or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and if found to exist, to order its abatement, which order shall be directed to and executed by the sheriff or marshal of said town or city or their deputy." This act contained the usual clause repealing all laws and parts of laws in conflict therewith. So that the general law of

1833, which provided that nuisances in a city might be abated by the mayor and aldermen, was thus amended by the act of 1892, so that, if the nuisance existed in a city having a minimum population of 20,000, the jurisdiction to abate the nuisance should be exercised by the police court of that city; and not only so, but the officer presiding in that court should hear and determine the question of its existence before ordering its abatement. And it appears that such change was at the instance of the city of Atlanta through one of its worthy and able representatives. No other conclusion can be drawn from this enactment than that all the power conferred on the city of Atlanta (including its board of health) to abate a nuisance manifestly injurious to the public health was taken away thereby, and jurisdiction thereof vested in the mayor's or recorder's court for hearing and determining the question whether such nuisance exists. It must be understood, however, that in so ruling those things which are declared either by the common or statute law to be nuisances, or which are nuisances *per se*, and from their very nature are indisputably so, are not included either in the ruling or in what has been said in the way of argument. As we have endeavored to show in the first division of this opinion, as to them no inquiry is necessary, because they have been so pronounced, or their character as such cannot be denied. In opposition to the view which we have just taken of the nature of the act of 1892, it is claimed that that act does not operate as a repeal of the provisions of the charter of the city of Atlanta as to the abatement of nuisances, and it is urged that repeals by implication are not favored. We assent to the correctness of the latter proposition, but, while not favored, the repeal of a special statute or particular parts thereof results by operation of law under certain well-defined rules. If this act repeals the charter provisions of the city of Atlanta, such repeal is by implication; and just here it may be observed that the test whether such repeal has been effected is whether it was the intention of the general assembly that such should be its effect. Concerning the repeal by implication of a general law by the enactment of another general law, Mr. Sedgwick, in his work on the Construction of Statutory and Constitutional Law, 2d ed. p. 104, says: "It is equally well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so in terms; and, even if the subsequent statute be not repugnant in all its provisions to a prior one, yet, if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act." Mr. Sutherland, in his work on Statutory Construction (p. 179), says, on the same subject: "An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an early act." To the same effect, see also Potter's Dwarrr. Stat. 54 L. R. A.

p. 154, and Endlich, Interpretation of Statutes, p. 280, with which rule the decisions of this court are in harmony. *Girardey v. Dougherty*, 18 Ga. 262; *Erwin v. Moore*, 15 Ga. 361; *Johnson v. Southern Mut. Bldg. & L. Asso.* 97 Ga. 622, 25 S. E. 358. The exact question, however, is whether the repeal of a special act is necessarily effected by the enactment of a general law covering the same subject; and it must be conceded that, as a rule, this effect is brought about less readily than where both the repealed and repealing statutes are in the form of general laws. Nevertheless, it rests upon the intention of the lawmakers, and we apprehend that the rule is that, when a general law is enacted, making certain provisions in relation to all the towns of this state, and the provisions of the enactment clearly manifest that it was the purpose of the lawmakers to establish a given condition in all of such municipalities, that the terms of such general law will supersede the rights and powers given to any particular municipality by its charter. Citing a number of authorities for the proposition, Judge Dillon in 1 Dill. Mun. Corp. § 85, says: "The powers conferred upon municipal corporations may at any time be altered or repealed by the legislature, either by a general law operating upon the whole state, or, in the absence of constitutional restriction, by a special act." Also, upon the authority of a number of later cases for his text, Mr. Tiedeman, in his treatise on the law of Municipal Corporations (§ 32), declares: "The powers and privileges conferred upon a municipal corporation by act of the legislature may at any time be repealed or amended by the legislature, either by a general law applicable to all municipal corporations throughout the state, or, in absence of constitutional limitations, by a special act applying to the particular corporation." It was ruled by the supreme court of Pennsylvania in the case of *Nusser v. Com.* 25 Pa. 126, that a general act prescribing the mode of punishment of a specific offense throughout the state operates to repeal an act limited to a single county prescribing the mode of punishment for the same offense within the designated county. To the same effect, see *State ex rel. Atty. Gen. v. Percy*, 44 Mo. 159, in which case the repeal seems to have been based on the proposition that by the enactment of a general law it was the manifest purpose of the legislature to produce uniformity. A number of authorities are cited in note 1, p. 214, by Mr. Sutherland (in his work above cited), to support what he declares to be the doctrine in such cases, which the text states as follows: "There is no rule of law which prohibits the repeal of a special act by a general one, nor is there any principle forbidding such repeal without the use of words declarative of that intent. The question is always one of intention, and the purpose to abrogate the particular enactment by a later general statute is sufficiently manifested when the provisions of both cannot stand together." [§ 159, p. 213.] In the

case of *Pausch v. Guerrard*, 67 Ga. 319, this court seems to have recognized the rule above announced as law in this state when it ruled that "while, ordinarily, a general law does not repeal a prior local law, unless the latter be specially named or necessarily embraced in the terms used, yet where it is apparent from the act itself and the Constitution of the state that it was intended to embrace the local law, the latter will be held to be modified or repealed thereby." But, as being conclusive, on principle, of the question under consideration, the case of *Croratt v. Mason*, 101 Ga. 246, 28 S. E. 891, is directly in point. A general act of this state provides that after its passage aldermen of towns and cities of this state, except in towns and cities of less than 2,000 inhabitants, shall be incompetent to hold any other municipal office during the term for which they are chosen. In the case just cited the defendant in error resided in Brunswick. He was, in December, 1895, elected an alderman of that city for a term of two years. During his term he was elected mayor. His eligibility to this office was questioned, and he replied that under the terms of the charter of Brunswick, granted prior to the enactment of the general law, he was eligible to be elected mayor while holding the office of alderman. It was said in the opinion in that case that, as the act bears uniformly upon all towns and cities throughout the state which are included and come in the class concerning which the legislation is had, the law was a general one, and that the contention that a special act which declared what persons were eligible to the office of mayor of the city of Brunswick was not modified by the general act was unsound; that it was the legislative act which created the municipal corporation of Brunswick, and prescribed the manner in which the offices of the corporation should be filled. Having done so, it remained in the power of the legislature to change that method at will. And we know of no reason why this cannot be legitimately done by a general statute declaring and fixing the policy of the state in all cities and towns of a certain class. It is not possible that the terms of the general act of 1892 in relation to the abatement of nuisances in the city of Atlanta and the provision of the charter of the city of Atlanta in respect thereto can be construed so as to stand together. The charter confers the power to abate on the mayor and general council and the board of health. The general statute, before it was amended, conferred it on the mayor and aldermen, and there was little difference in the provisions of the general statute and the charter in this regard. The amendatory act of 1892 left the power to abate nuisances in the towns and cities of this state, where the general act of 1833 had placed it, except as to those cities which have a population of 20,000 or more, to which latter class Atlanta belongs; and as to these the power to abate nuisances is vested in the police court. The jurisdiction thus conferred must be exclusive, otherwise the general act would have to be construed as

applying to some of the cities of the class named, and not to others. Being a general law, it must have general application to all cities coming within the class. That such was the intention of the lawmakers is manifest, not only because it was expressly made general by its terms, but in words it declares that all laws in conflict with its provisions are repealed. It must therefore be held, as a matter of law, that the power to abate nuisances of the kind in question is vested in the recorder's court of the city of Atlanta, and that at the time the board of health undertook to remove the floor of the Union passenger station in Atlanta because it was alleged to be a public nuisance it had no authority to do so; and, inasmuch as it is not only alleged, but shown, that the damages which would have been sustained by plaintiffs in error would have been irreparable in their nature if the removal of the floor was continued, the trespass thus being committed should have been enjoined, and the judgment refusing the application is reversed.

All the Justices concur.

Julius M. ALEXANDER *et al.*, *Pliffs. in Err.*,
v.

ATLANTA & WEST POINT RAILROAD
COMPANY *et al.*

(113 Ga. 193.)

*Minority stockholders of a corporation, who, by filing an equitable petition against it and its officers, succeeded in enjoining it and them from doing *ultra vires* acts which would have required the expenditure of money belonging to it, were not entitled to a judgment for their attorney's fees against the corporation, when there was, as a result of the litigation, neither a recovery of property for the corporation, nor administration or distribution by the court of any fund brought into its hands for this purpose, and when the corporation itself repudiated the effort of the plaintiffs to thus protect its interests, and, in defense to their petition, stood squarely upon the proposition that the acts in question were not *ultra vires*, but authorized by its charter.

(April 24, 1901.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of defendants in an action brought to recover attorney's fees alleged to have been expended in preventing illegal action on the part of defendants. *Affirmed*.

The facts are stated in the opinion.

*Headnote by FISH, J.

NOTE.—As to allowing attorney's fees out of corporate funds to minority stockholders who have successfully maintained a suit to recover corporate property wrongfully conveyed by the corporate officers, see, in this series, *Grant v. Lookout Mountain Co.* (Tenn.) 27 L. R. A. 98.

Mr. Henry A. Alexander, for plaintiffs in error:

Trustees are entitled to be paid out of the trust property all expenses that are necessary for its security, protection, or preservation.

2 Pom. Eq. Jur. § 1085; Lewin, Tr. p. 557; Perry, Tr. § 910.

Officers of a corporation occupy a fiduciary relation, and, while not actual trustees, are trustees *sub modo*, and are governed by the same rules as actual trustees.

3 Pom. Eq. Jur. § 1088; 1 Morawetz, Priv. Corp. § 237.

It is the essential and fundamental duty of the officers of a corporation to see that its operations are kept within the powers conferred by its charter. Whenever the officers undertake to embark the corporation on enterprises which are beyond the powers conferred upon it by charter, the legal effect of such action is the virtual abdication of their offices, and, as to such proceedings, they cease to represent the corporation. Stockholders who come forward at such a crisis and undertake to prevent the corporation from entering on such illegal course virtually become themselves, to that extent, clothed with the official character which the unfaithful officers have, by their misconduct, renounced, and become themselves the representatives of all the stockholders. The expenses incurred by them in such character should not be put upon them alone, but upon all ratably, and be paid by the corporation.

2 Spelling, Priv. Corp. § 643; 2 Cook, Corp. § 748; 1 Morawetz, Priv. Corp. § 271; *Grant v. Lookout Mountain Co.* 93 Tenn. 691, 27 L. R. A. 98, 28 S. W. 90; *Meeker v. Winthrop Iron Co.* 17 Fed. 48; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 21 So. 315; *Fox v. Hale & N. Silver Min. Co.* 108 Cal. 475, 41 Pac. 328; *Kernaghan v. Williams*, L. R. 6 Eq. 228; *Chetwood v. California Nat. Bank*, 113 Cal. 649, 45 Pac. 854; *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712; *Florida Internal Improv. Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387; *Woodruff v. New York, L. E. & W. R. Co.* 129 N. Y. 27, 29 N. E. 251; *Crumlish v. Shenandoah Valley R. Co.* 40 W. Va. 627, 22 S. E. 90.

That the officers are backed and supported in their illegal proceedings by a majority of the stockholders does not alter the rule that such expenses should be borne by the company.

Cheney v. Selman, 71 Ga. 384; *Guess v. Stone Mountain Granite & R. Co.* 72 Ga. 320.

That the minority stockholders simply secured an injunction, and did not have a receiver appointed, nor bring a fund into court, is immaterial on the question of their right to the payment of their expenses by the corporation.

The stockholders of a corporation having entered, the one with the other, into a solemn compact embodied in the charter, cannot plead or otherwise take advantage of 54 L. R. A.

their own wrong in attempting to violate that compact, and are estopped to assert that litigation seeking to prevent their breach of faith was not to their benefit.

The company is made a party defendant, not because it is really such, but because its own rights are primarily involved, and in order that it may itself receive the benefits and avails of the litigation.

Pom. Eq. Jur. § 1095; 1 Morawetz, Priv. Corp. § 256; *Grant v. Lookout Mountain Co.* 93 Tenn. 691, 27 L. R. A. 98, 28 S. W. 90; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 634, 15 S. W. 448; *Deaderick v. Wilson*, 8 Baxt. 131; *Hove v. Barney*, 45 Fed. 668; *Robinson v. Smith*, 3 Paige, 222, 24 Am. Dec. 212; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Evans v. Brandon*, 53 Tex. 56; *Allen v. Curtis*, 26 Conn. 456; *Smith v. Poor*, 40 Me. 415, 63 Am. Dec. 672; *Carter v. Ford Plate Glass Co.* 85 Ind. 180; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. ed. 654; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 21 So. 315.

Messrs. N. J. Hammond, T. A. Hammond, and Lawton & Cunningham also for plaintiffs in error.

Messrs. King & Spaulding, for defendant in error Louisville & Nashville Railroad Company.

If power exists to do any of the acts complained of, then a majority of the stockholders and board of directors can exercise such power, and the minority have no right to complain. A court will not control the majority in the exercise of rightful power, even though it may differ as to the advisability of such exercise.

2 Cook, Stock & Stockholders. 3d ed. § 684; *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186.

The Atlanta & West Point Railroad Company had full authority, by action of the majority of its stockholders, to accept the provisions of the general railroad law as an amendment to its charter, and such act is binding on the minority.

Northern Bank v. Stone, 88 Fed. 413; 2 Beach, Priv. Corp. § 780; *Pope v. Lake County*, 51 Fed. 769; *Nugent v. Putnam County*, 19 Wall. 241, 22 L. ed. 83; *New Buffalo Twp. v. Cambria Iron Co.* 105 U. S. 73, 26 L. ed. 1024.

If the general railroad law, so far as it would materially amend the charter, is not binding on the dissentients, the charter being amendable, the act of amendment is not void as would be an amendment in the case of an irrevocable charter, but is simply not binding upon dissentients, so far as material and fundamental, so long as they dissent. It is binding fully, so far as not a material and fundamental alteration.

Snook v. Georgia Improv. Co. 83 Ga. 61, 9 S. E. 1104.

Where proper corporate action is required in order to set in motion the act of a third party, unless the statute prescribes otherwise a majority vote is such proper corporate action.

Code, § 1857; 1 Cook, Stock & Stockhold-

ers, 3d ed. § 607; 1 Morawetz, Priv. Corp. 2d ed. § 474.

Messrs. Dorsey, Brewster, & Howell, Joseph B. Cumming, and Bryan Cumming, for Atlanta & West Point R. Co.

Every man is to pay his own lawyer; every litigant pays his own counsel.

Ball v. Vason, 56 Ga. 267.

To justify a court in appropriating the funds of one person to the payment of the fees of another, the party affirming the correctness of the proposition ought to be required to show by uncontrovertible authority the power of the court to do so.

Lowry Bkg. Co. v. Atlanta Piano Co. 95 Ga. 150, 22 S. E. 42.

This suit was brought in the right of complainants, and not in the right of the corporation. The real defendant is the corporation.

The corporation is not liable for the fees of the stockholders' counsel.

Hubbard v. Camperdown Mills, 25 S. C. 496, 1 S. E. 5; *Hand v. Savannah & C. R. Co.* 21 S. C. 162; 5 Thomp. Corp. § 7054; *Finance Co. v. Charleston, C. & C. R. Co.* 52 Fed. 678; *Bound v. South Carolina R. Co.* 51 Fed. 58; *Anderson v. Fidelity & Deposit Co.* 100 Ga. 742, 28 S. E. 463; *Milliken v. Steiner*, 56 Ga. 257; *Lowry Bkg. Co. v. Atlanta Piano Co.* 95 Ga. 150, 22 S. E. 42; *Waters v. Greenway Bros.* 17 Ga. 592; *Mitchell v. Atkins*, 71 Ga. 680; *Atty. Gen. v. North America L. Ins. Co.* 91 N. Y. 57, 43 Am. Rep. 648; *Woodruff v. New York, L. E. & W. R. Co.* 129 N. Y. 27, 29 N. E. 251.

Fish, J., delivered the opinion of the court:

In 1898 the stockholders of the Atlanta & West Point Railroad Company, in annual meeting assembled, passed, by a majority vote of the stockholders of the company, a resolution that the company should at once apply to the secretary of state for an amendment to its charter granting to it all the powers and privileges contained in the general law of the state for the incorporation of railroad companies. An application in the name of the company for the amendment was then made to, and granted by, the secretary of state. The railroad company then undertook and began to construct just outside of the corporate limits of the city of Atlanta a belt railroad, about 6 miles long, extending from a point on its main line to a point on the Georgia railroad. The Central of Georgia Railway Company and certain other minority stockholders of the Atlanta & West Point Railroad Company brought an equitable petition against the latter company and other defendants to prevent the construction of this belt line. The superior court refused to grant the injunction, and the plaintiffs brought the case to this court, where the judgment of the lower court was reversed solely upon the ground that the amendment sought to be made to the charter was void, because it was of such a vital and radical character that it could not be ingrafted thereon without the consent of all the stockholders of the company, 54 L. R. A.

and without the amendment the company had no power to construct this belt road. See *Alexander v. Atlanta & W. P. R. Co.* 108 Ga. 151, 33 S. E. 866, where, in the opinion of the court, will be found a fuller statement of the case and the contentions of the parties thereto. After the judgment of this court had been made the judgment of the court below, and before a final decree in the case, the plaintiffs filed an amendment to their petition, in which they alleged that by their action in obtaining the injunction they had saved and preserved for the benefit of the Atlanta & West Point Railroad Company a large amount of money which would otherwise have been dissipated, and had caused to be returned to the treasury of the company the money which had been illegally expended, and that the benefits of their action had accrued to the corporation and all of its stockholders, including those who were defendants, and that, as a matter of law and equity, the corporation was bound and should be compelled by a decree of the court, to pay all their costs and expenses, and all reasonable attorney's fees earned by their counsel. They prayed that the court would ascertain and determine the amount of said costs and expenses, and the reasonable attorney's fees earned in the cause, and that the defendant corporation be decreed to pay the same. The attorneys for the plaintiffs joined in the application in reference to the payment of the counsel fees, and prayed that the Atlanta & West Point Railroad Company should be required, by the decree of the court, to pay to them reasonable attorney's fees for their services in the case, alleging that such services were reasonably worth the sum of \$17,500. The amendment was demurred to, and the court sustained the demurrer and ordered the amendment to be stricken, to which ruling the plaintiffs excepted. The question for us to determine is whether or not the court erred in sustaining this demurrer.

As a general rule, only the court costs are chargeable to the losing party, and counsel fees and other expenses of litigation contracted for or incurred by the successful suitor cannot be included in the judgment. Every litigant must pay his own counsel. To this rule there are certain statutory exceptions, none of which are involved in this case. There are also cases where a fund has been brought into court for distribution, or property has been brought under the court's control, as the result of the litigation instituted and carried on by the plaintiff in behalf of himself and others, who have a common interest which is represented by him, in which the court will order that the necessary expenses of litigation and counsel fees which he has incurred shall be paid out of the fund which has been brought into court for distribution, or out of property which has been brought under the court's control, as the result of the plaintiff's diligence. So, a trustee, being the legal representative of those interested in the trust fund, is usually allowed out of the fund necessary and reasonable expenses, including

counsel fees, incurred in the proper management, protection, and preservation of the fund. Plaintiffs in error have cited authorities which sustain this last proposition, but we fail to see the relevancy of the same in the present case. A corporation may be regarded as a trustee for all of its stockholders, and the directors have been considered as quasi trustees for the corporation and their fellow shareholders; but a stockholder, as such, is trustee for no one. In *Hubbard v. Camperdown Mills*, 25 S. C. 496, 1 S. E. 5, where the supreme court of South Carolina held that "the attorneys of a minority of the stockholders of an insolvent corporation, who have filed a bill for injunction, receiver, and sale, charging fraud and confederacy on the part of the defendants, are not entitled to have their fees allowed out of the proceeds of sale made by the receiver appointed under the bill," McIver, J., said: "It has been argued here that the plaintiffs 'were in law and in fact, trustees,' and that having, in that capacity, brought this action, their expenses in so doing, including the fees of their counsel, are properly chargeable on the assets of the corporation constituting the trust fund. We do not question the proposition that a trustee is entitled to reimbursement out of the trust fund for all expenses properly incurred in preserving or protecting that fund. But we are unable to understand how these plaintiffs can, in any sense, be regarded as trustees. They were simply stockholders in a corporation, holding only a minority of the stock; two of them being also creditors to comparatively small amount. Being in the minority, they could not control, and therefore would not be responsible for, the management of the affairs of the corporation. They certainly cannot be regarded as trustees for the other stockholders, and, as to the creditors, they simply stood in the relation of debtors to the extent of their interest in the corporation." In *Hand v. Savannah & C. R. Co.* 21 S. C. 162, where the question presented was, who were entitled to fees and costs out of a fund in court, Simpson, Ch. J., in the course of an able opinion, in which he explains at length the governing principle in such cases, says: "The underlying principle in all these cases, where one has been allowed compensation out of a common fund belonging to others, for expenses incurred and services rendered in behalf of the common interest, is the principle of representation or agency. Where such compensation has been allowed, the party claiming has been in some way the recognized and authoritative representative of the whole, and therefore authorized to contract for the whole." Again, he gives the true principle in the following words, which have been quoted, and the principle approved and followed, by the supreme court of South Carolina in several subsequent cases: "No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another, by whom he

may have been employed. Before legal charge can be sustained, there must be a contract of employment, either expressly made or superinduced by the law upon the facts." Thompson, in his valuable work on Corporations, vol. 5, § 7056, p. 5586, referring to the quotation last above given, which he had quoted in the preceding section of the work, says: "The true principle is that expounded by the supreme court of South Carolina in the quotation given in the preceding section and in other subsequent decisions,—that it is only where one party is, under the principles of equity, entitled to proceed for the benefit of all who stand in a like situation with him, and consequently where the counsel whom he employs stands, in a sense, as representing all, that counsel are entitled to have their fees paid out of the common fund which they have recovered for the benefit of all." We agree with the South Carolina court and the learned author in holding that this is the true principle which should be applied in such cases. In the case under consideration the plaintiffs have brought no fund into court for distribution, nor have they brought any property whatever under the control of the court. The court has nothing within its grasp to dispose of which furnishes it the opportunity and imposes upon it the duty of recognizing and giving effect to substantial equities and existing rights. There are no assets in its hands for administration and distribution. Though we have examined numerous cases, we have yet to find one where, in the absence of statutory provisions applicable to the facts of the case, it has been held that a court has the power to relieve one party, either in whole or in part, of the burden of paying his own counsel, putting that burden upon another, when no property has been brought under the control of the court, and no fund has been brought into court for distribution.

What is the equity that the plaintiffs set up, and upon which they rely? It is not that they have brought into court something to be administered and distributed, and that another standing in like situation as themselves should not avail himself of the fruits of their diligence without bearing his share of the necessary expenses which they have incurred; but they allege that, by the suit which they instituted and prosecuted to a successful termination, they have saved and preserved for the benefit of the Atlanta & West Point Railroad Company a large amount of money, which, but for their efforts, would have been expended in the construction of the belt road, which the company had no legal power to build; and they have, by the same means, caused to be returned to the treasury of the company a considerable sum, which had already been invested in this illegal enterprise. They do not claim that the proceeding which they instituted and successfully prosecuted resulted in any order, judgment, or decree of the court which compelled the return to the corporation's treasury of any money which had been illegally diverted therefrom.

Granted that they have accomplished what they claim, and that by so doing they have really benefited the corporation; upon what theory can it be held that the court has the power to compel the railroad company to pay the expenses which they voluntarily, without its solicitation or authority, incurred in bringing about this result? Undoubtedly there are instances in which, owing to the wrongful and fraudulent conduct of those in control of the affairs of the corporation, stockholders may, in right of the corporation, bring an action to undo a wrong done to the corporation; and, if they are successful in restoring to the company money or property of which it has been wrongfully deprived, they may be entitled to have their attorney's fees and other necessary expenses of the litigation paid by the corporation for which they were acting. A stockholder may always sue when the right of action is directly in himself, and in doing so he simply exercises a right which every person who is *sui juris* has,—of applying for himself to the courts for the protection of his legal rights. He may sometimes sue when the right of action is in the corporation, and in doing so he merely represents the corporation, in whose behalf he is permitted to set the machinery of the court in motion. In cases of the first class, the stockholder, whether successful or not, must bear the necessary expenses which he incurs in the litigation, and cannot compel the corporation to defray them, or to compensate him if he has already paid them. In cases of the second class, if he succeeds in the suit, and the corporation receives and enjoys the fruits of his efforts in its behalf, the court can require the necessary expense of the litigation incurred by the plaintiff, including his attorney's fees, to be paid out of the property or fund recovered in the suit. It is important, therefore, to determine to which class of cases the action brought by the minority stockholders in the case under consideration belongs. Did the original case, as made by the plaintiffs, to the extent that it was sustained by the court, fall within the class in which the right to sue is in the corporation, or did it fall within the class where the right to sue is in the complaining stockholder? In 2 Pom. Eq. Jur. § 1091, it is said: "Whenever the acts of the directors do not consist of any wrongful misuse of the corporate property, or wrongful exercise of the corporate franchise, but are of such a nature that they directly and primarily affect the interest of the stockholders in their shares of stock, by diminishing its value or otherwise impairing their proprietary rights in it, then the stockholders are directly injured and are primarily interested. As the *cestuis que trust* whose rights have been violated, they must institute and maintain any equitable suits for relief against their defaulting trustees. The remedy is for their benefit, and belongs to them alone. On the other hand, whenever the breach of trust consists of a wrongful dealing of any kind or in any manner with the corporate property or with the cor-

porate franchises, the corporation itself is directly injured and is primarily interested. As the *cestui que trust* whose rights have been violated, it must institute and maintain any equitable suits for relief against its defaulting trustees. The remedy obtained, whether pecuniary or otherwise, is for its benefit, and belongs to it alone. Under certain special circumstances, in cases of this latter kind, where the suit should be brought by the corporation as plaintiff, but it becomes impossible to institute such a proceeding, in order to prevent a complete failure of justice the stockholders are permitted to set the machinery of the court in motion by commencing the action in their own names; but otherwise the suit is treated in every respect as one brought by and for the corporation. In applying these general propositions, it will be found that there are several distinct classes of cases appropriate for different conditions of fact, and governed by different rules." In the next section the learned author deals with one of these classes, which he designates as the "first class," and then, in § 1093, says: "In a second class of cases, where the directors are not charged with any misappropriation of the corporate property for their own benefit, nor with any breach of their fiduciary duty to the corporation, but, although purporting to act for the common welfare, they have adopted, or are about to adopt, some measure which is *ultra vires*, or beyond the scope of their corporate powers, a suit may be prosecuted against them by stockholders to obtain the appropriate relief, either of rescission or of prevention. . . . The theory of this class of suits is that a stockholder has a right that the operations of the corporation should be kept by the directors within the powers conferred by its charter. Every measure which transcends those powers, although done in good faith, violates the rights which inhere in the ownership of stock, and puts the value of the stock itself at hazard. The suit may be brought by a single stockholder suing on his own account alone, or by a stockholder suing on behalf of himself and all others who are similarly situated. The corporation is, of course, made a codefendant, and any other corporation or person who has joined in the *ultra vires* transaction may also be made a codefendant." The italics in these quotations are ours. On the same subject, 4 Thomp. Corp. § 4491, says: "Where an action is brought by one or more stockholders to enjoin the performance of *ultra vires*, fraudulent, or oppressive acts on the part of the directors, the remedy is preventive, consisting of an injunction against the performance of such acts, to which may be superadded, in appropriate cases, other forms of equitable relief. Where, on the other hand, the action is brought to undo frauds and breaches of trust already committed, and to restore to the corporation assets thereby wasted, the action does not, as in the former case, proceed in right of the stockholder, but it proceeds in right of the corporation; and consequently whatever is restored accrues to the cor-

poration, and the law at once attaches to it the character of a trust fund, for the creditors of the corporation first, and for its stockholders next, in which all are to share ratably, and in respect of which no one gets a preference over the other,—not even the stockholder who takes upon himself the burden of prosecuting the suit which results in its restoration."

Under these authorities, into which class of cases does the suit brought by the minority stockholders in the present case fall? Were they suing in right of the corporation, or in right of themselves, as minority stockholders? What was the real gist of their action,—the ground upon which they were entitled to and obtained the relief for which they prayed? It is found in the 18th and 21st paragraphs of the petition as amended. These paragraphs set forth the real gravamen of their complaint,—the cause of action upon which the injunction was granted. The 18th paragraph alleges: "The petitioners in this case for valuable consideration, bought their stock in said Atlanta & West Point Railroad Company, long prior to the 13th day of September, 1898, in view of its charter rights, and because of its contracts so made with the state of Georgia as to its franchises, and because these petitioners, by the fact of holding the obligations of said Atlanta & West Point Railroad Company, were entitled to certain rights, and affected only by certain liabilities, growing out of and fixed in said charter of the Atlanta & West Point Railroad Company." The 21st paragraph is as follows: "The said action of the stockholders and directors was illegal, in this; a majority of the stockholders of the Atlanta & West Point Railroad Company had no right, as against said minority petitioners, to make any such change in its articles of incorporation, because it was a material and fundamental change in the contract between the state of Georgia and the corporation, and between the corporation and these petitioners. If of force, it was a material and essential alteration of said original contract, and does not in any way bind these minority petitioners, because it impairs the obligation of the contracts of said Atlanta & West Point Railroad Company with the state of Georgia and the said contracts of these petitioners with the Atlanta & West Point Railroad Company by giving new powers and by creating new liabilities and new obligations not embraced under their original contract. This cannot be done under said general law, because it is a violation of the Constitution of the United States (art. 1, § 10), and of the Constitution of the state of Georgia (art. 1, § 3, ¶ 2), each of which constitutions, at said cited places in them, respectively, forbids the passage by the legislature of Georgia of 'any law impairing the obligation of contracts.'" The sole ground upon which the injunction was granted was that the building of the belt railroad by the Atlanta & West Point Railroad Company would be an *ultra vires* act, which the plaintiffs, as dissenting stockholders, had the right to prevent. They had

the right to stand upon the implied contract that the charter of the corporation would not be vitally and radically changed without their consent, and that the corporation would not engage in any enterprise not authorized by its charter. This they did, and appealed to the court to protect them against a violation of their rights, and it was for the protection of their rights that the court granted the injunction. Whatever they may have said in the original petition as to the injury which the corporation would suffer if its funds were used in the construction and operation of this belt line, reduced to its last analysis, the true merit in their case, upon which the court acted in granting the relief for which they prayed, was that the building of the belt line, not being within the powers granted to the corporation in its charter, would violate the rights which inhered in the ownership of their stock. It was because it would violate those rights that the court granted the injunction for which they prayed. Their suit was not for the corporation, but for themselves. They were not seeking to recover for the corporation any of its assets of which it had been wrongfully and fraudulently deprived, nor were they seeking to undo any wrong whatever which had been done to the corporation. The solid ground upon which they stood was that, without their consent, as stockholders, the amendment to the charter was a nullity, and without the amendment the building of the belt line would be a violation of their rights as stockholders in the corporation. The corporation did not authorize them to employ the attorneys who represented them; nor have they, through the court, recovered anything whatever for the corporation, from the acceptance of which by the corporation an obligation on its part to pay the necessary expenses of litigation incurred by them might be implied. There is therefore no ground upon which to found even a plausible presumption that in prosecuting the suit they were acting as agents of the corporation. Counsel for the plaintiffs in error cite, "as absolutely conclusive" in their favor, "the remarks of Mr. Pomeroy in his work on Equity Jurisprudence, in § 1095 of the third volume [second volume 2d ed.]," and quote extensively from this section of the author's valuable work. We think counsel have misunderstood the author's meaning. We have already shown, in the two sections which we have quoted from this work, that, according to this eminent authority, the right to sue in a case of this character is in the stockholder, and not in the corporation; and, rightly understood, there is nothing in the section quoted by counsel which conflicts with those which we have quoted. The learned author does not here contradict himself. In the section upon which counsel rely he says: "Wherever a cause of action exists primarily in behalf of the corporation against directors, officers, and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be ob-

tained through a suit by and in the name of the corporation, and the corporation either *actually or virtually refuses* to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrongdoing directors, officers, and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party,—usually as a codefendant. The *rationale* of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought. He is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court.*" The italics here are the author's. "The *rationale* of this rule should not be misapprehended," as it seems to have been by the learned counsel for the plaintiffs in error. In the present case the stockholder does bring the suit because his rights have been directly violated. He does bring it because the cause of action is his. He does bring it because he is entitled to the relief sought. He is not merely "permitted to sue in this manner simply in order to set in motion the judicial machinery of the court" in behalf of the corporation, but he has a right to sue because his contract has been violated and his rights are imperiled. He is not compelled, as in the class of cases with which the author deals in the section of the work quoted by counsel, before bringing his suit, to ask the corporation to institute the suit, and, when bringing it, to allege such a request, and a denial of the same, or to furnish a reason why he did not make it. He stands upon his own rights, and not those of the corporation. He does not come into court as the agent of the corporation, nor is he overshadowed by it. He does not represent it, but represents himself. His position is this: "When I acquired the stock which I hold, I did it upon the faith of the then existing charter of the corporation, and this charter cannot be legally changed, in a vital and radical manner, without my consent. I have not consented for it to be so amended, and without the amendment the act which I seek to enjoin is beyond the power of the corporation. I stand upon my rights as a stockholder, based upon the contract which the law implies exists between the corporation, the other stockholders, and myself, and I ask the court to protect me against a violation of this contract." Coming into court upon such a proposition as this, he needs, as we have said, no permission to sue "simply in order to set in motion the judicial machinery of the court," for the protection of the corporation; for he comes in his own right and upon his own cause of action. He can stand alone if he chooses, or he can sue in behalf of himself and all other stockholders who are similarly situated, and who see fit to come in and join with him in the action;

but he cannot make those who neither authorize nor adopt his suit contribute to the payment of the necessary expenses which he has paid or incurred in its prosecution.

Counsel for the plaintiffs in error cite a number of cases in support of their contention. They say: "There was no fund in court in *Meeker v. Winthrop Iron Co.* 17 Fed. 48. When the expenses of litigation were allowed there, nothing had been done except the cancellation of a lease which had been adjudged to be unlawful. There was no property in court." We have read that case very carefully, and are of opinion that it fails to sustain the contention of plaintiffs in error. In that case the plaintiffs sued in right of the corporation, to undo a wrong done to it, and succeeded in having a fraudulent lease of its property canceled. The court appointed a receiver to take charge of and superintend the company's business, and required the defendants to account with the corporation for certain rents and profits; and, in the administration of the trust fund, the control of which it had thus acquired, the court decreed that the plaintiffs, having prosecuted the suit "for the common benefit of all the parties interested, to protect and preserve the trust fund, were entitled to be reimbursed therefrom for all proper expenditures made or liabilities incurred in and about the prosecution of the same." There may have been no property in court at the precise moment when the expenses of litigation were allowed to the plaintiffs, but the same decree which provided for the allowance of these expenses also provided for the appointment of the receiver. The court took charge of the company's business, canceled a fraudulent lease of its property, and decreed that the minority stockholders who had come to the rescue of the corporation, and brought its business and property under the jurisdiction and control of the court, should be reimbursed the necessary expenses which they had incurred in the suit which had brought about these results. Though, from the necessity of the case, the suit had to be instituted and carried on by the minority stockholders, it was clearly in the right of the corporation, and the recovery was for the corporation. Another case cited is *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 21 So. 315. That case was clearly one in which the minority stockholders were suing to undo a wrong done to the corporation by certain directors thereof, who had neglected their duty to the corporation, and had appropriated "exorbitant and unreasonable amounts" of the company's funds in the payment of salaries to themselves. The opinion of the court clearly shows that it was a suit which the stockholders could not bring in their own right, but which could only be brought in right of the corporation; the corporation being the only proper complainant in such an action. Coleman, J., delivering the opinion, after stating the case, said: "It will be seen from this statement of the purposes of the bill that the corporation is the proper complainant, and that stockholders are not al-

lowed to apply to a court of equity for relief in such a case, except upon averment and proof that the corporation has refused upon application to remedy the wrong, or upon sufficient averments to show that application to the board of directors or stockholders would have been in vain, or the circumstances were such as to excuse the complaining stockholders from first seeking a remedy in this way, if there can be any other in any case." It was upon this ground that the court reversed the judgment of the court below, which overruled a demurrer based thereon, and for this reason the court said: "Ordinarily, we would render a decree here annulling the decree of the court below, and dismissing complainants' bill; but we find difficulties, owing to the condition of the case as presented in the abstract, when submitted for final decree." It is true that the court did hold that, where minority stockholders, by suit, obtain a cancelation of claims against the corporation, and an injunction restraining the directors from voting excessive compensation to officers, the complainants are entitled to a reasonable solicitor's fee, to be paid by the corporation; but as the court held that the demurrer to the bill, for the reasons indicated above, should have been sustained, we do not see how the question with reference to the plaintiffs' attorney's fees was properly before it for determination. However that may be the suit, as the court decided, was one which could only stand in court in right of the corporation, and which the stockholders could not bring in their own behalf. Another case cited is *Grant v. Lookout Mountain Co.* 93 Tenn. 691, 27 L. R. A. 98, 28 S. W. 90, where the corporation was held liable for the reasonable attorney's fees of the plaintiffs, who were minority stockholders. There the suit, though brought by these stockholders, was, in the language of the court, "to all intents and purposes, the suit of the corporation itself," and the whole of its property, both real and personal, which had been illegally conveyed away, "threatening the entire destruction and dissolution of the corporation," was recovered and restored to the corporation. The court said it was a suit which the corporation ought to have commenced, that it was an indispensable party thereto, and that for this reason the decree was not recovered for the minority stockholders, but for the corporation. In the case of *Fox v. Hale & N. Silver Min. Co.* 108 Cal. 475, 41 Pac. 328, a single stockholder successfully prosecuted a suit to undo a wrong done to the corporation, and to recover from the wrongdoers a large amount of money of which the corporation had been deprived by means of a fraudulent conspiracy between the directors and others. The defendants took the main case up (108 Cal. 369, 41 Pac. 308), and the branch of the case which counsel cite went to the supreme court upon a separate appeal by the corporation "from that part of the judgment appointing a receiver of the moneys collected on the execution, and directing him to pay the plaintiff's attorneys, as compensation for

their services, 25 per cent of all moneys so collected." After the appeal was taken, it was "voluntarily dismissed by the appellant, so far as the amount of the allowance to attorneys . . . [was] concerned," so that it stood "as an appeal from that part of the decree appointing a receiver, and involves only the question of the power of the court to make such appointment." Beatty, Ch. J., delivering the opinion, said: "There is no doubt, we think, that the case was one in which the court had power to appoint a receiver to carry its judgment into effect. The action was not prosecuted by the plaintiff in his own right or for his own exclusive benefit. He sued in behalf of the corporation to recover a fund in which others were equally interested, and the judgment in his favor was for the use and benefit of the corporation. He was, therefore, not entitled to receive the amount of the judgment himself, but clearly was entitled to an allowance out of the moneys collected of his reasonable expenses, including counsel fees." Manifestly, that case is in no way in conflict with the conclusion at which we have arrived in the one before us. Counsel cite another case, decided by the same court, which needs no comment at our hands to show that it does not sustain their contention. We simply quote all that is said in the brief of counsel in reference to that case, italicizing the salient feature thereof. "In a California case, a stockholder *suing in behalf of the corporation recovered certain funds from defaulting directors*. The concluding paragraph of the opinion is: 'The order is reversed, with directions to the trial court to enter the order prayed for, after making reasonable allowance to the plaintiff, Chetwood, for his costs, disbursements, attorney's fees in the said action, as contemplated by law.' [*Chetwood v. California Nat. Bank*, 113 Cal. 649, 45 Pac. 854.]" In *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712, cited by plaintiffs in error "minority stockholders of a corporation brought a bill to prevent an asset of the corporation from being appropriated by the majority stockholder to his own use," and obtained a cancelation of a fraudulent assignment of the same by the majority stockholder to third parties. The asset in question was a judgment against a railroad company, which "was required to and did bring into court the greater portion of the amount due on the judgment." The parties to the case, including the corporation owning the judgment, "consented that the funds should be distributed" by the court under the proceedings pending therein; and the court, in distributing the fund, allowed and required the counsel fees incurred by the minority stockholders to be paid out of the fund. Certainly there is a very wide difference between the facts in that case and those in the case in hand. There the wrong which was righted, through the suit prosecuted by the minority stockholders, was a fraudulent conversion by the majority stockholder of valuable property belonging to the corporation, which was recovered for the corporation, and the fund

derived therefrom was in court for distribution. Nothing more need be said to show that the principle deducible from that case does not control in the one which we have under consideration. Counsel for plaintiffs in error quote from *Kernaghan v. Williams*, L. R. 6 Eq. 228, some remarks of Lord Romilly, M. R. (at page 231), in delivering the opinion of the court: "If Mr. Williams [a complainant minority stockholder] is right in the suit which he has instituted, he will obtain a decree, and he will obtain, as the results of the suit, the costs; if he is not right, then he will not; and this, unquestionably, is certain,—that, if he succeeds, when the suit is over the company cannot come and claim the amount of funds recovered by that suit for their benefit, without paying the expenses incurred." We fail to see the relevancy of this citation. The question whether the corporation could be compelled by the court to pay the necessary expenses incurred by the minority stockholder in the suit which he had instituted was not directly involved in that case, and the opinion of the master of the rolls as to the rule which would be applied in the event certain contingencies with reference to that suit should occur is a well-recognized one, and not in conflict with the views which we have expressed. In the present case the corporation has not come forward to claim anything as the result of the suit instituted by the minority stockholders, and, if it had, it would have found nothing to claim, for no fund or property has been recovered. Another case to which we are referred is *Florida Internal Improv. Co. v. Greenough*, 105 U. S. 527, 28 L. ed. 1157. There a large holder of the bonds of a railroad company brought suit, in behalf of himself and the other bondholders, against the trustees of a fund which was pledged for the payment of the interest accruing on the bonds and instalments of the sinking fund for meeting the principal, "to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust;" and all this was done, at great expense and trouble on the part of the complainant, and the other bondholders came in "and participated in the benefits resulting from his proceedings." The decision, allowing the complainant his counsel fees and other necessary expenses of litigation out of the fund in court, rests upon the principle announced in the third headnote to the case,—that "a trust fund must bear the necessary expenses of its administration." The case of *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387, also relied on by plaintiffs in error, where "the property was brought under the direct control of the court, to be administered for all entitled to share the fruits of the litigation," and where the solicitors of the complainants were "allowed reasonable compensation in respect of the demands of unsecured creditors (other than their immediate clients), who filed their claims" and shared in the common

benefits secured to their class through the suit instituted and successfully prosecuted by the complainants, was held to fall within the principle announced in the *Greenough Case*. It is very apparent to us that neither of these two cases decided by the Supreme Court of the United States affords authority for sustaining the contention of the plaintiffs in error. One marked difference between them and the case in hand is, as before remarked, that here no trust fund or property has been brought under the control and administration of the court; and another is that in each of those cases the plaintiff or plaintiffs sued for an entire class, the other members of which came forward and participated in the fund which had been recovered for all. Because the building of this belt line would have been an *ultra vires* act on the part of the corporation, we do not think it necessarily follows that the funds of the company invested therein would have been dissipated or lost. So far as we are informed, if the belt line had been built and operated by the company the enterprise might or might not have proved to be a profitable one. It is urged in one of the briefs for the plaintiffs in error that, if this belt road had been built, the corporation would have been in danger of having its entire charter forfeited on suit by the attorney general. There would have been no danger from this source; for the state, through its appropriate department, having granted the application for the amendment to the charter, which, if valid, would have authorized this action by the corporation, could not, after the corporation had exercised the powers which the state purported to confer upon it, have forfeited the charter because of the exercise of those powers. The minority stockholders, who had not consented to the amendment to the charter, had the right to complain when the corporation undertook to exercise powers which the amendment purported to confer upon it; but the state, which had, so far as it could, granted the amendment, could not complain.

It is claimed that the action brought by the plaintiffs "resulted in having returned to the treasury of the company a large sum amounting to about \$55,000, which had been expended in carrying forward the illegal project before suit was brought," and that at least as to this sum, they are entitled to have their attorney's fees paid by the corporation. Suppose, in consequence of the plaintiffs' suit, a large sum of money which had been expended in the *ultra vires* undertaking was returned by the directors of the company to its treasury; it was not brought into court, and from thence returned to the company's treasury, nor did the court do anything whatever to compel its return. The court did nothing but grant an injunction restraining the company from building the belt railroad, and thus preventing any further expenditure of the company's money thereon. The court did not deal with the money which had already been spent, and its return to the company's treasury, so far as the court was concerned, was purely vol-

untary. The plaintiffs neither sued to recover, nor did they seek to compel the return of, any money belonging to the corporation, and the only legal result of their suit was the injunction.

Judgment affirmed.

All the Justices concur.

SAVANNAH, FLORIDA, & WESTERN
RAILWAY COMPANY, *Plff. in Err.*,
v.

A. A. BEAVERS.

(118 Ga. 398.)

*One who makes an excavation upon his land is not bound to so guard it as to prevent injury to children who come upon it without his invitation, express or implied, but who are induced to do so merely by the alluring attractiveness of the excavation and its surroundings.

(May 21, 1901.)

ERROR to the Superior Court for Ware County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's minor child. *Reversed.*

The facts are stated in the opinion.

Messrs. Chisholm & Clay for plaintiff in error.

Mr. Leon A. Wilson, for defendant in error:

When a child of tender years commits a mere technical trespass, and is injured by agencies that to an adult would be open and obvious warnings of danger, but not such to a child, he is not debarred from recovering if the things instrumental in his injury were left exposed and unguarded, and were of such a character as to be likely to attract children, excite their curiosity, and lead to their injury while they were pursuing their childish instincts. Such dangerous and attractive instrumentalities become an invitation by implication.

Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 2 N. E. 451; 7 Am. & Eng. Enc. Law, 2d ed. pp. 403, 404; *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313, 25 N. E. 156; *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 207, 39 N. E. 484; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Cooper v. Overton*, 102 Tenn. 211, 45 L. R. A. 591, 52 S. W. 183.

To maintain upon one's premises or prop-

*Headnote by FISH, J.

NOTE.—For earlier cases in this series as to liability for maintaining dangerous ponds or excavations on private premises, causing death of child, see cases in note to *Lepnick v. Gaddis* (Miss.) 26 L. R. A. 686; also (sustaining liability) *Pekin v. McMahon* (Ill.) 27 L. R. A. 206; (denying liability) *Moran v. Pullman Palace Car Co.* (Mo.) 38 L. R. A. 755; *Dobbins v.* 54 L. R. A.

erty enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express.

Price v. Atchison Water Co. 58 Kan. 551, 50 Pac. 450; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L. R. A. 657, 56 Pac. 4; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451.

The company had notice that children frequented the place. The homicide was, within the ordinary probable sequence of events, a result of defendant's negligence. It might reasonably have been anticipated. There was danger of its happening, such as an ordinarily careful person might have apprehended, and would be likely to apprehend, as a possible result of any relaxation of diligence and care.

Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 12 N. E. 451; *Mackey v. Vicksburg*, 64 Miss. 777, 2 So. 178; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745.

The owner of property who has thereon a dangerous agency which is attractive to children, or has knowledge that they resort to it for amusement or otherwise, and fails to use ordinary care under the circumstances to guard the same against injury to them, must respond in damages for such neglect, irrespective of the fact that the danger is not adjacent to a highway.

2 Wood, Railway Law, 321; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 756, 36 S. W. 659; *Schmidt v. Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16, 2 S. W. 865; *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. 26.

In such cases the question of negligence is one for the jury.

1 Thomp. Neg. 304, 305; *Smith, Neg.* 413; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619.

The question whether the child used the care expected of one of its age was for the jury.

Biggs v. Consolidated Barb-Wire Co. 60 Kan. 217, 44 L. R. A. 655, 56 Pac. 4; *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 83 Ga. 512, 10 S. E. 197; *Western & A. R. Co. v. Rogers*, 104 Ga. 226, 30 S. E. 804.

If defendant, by the exercise of reasonable forethought, should have anticipated the probability of the child's action, it should

Missouri, K. & T. R. Co. (Tex.) 38 L. R. A. 573; *Omaha v. Rowman* (Neb.) 40 L. R. A. 531; *Stendal v. Boyd* (Minn.) 42 L. R. A. 288; *Ritz v. Wheeling* (W. Va.) 43 L. R. A. 148; *Cooper v. Overton* (Tenn.) 45 L. R. A. 591; *Arnold v. St. Louis* (Mo.) 48 L. R. A. 291; and *Tucker v. Draper* (Neb.) *post*, 321

have guarded against it by removing the earth or obstructing the pathway. If it failed to do so, it failed in a duty which rested upon it, and is not relieved from responsibility even though the child was a trespasser in going upon the premises.

Mackey v. Vicksburg, 64 Miss. 777, 2 So. 178.

Where a person maintains upon his premises anything dangerous to life or limb and of a nature to invite the intrusion of children, he owes them the duty of precaution against harm, and is liable to them for injury from that thing, even though their own act, if not negligent, puts in operation its hurtful agency.

Price v. Atchison Water Co. 58 Kan. 551, 30 Pac. 450; *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154; *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, 39 N. E. 484; *Mullaney v. Spence*, 15 Abb. Pr. N. S. 319; *Malloy v. Hibernia Sav. & L. Soc.* (Cal.) 21 Pac. 525.

In the *Turntable Case* the rule is declared that children had an implied invitation to go upon the premises because their being attracted to them might have been expected.

Stout v. Sioux City & P. R. Co. 2 Dill. 294, Fed. Cas. No. 13,504; 27 Am. & Eng. Enc. Law, p. 344; 7 Am. & Eng. Enc. Law, 2d ed. p. 408.

Fish, J., delivered the opinion of the court:

A. A. Beavers obtained a verdict and judgment against the Savannah, Florida, & Western Railway Company for the death of his minor child, and, upon the defendant's motion for a new trial being overruled, it excepted. There was but little conflict in the evidence, and that in behalf of the plaintiff conduced to establish the following facts: The defendant railway company undertook to construct a water tank upon its premises. The work was temporarily suspended, and an excavation 12 feet square, about 7 feet deep, and containing about 4 or 5 feet of muddy water, concealing its depth, was left uncovered, and guarded only by piling placed around it, some 18 inches in height. Upon the sides of the excavation, and 2 feet from the surface, there was a ledge or sill, 5 by 10 inches. There was a ladder and a long handled pump left in the excavation, the ladder extending to the top. Near by there was a tram road upon which there was a small flat car, used for hauling away dirt taken from the hole. Eight and a half feet from the edge of the excavation, and along the outer line of the defendant's right of way, there ran a foot-path, much traveled by the public. Some 28 feet from the excavation there was a canal, along the banks of which there were berries and flowers, which children were accustomed to gather. There were no flowers nor berries immediately about the excavation. It did not appear that the officers of the defendant company knew that children frequented the locality. The foreman of the "gang," while making the excavation, saw children

gathering flowers and berries along the banks of the canal and observing the progress of the work, but of this he never informed the officers of the company. No one lived nearer to the excavation than 100 yards, and the plaintiff resided 400 or 500 yards away. The public street was about 100 yards distant therefrom. Plaintiff's two sons, one nine and the other five and a half years old, went, with two other boys, the elder of whom was eleven years of age, to the excavation to play with frogs, and while the younger son of plaintiff was standing on the ledge, inside the hole, engaged in such childish sport, he fell into the water, and was drowned. All of these boys had been playing with the frogs in the excavation for several days prior to the accident, but there was no evidence that any of the company's officials had knowledge of this fact. A day or two before the accident a man passing by warned these boys to get away from the excavation or they would get hurt. In going to this place the boys did not use the footpath. Neither plaintiff nor his wife knew of the existence of the excavation.

Under the facts stated, was the defendant company liable in damages to the plaintiff for the death of his child? This question turns upon another; that is, whether or not the company owed the child any legal duty which it neglected to perform, for there can be no actionable negligence without the breach of a legal duty. The rule is too well settled to need the citation of authority that a landowner is under no duty to have his land in a safe condition for an adult trespasser to enter thereon. Such a trespasser has ordinarily no remedy for an injury happening to him by reason of the condition of the property upon which he intrudes. He takes the risk of the condition of the premises. Nor is the owner bound to warn him of nonapparent dangers, provided they were not prepared with intent to harm trespassers. Is there any difference in the case of a child entering upon the premises without the permission of the owner? There is an irreconcilable conflict of authority, in this country at least, upon the question, and it is not easily determined which way the weight of authority inclines. There are many decisions by courts of great respectability to the effect that "when a child of tender years commits a mere technical trespass, and is injured by agencies that to an adult would be open and obvious warnings of danger, but not so to a child, he is not debarred from recovering, if the things instrumental in his injury were left exposed and unguarded, and were of such a character as to be likely to attract children, excite their curiosity, and lead to their injury, while they were pursuing their childish instincts. Such dangerous and attractive instrumentalities become an invitation by implication." 7 Am. & Eng. Enc. Law, 2d ed. pp. 403, 404. On the other hand, there are numerous cases wherein courts of the highest respectability enunciate the doctrine that an owner or occupier of land is ordinarily un-

der no obligation to a trespasser so far as concerns the condition of his premises, and the fact that the trespasser is an infant of tender years affords no reason for modifying this rule, and charging the owner or occupier of land with a duty which does not otherwise exist; and, if for more beneficial user he creates upon his premises an instrumentality which happens to be attractive to children, he does not thereby extend to them an implied invitation to enter thereon. The tendency of the more recent decisions seems to be in favor of the doctrine last mentioned, and we are of opinion that, upon principle, it is the stronger side of the question. The principle involved has been so frequently and elaborately discussed by learned jurists that it is unnecessary to do more than refer to some of the decisions which are particularly applicable to the case which we have under consideration. Before doing so, however, we take the liberty of making a somewhat extended quotation from a monograph in 11 *Harvard Law Review*, pp. 349-373, 434-448, by the Hon. Jeremiah Smith, formerly one of the justices of the supreme court of New Hampshire, wherein the subject, "Liability of Landowners to Children Entering without Permission," is very learnedly and exhaustively treated. In maintaining the proposition that the landowner is under no duty, so far as concerns the condition of his premises, to intruding children, that eminent jurist says: "Assuming, then, that the law is not only settled, but is also consistent, in holding that the owner of land is not liable for the condition of his premises to an adult who enters without permission, the next inquiry is, What difference is there between the case of the adult intruder and the child intruder? Are there considerations which do not exist in the case of the adult, and which, when put into the scale, ought to turn the balance in favor of the child? The two prominent arguments are: (1) That the child is innocent; (2) that the child is incapable of protecting itself. What force is to be allowed to these considerations, and do they, when estimated at their true value, outweigh the reasons against imposing liability upon the landowner? . . . Of course, the innocence of a plaintiff does not, *per se* establish the fault of a defendant. The landowner cannot be liable unless he owed to the child a duty which he has neglected. Should the law, in view of the innocence of the child, impose on the landowner the duty here in controversy? No doubt there are cases where a defendant is rightly held liable to a child plaintiff when he would not be liable to an adult plaintiff under similar circumstances. Where it is admitted that a duty exists to use care to avoid harm to both children and adults, *e. g.*, in the use of the public highway), then, in point of fact, more care may be required towards a child than towards an adult. In view of the child's helplessness and unconsciousness of danger, more care may, as matter of fact, be required under the unvarying legal rule, of 'due care under the circumstances,' just 54 L. R. A.

as more care, in fact though not in law, may be required to avoid colliding with an obviously lame or blind adult than with a vigorous man in full possession of all his faculties. But all this is true only where it is admitted or proved that a duty exists. 'In considering the question as to whether a duty exists, there is no distinction between the case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former.' [Citing *Denman, J., in Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62.] So if it be conceded or proved that the defendant was negligent, and that his negligence constituted part of the legal cause of the plaintiff's damage, then the incapacity and immaturity of a child plaintiff may furnish a good answer to the defense of contributory negligence. Conduct of the plaintiff, which would have been negligent in an adult, may not be held negligent in a child. But the fact that the child plaintiff was not 'capable of contributory negligence' does not necessarily establish that the adult defendant was negligent. It does not *per se* prove that the defendant owed to the plaintiff a duty, or that he failed to perform a duty. 'If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous.' [Citing *Lurton, J., in Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 353.] 'The fact that injury has resulted, and to a child himself incapable of negligence, will not import the negligence of the defendant, which is the sole ground of liability.' [Citing 1 *Beven, Neg.* 2d ed. 183; *Culbertson v. Crescent City R. Co.* 48 La. Ann. 1380, 20 So. 902; *Emerson v. Peteler*, 35 Minn. 481, 29 N. W. 311; *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062.] Obviously, cases of the two foregoing classes do not furnish arguments from analogy in favor of creating a duty towards children in situations where no duty at all would exist towards adults. Why should innocent children have greater rights than innocent adults, in respect to damage resulting from the nature of the premises upon which they enter without permission? Remedy against the landowner for harm happening from the condition of the premises is denied to adults who are entirely free from intent to violate rights, and whose presence upon the land is due to pardonable mistake or to irresistible external force. The test is not whether their motives were innocent, or even laudable, or whether their conduct was careful, but whether they entered without the owner's permission. If so, they cannot claim that the owner was under a duty to make things safe for their access, or to give warning of nonapparent danger. [Citing *Morgan v. Hollowell*, 57 Me. 375; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684.] It may possibly be suggested that an adult trespasser is barred upon grounds inapplicable to a childish intruder. It may be urged that the adult is

barred by his own wrong, both (1) because he must always be regarded as guilty of contributory negligence; and (2) because, even if not negligent, he is a tortfeasor in the technical sense, whereas a young child may be incapable of negligence, and ought not to be regarded as even technically a tortfeasor. But this argument entirely misconceives the true reason why an adult trespasser fails to recover in the case supposed. The decision turns, not upon the presence of fault in the plaintiff, but upon the absence of fault in the defendant. The plaintiff's action is defeated, not because his own wrong bars a recovery against the landowner who has neglected to perform a duty owing to him, but because he has not succeeded in establishing the primary proposition that the landowner owed to him the duty in question. His trespass is not necessarily and always a negligent act, and hence does not invariably bar him on the ground of contributory negligence. [Citing 1 Shearm. & Redf. Neg. 4th ed. §§ 97, 98.] Nor does his tort, even when he is a conscious and morally inexcusable trespasser, prevent his recovering against the landowner for negligently bringing force to bear upon him by a positive act done after his entry, i. e., by what Clerk & L. Torts, 2d ed. 14, call 'a negligent act of commission.' But when an adult, who entered without permission, seeks to recover against the landowner for harm happening from the condition of the premises, he fails even though he were morally blameless. He may be a technical tortfeasor, but recovery is not denied to him by way of punishment for his own 'wrong.' He fails because the landowner owed him no duty to have the premises in safe condition for his entry. [Citing Shearm. & Redf. Neg. 4th ed. §§ 97, 98, *supra*.] Why should the moral innocence of a childish intruder raise a duty on the part of the landowner which is not created by the moral innocence of an adult intruder? The youthful innocence of the child does not make restrictions on the right of user less damaging to the owner, or make the alleged duty of preventing entrance of an intruder, or of protecting him from harm after entry, less burdensome than in the case of an adult. . . . The child, it is said, is incapable of protecting itself, and hence it is eloquently contended that the law must impose the duty of protection upon landowners. The apparent assumption is that all the children in the world are mere waifs and strays, and that the duty of caring for them must be imposed upon the landowners because the law can find no one else to bear the burden. [Citing the language of Mr. Justice Agnew in *Hydraulic Works Co. v. Orr*, 83 Pa. 336.] The fact is that the vast majority of children have protectors appointed alike by nature and by law, viz., their parents, who have legal power to control their actions, and whose moral duty to keep their children from entering upon dangerous premises is generally regarded as at least equal to the moral obligation of the landowner to fence them out. If the child, upon entering the

premises, is hurt by the 'active negligence' of the owner in bringing force to bear upon him, it may well be that the negligence of the parent in failing to restrain the child's entrance does not bar the child's recovery for the force thus brought to bear upon him after his entrance. But it is going far beyond this to say that the child can recover for harm sustained by him through the condition of the premises without the immediate intervention of any human agency save his own. [Citing *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 353.] When a child wakes up in the morning in his father's house, the duty of providing a safe playground for him during the day rests upon his parents. Is this duty shifted from the parent to private landowners because the child chanced to escape from the parent's care? [Citing *Clark v. Manchester*, 62 N. H. 577; *Missouri, K. & T. R. Co. v. Dobbins* (Tex. Civ. App.) 40 S. W. 861.] If those who brought the child into the morning are unable, by reason of poverty, to provide him a playground, this may afford an argument for the passage of a statute imposing that duty upon the municipality, in which case each landowner would have to contribute his proportion of the expense. But this is quite another thing from assessing upon a single unfortunate landowner the entire damage arising from the want of such a playground. [Citing *Ross v. Keith*, 16 Sc. Sess. Cas. 4th series, p. 89.]

An early case, and one often referred to, is that of *Hargreaves v. Deacon*, 25 Mich. 1. There the plaintiff, as administrator, sought to recover damages for the death of his son, a child of tender years, who was killed by falling into a cistern which had been left uncovered on premises not immediately adjoining the highway. It was held: "Owners of private property are not responsible for injuries caused by leaving a dangerous place unguarded, where the person injured was not on the premises by permission, or on business, or rather lawful occasion, and had no right to be there." Mr. Justice Campbell, in delivering the opinion of the court, says: "Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort, held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." In *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, the eight-year old son of the plaintiff was drowned in a pond of water, not bordering on the highway, which had been formed in consequence of rock having been quarried on

a lot owned by the defendant. It was ruled that the owner of the quarry was under no obligation to build a fence around it to keep trespassers away, nor liable for injury to them occasioned by the absence of such a fence. In *Klitz v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223, the declaration alleged that the defendant was the owner and in possession of a vacant and uninclosed lot in a thickly-settled part of the city of Milwaukee, to which the public had free and unobstructed access; that for a long time there had existed upon the lot a deep and dangerous hole or excavation, partially filled with water, making a pond, which covered about the entire surface of the lot; that the water of the pond was roily, so that its depth could not be ascertained except by measurement, but that in places it was 9 feet deep, so that the pond was dangerous to the lives of children who might be attracted thereto, for amusement or otherwise; that the defendant, well knowing that the pond was dangerous to the lives of children residing in the vicinity of the same, wrongfully, negligently, and carelessly permitted it to remain unguarded by a fence or barricade; and that plaintiff's son, a lad nine years of age, "while playing upon and about said pond of water, being induced thereto by reason of the unguarded and unprotected condition of said hole as aforesaid, fell and was precipitated into the same, and was drowned." A demurrer to the declaration was sustained in the trial court, which ruling, on appeal, was affirmed by the supreme court. Mr. Chief Justice Cole, speaking for the court, said: "The single question presented is, Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made, or caused to be made), where surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity? If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability, unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises, for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold,"—citing 1 Thomp. Neg. 361.

The facts in the case of *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, are quite similar to those in the case under consideration. There the defendants "were the owners of a lot of ground in the outskirts of Philadelphia, upon which there was, and had for some time been, a deep well. The nearest paved highway ran 300 feet from the well, and the nearest road about 80 feet. There were houses about 300 feet off, but the built-up part of the city was nearly half a mile distant. Whether any paths led near the well was disputed. The well was uncovered, and was not hidden by bushes or shrubbery. It was not fenced round, nor was the

lot in which it lay. The lot was a common place of resort for children and adults. A boy of a little less than eight years of age was found drowned in the above well, his hat being found on the side, together with a few small fishes. In a suit by the boy's father against . . . [the defendants] to recover damages for his death,—held that the boy was a trespasser, and that . . . [the defendants] had not been guilty of any such negligence as would render them liable for his death." In delivering the opinion of the court, Mr. Justice Paxson said: "Nor do we assent to the broad proposition that 'the owner of premises in the neighborhood of a populous city, and opening on a public highway, must so use them as to protect those who stray upon them and are accidentally injured.' This doctrine rests chiefly upon the case above referred to [*Hydraulic Works Co. v. Orr*, 83 Pa. 332], which was not intended to decide any such principle, and is in direct conflict with the recent well-considered case of *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, in which it was held that 'where the owner of land, in the exercise of lawful dominion over it, makes an excavation thereon which is such a distance from the public highway that a person falling into it would be a trespasser upon the land before reaching it, the owner is not liable for an injury thus sustained.' . . . We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or dead fall, as in *Hydraulic Works Co. v. Orr*. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brick yards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it, or fill up their ponds and level the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit, yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children

upon every member of the community except their parents."

In *Clark v. Manchester*, 62 N. H. 577, the city of Manchester began filling a reservoir, but left a portion of the excavation, which contained water. The excavation was uninclosed. The plaintiff's boy, a little less than four years old, and living with his parents, about 150 feet from the reservoir, having followed, with a crowd of other boys, a band of music to the gate of a play or ball ground near by, and wandering by the reservoir excavation, fell into the water, and was drowned. On the facts stated, it was held that an action could not be maintained by the administrator of the child against the city, and the case was "discharged." Subsequently, the plaintiff amended his declaration by alleging "that the place of the reservoir, at the time of the injury, was an unguarded excavation, pit, and trap, near to the public street, and the residences of a large number of people, including that of the plaintiff, and the water therein, together with the work of filling the excavation, was calculated to and did allure to it young children; that the defendants had knowledge of the situation, and these facts were a license and invitation to the plaintiff's child to come there; and that, neither he nor his parents being in fault, he went there, fell into the pit, and was drowned." Mr. Justice Allen, rendering the opinion of the court, said: "If the facts stated in this count were proved, they would not establish the defendants' liability. The excavation for a reservoir was not made and filled with water for a trap, but for lawful use by the defendants on their own land. . . . The averment of license and invitation to the child to go there is one of argument by inference from the facts stated, and the facts positively averred do not warrant and support the inference. The fact that children went to the reservoir pit from curiosity or for pleasure, without objection of the defendants, was not an invitation nor a license to go there. The child was not upon the land by invitation, nor under circumstances which made it the duty of the defendants to protect him. He was there to gratify his curiosity, or for mere pleasure, and the defendants owed him no special duty. It was not a case of setting a trap for the children, nor one of wantonly and knowingly leading them into danger, and this one to destruction. It was the ordinary case of a landowner, managing, within the boundaries of his own land, his own property, in his own way, for his own use and benefit; and though in doing this he might find occasion to dig excavations, construct reservoirs, provide fish ponds, plant and cultivate fruit trees, erect and maintain useful structures, instruments and machinery, all of which are alluring, attractive, and dangerous to children, yet it could not be claimed that he must constantly guard these things against the approach of persons coming without license or invitation, and attracted by mere curiosity or pleasure, or suffer in damages for any injury they might receive. The rule that the owner of land

may manage it in his own way, for his own benefit, and owes no duty to those who come upon it for no business purpose, but without license, express or implied, is too well established to need further comment, or to warrant a departure from it."

In *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, the allegations of the petition were, in substance, that the defendants had for a long time negligently permitted the surface water to accumulate on certain lots, which they owned and were in possession of, thereby creating a deep and dangerous pond, and that they had failed and neglected to fence such lots, or to erect barriers of any kind, to prevent children, lawfully in the vicinity thereof, from falling into said pond; that the lots were situated in the vicinity of one of the public schools of the city of Omaha, and that the pond was not only dangerous to persons passing along a named street adjacent thereto, but was in a public and much-frequented place, and was attractive to children of tender age, many of whom were accustomed to play about and upon said water; that on a given day the plaintiff's intestate, a boy of ten years of age, yielding to the natural impulse of childhood, went on said pond, upon a section of a wooden sidewalk out of which he had constructed a raft, and while floating thereon fell into the pond and was drowned. A demurrer to the petition was sustained, upon the ground that it failed to state a cause of action against the owners of the land, the court holding: "The owner of a vacant lot upon which is situated a pond of water or a dangerous excavation is [not] required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, express or implied, but for the purpose of amusement or from motives of curiosity."

To the same effect, see *Omaha v. Bowman*, 52 Neb. 293, 40 L. R. A. 531, 72 N. W. 316, where a boy seven years old was drowned by falling off a raft floating on a pond, which had been made by the city in constructing and filling up a certain street.

So, in *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, it was held: "The owner of a vacant lot upon which a pond of water has accumulated, by reason of an embankment erected by the city in the grading of the street, preventing the flow of surface water from the lot, owes no duty to trespassers to keep the water from accumulating upon the premises, nor to keep the lot guarded against trespasses by children, and is not liable for the death of a child from drowning in the pond while trespassing in the lot." In that case a boy eleven years old was drowned by falling into the pond from a raft thereon.

In *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965, "where a child of tender years was taken by an older sister, to whose care it was intrusted, to vacant residence lots in a city, for recreation and pleasure, and was accidentally knocked down and killed by the caving in of an embankment, caused by excavations for sand, and which had been left

unfenced, [it was] held that the landowner was not liable in damages, and that he owed no duty to persons coming upon the premises, without his invitation, to protect them from danger from excavations thereon." The court said: "There is nothing to take the case out of the general rule that where the owner of land, in the exercise of his lawful dominion over it, makes an excavation thereon, so far from the street that a person coming onto the land without his invitation, and falling into it, would be a trespasser before reaching it, such owner is not liable to an action for the injury sustained. . . . The maxim *Sic utere tuo*, etc., has no application to such a case. It refers to acts the effect of which extends beyond the limits of the property, and to neighbors who do not interfere with it or enter upon it. If the rule were otherwise, a landowner could not sink a well or dig a ditch or open a stone quarry on his own land, except at the risk of being made liable for consequential damages, which would unreasonably restrict its enjoyment."

It was held in *Grindley v. McKechnie*, 163 Mass. 494, 40 N. E. 764, that an owner who digs a deep hole on his unfenced land about 25 feet from the street, which fills with water, and is concealed by boards and shavings floating on the surface, is not liable in damages for the death of a child five years old, who, without the consent of the owner, goes on the land, and is drowned in the hole.

Among the cases relied on by defendant in error is that of *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637, 77 Ga. 102, wherein this court held: "Where a railroad company leaves a dangerous machine, such as a turntable, unfastened in a city, on a lot which is not securely inclosed, and where people and children are wont to visit it and pass through it, this is negligence on the part of such company; and where an infant of ten or twelve years of age resorted to the turntable, and in riding upon it was dangerously and seriously injured, the railroad company is liable for damages for such injuries to the infant." The rule of the so-called *Turntable Cases* has been adopted by many of the courts, by others it has been severely criticised, and by some wholly repudiated. Some of the courts which have recognized the rule have limited its operation strictly to turntables and other dangerous and attractive machinery. It has been repudiated by the courts of last resort in New Hampshire, Tennessee, Massachusetts, New York, and New Jersey. See *Frost v. Eastern R. Co.* 64 N. H. 220, 9 Atl. 790; *Bates v. Nashville, C. & St. L. R. Co.* 90 Tenn. 36, 15 S. W. 1069; *Daniels v. New York & N. E. R. Co.* 154 Mass. 340, 13 L. R. A. 248, 28 N. E. 283; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682. Liability was also denied in *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 70, 25 Am. Rep. 269, on account of "the isolated position" of the turntable in question. The rule was recognized in *Keffe v. Milwaukee & St. P. R. Co.* 21 54 L. R. A.

Minn. 207, 18 Am. Rep. 393, wherein Mr. Justice Young pronounced perhaps the ablest opinion ever delivered in support of the doctrine. The same court, however, in *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 402, clearly intimated that the doctrine of the *Turntable Cases* ought not to be extended; and in *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899, said: "We did not mean by this [what was said in *Twist v. Winona & St. P. R. Co.*] that we would not apply the doctrine to any but 'turntable cases,' but merely that we would not extend the doctrine to cases which, upon their facts, did not come strictly and fully within the principle upon which those cases rest. We would not extend it to an ordinary case of a landowner merely allowing a pool or pond of water to stand on a vacant lot. To bring a case of such a pond within the principle of these cases, it would have to be exceptional and peculiar in its circumstances." And in *Ratte v. Dawson and Dehanitz v. St. Paul*, 73 Minn. 385, 76 N. W. 48, and in *Haesley v. Winona & St. P. R. Co.* 46 Minn. 233, 48 N. W. 1023, the principle was considerably limited in its application. In the last-mentioned case the court held: "A railway company, maintaining what is known as a 'gravity' yard or side track, has undoubtedly performed its duty as to a trespassing child of tender years, strictly *non sui juris*, when it securely fastens, by means of the ordinary appliance or brake, such cars as it may have occasion to place upon the grade of its track." In *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592, the doctrine of the *Turntable Cases* was followed, but it was limited, as has been seen, in *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74; and again in *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069, where the court held: "Railroad cars and similar machinery are not 'dangerous machines,' within the meaning of the rule declaring turntables to be such;" and also in *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891, where it was held: "The owner of a building in process of construction in a city is not liable for injuries to a child playing thereat without his knowledge, and without any inducement or invitation, implied or otherwise, on his part to the child to go upon the premises." In *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203, and *Union P. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501, the doctrine of the *Turntable Cases* is recognized; but in *Chicago, K. & W. R. Co. v. Bockoven*, 53 Kan. 279, 36 Pac. 322, where it appeared that a child was killed by falling off a defective gate of a railroad company, upon which it was swinging, the court said: "We are not willing to extend the rule declared by this court in the *Fitzsimmons* and *Dunden Cases*. In some of the courts the rule in those cases has been questioned, and in others denied." In *Evansich v. Gulf, C. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586, and other cases decided by the supreme court of that state, the turntable rule has been followed; but in *Missouri, K. & T. R. Co. v. Dobbins* (Tex.

Civ. App.) 40 S. W. 861, affirmed by the supreme court of Texas (91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62), the rule is sharply criticised, the latter court holding: "The common law does not impose upon the owner of property the duty to use care to keep his premises in such condition that a child of tender years going thereon without invitation may not be injured. . . . A railroad company which constructs a platform for the reception of freight and passengers, and a path of plank leading thereto, would not be liable to anyone who fell from the path into an excavation, who was not going to or from the platform on business connected with the company." There it appeared that plaintiff's child, less than three years old, fell into such excavation and was drowned. The rule of the *Turntable Cases* was recognized also in *Barrett v. Southern P. Co.* 91 Cal. 296, 27 Pac. 666; but, as we have seen, in *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, the rule was not extended to a case where a child trespassing upon an unguarded lot fell into a pond thereon and was drowned. The rule was also recognized in *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; but, as we have already seen, in *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, it was not applied where the child of the plaintiff was trespassing upon the lot of the defendant, and was drowned by falling from a raft on a pond thereon. Adopting what we believe to be the wise course of these courts in limiting the doctrine of the *Turntable Cases*, we hold that the case of *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637, 77 Ga. 102, is not authority which is applicable to the facts of the case under consideration. Our conclusion is that the evidence in this case does not disclose the breach of any duty lawfully due from the defendant railway company to the deceased child, and consequently did not warrant a finding that his death was occasioned by its negligence. Irrespective, therefore, of other questions presented, the verdict in favor of the child's father was without evidence to support it, and the trial court erred in not setting it aside.

As supporting the rule that the owner or occupier of land owes no duty of immunities to trespassing children, see the following cases and authorities therein cited: *Central*

Branch Union P. R. Co. v. Henigh, 23 Kan. 347, 33 Am. Rep. 167; *Greene v. Linton*, 7 Misc. 272, 27 N. Y. Supp. 891; *Powers v. Creem*, 22 App. Div. 480, 48 N. Y. Supp. 21; *Newdell v. Young*, 80 Hun, 364, 30 N. Y. Supp. 84; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Sterger v. Van Sicklen*, 132 N. Y. 499, 16 L. R. A. 640, 30 N. E. 987; *Murphy v. Brooklyn*, 118 N. Y. 575, 23 N. E. 887; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *McEachern v. Boston & M. R. Co.* 150 Mass. 515, 23 N. E. 231; *McGuinness v. Butler*, 159 Mass. 233, 34 N. E. 259; *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 21 L. R. A. 448, 34 N. E. 186; *Holbrook v. Aldrich*, 168 Mass. 15, 38 L. R. A. 493, 46 N. E. 115; *Galligan v. Metacomet Mfg. Co.* 143 Mass. 527, 10 N. E. 171; *Breckenridge v. Bennett*, 7 Kulp, 95; *Rodgers v. Leca*, 140 Pa. 475, 12 L. R. A. 216, 21 Atl. 399; *Oil City & P. Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128; *Talty v. Atlantic*, 92 Iowa, 135, 60 N. W. 516; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993; *Fredericks v. Illinois C. R. Co.* 46 La. Ann. 1180, 15 So. 413; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339, 10 So. 678; *Gulf, C. & S. F. R. Co. v. Cunningham*, 7 Tex. Civ. App. 65, 26 S. W. 474; *Galveston Oil Co. v. Morton*, 70 Tex. 400, 7 S. W. 756; *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L. R. A. 825, 36 S. W. 430; *Slayton v. Fremont, E. & M. V. R. Co.* 40 Neb. 840, 59 N. W. 510; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Phillips v. Burlington Library Co.* 55 N. J. L. 307, 27 Atl. 478; *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675; *Benson v. Baltimore Traction Co.* 77 Md. 536, 20 L. R. A. 714, 26 Atl. 973; *Kayser v. Lindell*, 73 Minn. 123, 75 N. W. 1038; *Dehanitz v. St. Paul*, 73 Minn. 385, 76 N. W. 48; *Buch v. Armory Mfg. Co.* 69 N. H. 257, 44 Atl. 809; *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765, 27 Pac. 689; *Charlebois v. Gagebic & M. River R. Co.* 91 Mich. 59, 51 N. W. 812; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 36 S. W. 659; *Clark v. Richmond*, 83 Va. 355, 5 S. E. 369; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155.

Judgment reversed.

All the Justices concur.

NEBRASKA SUPREME COURT.

Nancy J. TUCKER, Admx., etc., *Plff. in Err.*,

Thomas DRAPER, Admr., etc., of Harry Draper, Deceased.

(.....Neb.....)

*1. One who goes upon the premises

*Headnotes by SEDGWICK, C.

NOTE.—As to liability for death of child drowned in pond on private premises, see the preceding case of *Savannah, F. & W. R. Co. v. Beavers* (Ga.) and footnote thereto.

As to imputing negligence of father to child in action brought for benefit of father, see, in 54 L. R. A.

of another by express or implied invitation of the owner may recover damages for an injury caused by a failure on the part of such owner to keep the premises in a reasonably safe condition.

2. In an action by an administrator to recover damages for the death of his intestate, under chap. 21, Comp. Stat., the petition must show a pecuniary injury to the widow or next of kin; but as against a gen-

this series, *Wymore v. Mahaska County* (Iowa) 6 L. R. A. 545, and note; *Atlantic & C. Air Line R. Co. v. Gravitt* (Ga.) 26 L. R. A. 553, and *Ploof v. Burlington Traction Co.* (Vt.) 43 L. R. A. 108.

eral demurrer it is sufficient in that regard to allege that, "by reason of the death of the intestate, and the loss of the service and society and fellowship of the said intestate, the plaintiff has been damaged in the sum of \$5,000."

3. In such action, unless the facts are undisputed, and are of such a nature that ordinary minds would not differ in their judgment of them, the question of negligence must be submitted to the jury.
4. Evidence examined, and found sufficient to warrant the trial court in submitting the question of negligence to the jury.
5. In such action for the death of a child the father, as administrator, being plaintiff, it is error to instruct the jury that contributory negligence of the father is no defense.

(June 5, 1901.)

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Mr. A. W. Field, for plaintiff in error: In the absence of invitation, express or implied, there can be no recovery.

Plaintiff's action is based upon the theory that plaintiff's intestate was injured while on defendant's premises by invitation. The petition does not state facts sufficient to constitute a cause of action on that theory.

Richards v. Connell, 45 Neb. 467, 63 N. W. 915; *Omaha v. Bowman*, 52 Neb. 293, 40 L. R. A. 531, 72 N. W. 316, 59 Neb. 84, 80 N. W. 259.

Permitting a pond of water to remain on vacant land a short distance from a highway does not render the owner of the premises liable for the drowning of a boy while bathing therein.

Moran v. Pullman Palace Car Co. 134 Mo. 641, 33 L. R. A. 755, 36 S. W. 659; *Stendal v. Boyd*, 73 Minn. 53, 42 L. R. A. 288, 75 N. W. 735; *Cooper v. Overton*, 102 Tenn. 211, 45 L. R. A. 591, 52 S. W. 183; *Arnold v. St. Louis*, 152 Mo. 173, 48 L. R. A. 291, 53 S. W. 900; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993; *Schauf v. Paducah*, 20 Ky. L. Rep. 1796, 50 S. W. 42.

The so-called *Turntable Cases* grew out of accidents to children while playing on turntables of railway companies. The weight of modern authority seems to condemn the reasoning of these original cases, or at least confines it strictly to the use of "dangerous machinery."

Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682; *Turess v. New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993.

If the *Turntable Cases* are authority at all, now, in regard to the duty of a private landowner, they do not impose the duty upon the landowner to guard it against licensees or trespassers.

O'Leary v. Brooks Elevator Co. 7 N. D. 554, 41 L. R. A. 677, 75 N. W. 919; *Fitz-54 L. R. A.*

patrick v. Cumberland Glass Mfg. Co. 61 N. J. L. 378, 39 Atl. 675; *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276, 28 N. E. 1133; *Harobine v. Abbott*, 177 Mass. 59, 58 N. E. 284; *Moffatt v. Kenny*, 174 Mass. 311, 54 N. E. 850; *Buch v. Amory Mfg. Co.* 69 N. H. 257, 44 Atl. 809; *Clapp v. LaGrill*, 103 Tenn. 164, 52 S. W. 134; *Re Demarest*, 86 Fed. 803; *Berlin Mills Co. v. Croteau*, 32 C. C. A. 126, 50 U. S. App. 419, 88 Fed. 860; *Reeves v. French*, 20 Ky. L. Rep. 220, 45 S. W. 771; *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33; *Smith, Liability of Landowners*, 11 Harvard Law Review, 349.

Where the statute makes the action for the benefit of the next of kin, they being the beneficiaries in the result, and no part of the recovery going to the estate of deceased, contributory negligence on the part of these beneficiaries will defeat recovery.

McKay v. New England Dredging Co. 92 Me. 454, 43 Atl. 29; *Malott v. Shimer*, 153 Ind. 35, 54 N. E. 101; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L. R. A. 579, 77 N. W. 748, 78 N. W. 771; *Chicago, B. & Q. R. Co. v. VanBuskirk*, 58 Neb. 252, 78 N. W. 514; *Tucker v. State use of Johnson*, 89 Md. 471, 46 L. R. A. 181, 43 Atl. 779, 44 Atl. 1004; *Chicago, E. I. & P. R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556; *Plouf v. Burlington Traction Co.* 70 Vt. 509, 43 L. R. A. 108, 41 Atl. 1017; *Mats v. Chicago & A. R. Co.* 85 Fed. 180; *Pittsburgh, C. O. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Hindry v. Holt*, 24 Colo. 464, 39 L. R. A. 351, 51 Pac. 1002; *Atlanta & O. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553, 20 S. E. 550; *Westbrook v. Mobile & O. R. Co.* 66 Miss. 560, 6 So. 321; *Shippy v. AuSable*, 85 Mich. 280, 48 N. W. 584; *Glassey v. Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172; *Erie City Pass. R. Co. v. Schuster*, 113 Pa. 412, 57 Am. Rep. 471, 6 Atl. 269; *Bellefontaine & I. R. Co. v. Snyder*, 24 Ohio St. 670; *St. Clair Street R. Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519; *Williams v. Texas & P. R. Co.* 60 Tex. 205; *Chicago City R. Co. v. Wilcox*, 33 Ill. App. 450, 138 Ill. 370, 21 L. R. A. 76, 27 N. E. 899; *Pratt Coal & I. Co. v. Brawley*, 83 Ala. 371, 3 So. 555; *Huff v. Ames*, 16 Neb. 139, 49 Am. Rep. 716, 19 N. W. 623; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454; *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545, 43 N. W. 265; *Beach, Contrib. Neg.* 1st ed. §§ 44, 45, 2d ed. §§ 131 et seq.; 2 Thomp. Neg. 1191; *Wharton, Neg.* § 310; 3 Lawson, Rights, Rem. & Pr. 2135; *Bishop Noncontract Law*, §§ 578-580; *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509, 22 So. 913; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Louery v. New York Ice Co.* 28 Misc. 163, 65 N. Y. Supp. 707, 44 App. Div. 637, 60 N. Y. Supp. 1142; *Toner v. South Covington & C. Street R. Co.* 22 Ky. L. Rep. 564, 58 S. W. 439; *Lindsay v. Canadian P. R. Co.* 68 Vt. 556, 35 Atl. 513.

Messrs. E. J. Burkett and Lamb & Adams, for defendant in error:

When the owner of land expressly or by

implication invites a person to come upon his land, he cannot permit anything in the nature of a snare thereon, which results in injury to a person who avails himself of the invitation, and who at the time is exercising ordinary care, without being responsible for the consequences.

Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891.

Where two parties are negligent, and the negligence of one as compared with that of the other is gross and that of the other is slight, then a liability exists.

Edgerton v. O'Neil, 4 Kan. App. 73, 46 Pac. 206; *Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. 513.

Deceased was induced to come upon said premises by invitation, or resorted there as to a place of business or general resort held out as open to customers or others whose lawful occasions might lead them to visit there.

Hargreaves v. Deacon, 25 Mich. 1.

The question whether or not the lots had been thrown open, or dedicated to the public, was one of fact that was submitted, and of right should be submitted, to the jury.

State v. Schwinn, 65 Wis. 207, 26 N. W. 568.

From public use, either with actual or implied assent of the owner, the law will presume a dedication.

5 Am. & Eng. Enc. Law, pp. 400, 403; *Case v. Favier*, 12 Minn. 89, Gil. 48; *Downer v. St. Paul & O. R. Co.* 23 Minn. 271; *David v. New Orleans*, 16 La. Ann. 404, 79 Am. Dec. 586.

The common law does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind, without taking reasonable precautions to insure the safety of such as may be thereby attracted to his premises.

Price v. Atchison Water Co. 58 Kan. 551, 50 Pac. 450; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Peikin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, 39 N. E. 484.

When a child of tender years commits a mere technical trespass, and is injured by agencies that to an adult would be open and obvious warnings of danger, but not so to a child, he is not debarred from recovering, if the things instrumental in his injury were left exposed and unguarded, and were of such a character as to be likely to attract children.

2 Shearm. & Redf. Neg. 4th ed. 705; 4 Am. & Eng. Enc. Law, p. 53; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257.

When one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.

Bennett v. Louisville & N. R. Co. 102 U. S. 54 L. R. A.

577, 26 L. ed. 235; *Corby v. Hill*, 4 O. B. N. S. 562; *Kinchlow v. Midland Elevator Works* 37 Kan. 374, 46 Pac. 703; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313, 25 N. E. 156; *Young v. Harvey*, 16 Ind. 314; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133; *Graves v. Thomas*, 95 Ind. 361; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Binford v. Johnston*, 82 Ind. 430, 42 Am. Rep. 508; *Harriman v. Pittsburgh, O. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451.

Persons are required to use greater care in dealing with children of tender years than with older persons who have reached the age of discretion, and greater care is required to avoid injury to them, even when they are trespassers.

Penso v. McCormick, 125 Ind. 116, 9 L. R. A. 313, 25 N. E. 156; *Indianapolis, P. & O. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70; *Harriman v. Pittsburgh, O. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559; *Morrow v. Sweeney*, 10 Ind. App. 626, 38 N. E. 187.

The fact that the parents inherited the estate of the child does not make the rule which would bar the parent who was guilty of contributory negligence from recovering in his own right applicable to the action of the administrator.

Wymore v. Mahaska County, 78 Iowa, 396, 6 L. R. A. 545, 43 N. W. 264; *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275, 35 Atl. 899; *Huff v. Ames*, 16 Neb. 139, 49 Am. Rep. 716, 19 N. W. 623; *O'Leary v. Brooks Elevator Co.* 7 N. D. 554, 41 L. R. A. 677, 75 N. W. 919.

There was no testimony introduced or attempted to be introduced, that would tend to show that the plaintiff was negligent in permitting the deceased to go upon said lot.

MoVee v. Watertown, 92 Hun, 306, 36 N. Y. Supp. 870; *Hedin v. Suburban R. Co.* 20 Or. 155, 37 Pac. 540; *Metcalfe v. Rochester R. Co.* 12 App. Div. 147, 42 N. Y. Supp. 661; *Dan v. Citizens' Street R. Co.* 99 Tenn. 88, 41 S. W. 339.

Sedgwick, C., filed the following opinion:

The plaintiff sued as administrator of his son, a child three years and three months of age, who was killed by falling into a well on the premises of the defendant. There was a trial with a jury, and verdict for the plaintiff. The defendant's motion for a new trial was overruled, and judgment entered on the verdict. The case is brought here upon petition in error.

The defendant insists that the petition was insufficient, and that the general demurrer thereto ought to have been sustained by the court; and the first ground of this objection is that, as the accident occurred on the private property of the defendant, and in the absence of an express or implied invitation to the deceased child to go upon the premises, there can be no recovery; and that

the facts alleged in the petition fail to show such invitation. There is some repetition and some incoherency in the petition, but it contains the allegations that defendant permitted the public in general to use the lots for hitching horses and teams, and permitted their use by the patrons of the saloon and other persons desiring places to hitch horses and teams during their temporary stay in the city of Lincoln, and the lots were thrown open to the public in connection with said saloon so as to better enable the tenant to rent said saloon, and make it bring a better rental and more money to the owners; and for said reason the public was, by defendant, notified and invited to go upon said lots and use them as above stated; and said lots and premises were by defendants thrown open to the public in general, and the general public was, by defendant, invited to enter and use the same as public property. As against a general demurrer, we think there is here an allegation that the lots were thrown open to the general public, and the general public was invited to use the lots as public property; and the deceased child, being one of the general public, he was, of course, embraced in the invitation.

The second objection to the sufficiency of the petition is, that there is no sufficient allegation of pecuniary loss to the plaintiff. The allegation is that, "by reason of the death of the said Harry Draper, the plaintiff has been damaged by reason of the loss of the service and society and fellowship of the said Harry Draper in the sum of \$5,000." It is assumed that the society and fellowship of one's children have no pecuniary value. Some courts have so expressed themselves, but we do not find it necessary to discuss that proposition. In *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44, the supreme court of Michigan in a well-reasoned opinion, citing many authorities, concludes that "pecuniary injury must be alleged and proved." There was no allegation of loss of service, nor of actual pecuniary damage. The allegation was, "By reason of which negligence of said defendant and injury to and death of said Lorenzo Hurst an action hath accrued to the said plaintiff, as the representative of the next of kin of said Lorenzo Hurst, and in which he claims damages from the said defendant in the sum of \$10,000." The court said: "It is argued, however, by the counsel, that this statute declares the liability of the person or corporation whose negligence caused the death, and that, therefore, no evidence of pecuniary damages was requisite to entitle the next of kin to maintain the action, and to recover such damages." The statute leaves it to the jury to give such damages as they shall deem fair and just; and held that there must be a special allegation of pecuniary loss in the petition, which must be supported by proof. See also *Orgall v. Chicago, B. & Q. R. Co.* 46 Neb. 4, 64 N. W. 450; *Kearney Electric Co. v. Laughlin*, 45 Neb. 391, 63 N. W. 941. In *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252,

78 N. W. 514, the action was brought by the administrator of the estate of Charles P. Van Buskirk, deceased, and the petition alleged that "the said Charles P. Van Buskirk has neither wife nor children, but left Alonzo J. Van Buskirk, Mary P. Van Buskirk, his parents, and Gertrude G. Eledge, Lewis G. Van Buskirk, . . . brothers and sisters, who are heirs at law and next of kin, who have been damaged in the sum of \$5,000." This petition was precisely within the rule announced in *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44, and other cases, and was clearly insufficient, and was so held. In the opinion it is said that it is necessary to aver a loss of means of support where, from the relation of the survivors, the law would not presume that from his death such survivors had been deprived of their means of support; but it was not intended to declare the rule that the action cannot be maintained unless it in some way appears that the survivors of the deceased have lost their means of support. Loss of means of support is pecuniary injury, but it by no means follows that it is the only pecuniary injury for which a recovery may be had in such actions. *Friend v. Burlington*, 53 Neb. 674, 74 N. W. 50. The services might be valuable to a parent entitled thereto, who was in such financial condition as not to be dependent upon such services.

The defendant insists that there was not sufficient evidence to warrant the submission of the issues to the jury. The case of *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, is cited as decisive of this question. In that case the court said: "The owner of a vacant lot upon which is situated a pond of water or a dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises, not by invitation, express or implied, but for the purpose of amusement, or from motives of curiosity." A boy of about ten years of age, who was accustomed to play in and about a pond of water in a vacant lot, the property of defendant, fell from a section of sidewalk which he was using as a raft on the pond, and was drowned. The defendant had permitted the surface water to accumulate on this lot. He had nothing to do with causing it to accumulate there. The pond was formed in the course of nature. The boy formed a raft, and "went on said pond, floating thereon." He was capable of constructing, and did construct, the "raft" that caused his death. Negligence, and even recklessness, was properly chargeable against him, and it was held that the defendant was not liable. We have no doubt that under the facts in that case the law was correctly applied. The case of *Omaha v. Borman*, 52 Neb. 293, 40 L. R. A. 511, 72 N. W. 310, is similar in character. "A body of water—either standing, as in ponds and lakes, or running, as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays—is a natural object, incident to all countries which are not

deserts. Such a body of water may be found in or close to nearly every city or town in the land. The danger of drowning in it is an apparent, open danger, the knowledge of which is common to all; and there is no just view, consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall." *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 114, 598; *Omaha v. Bowman*, 52 Neb. 293, 40 L. R. A. 531, 72 N. W. 316. There is no hard and fast rule applicable to everyone under like circumstances. To an adult in full possession of his mental and physical powers, one standard may be applied; to a boy, particularly if he be of limited intelligence, another standard; and to an infant not *sui juris*, and totally ignorant of danger, still another. *Baltimore & P. R. Co. v. Cumberland*, 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. 380, 382; *Huff v. Ames*, 16 Neb. 139, 49 Am. Rep. 719, 19 N. W. 623. "Much may depend upon the character of the injury, the circumstances under which it occurred, and the size, intelligence, and maturity of the child. In such cases the jury must be allowed to pass upon the question of contributory negligence. It is error to rule it as a question of law." *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, 368. It is only where the facts are undisputed, and are of such a nature that ordinary minds would not differ in their judgment of them, that the question is one of law for the court. In *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, it is said that plaintiff can recover in case "where the plaintiff was injured while upon defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition." It appears that these premises, consisting of three lots in the heart of the city of Lincoln, had a saloon located at one corner of the tract; that the lots were so situated that teams could drive thereon immediately from the principal streets of the city, and that people had frequently been invited by the owner to use the lots for the purpose of hitching their teams and that the citizens generally did so, both those who patronized the saloon and others; that there had been shows or some kind of public entertainments upon the lots at different times, and people had frequented them at such times, the people being, as one of the witnesses expressed it, "as thick as they could stand;" that there were at one time stairs put in at least two places to enable the people to go on the lots directly from the sidewalk on one side thereof, and it does not appear how long these stairs so remained, or whether they were taken away. The evidence also tends to show that a neighbor was allowed to and did use the lots for storing sewer tiling, and that piles of said tiling 3 to 5 feet in height, and covering a considerable space, were at times upon said

lots; that the well was located in an open part of said lots about 20 feet from the said tiling; that the well was something more than 20 feet deep, and that the top was surrounded by a curb 10 or 12 inches high, which had been covered over with boards; that these boards, or at least some of them, were loose, and had been removed, and had been allowed to remain so for six months or more immediately prior to the accident; that there was a path running somewhere in the lots, and within 3 or 4 feet of the well; that it was a very public place, and that the boys of the city had frequently played ball on an adjoining lot, and on such occasions had, in playing ball, run across the lot in question; that they were playing ball there on the day of the accident, and not long before the accident one of the boys, in chasing the ball, nearly ran into the well; that the health officer of the city, some two or three years before the accident, called the attention of the owner of the premises to the dangerous condition of the well, and was told by the owner to go to h—, that he would run his own business; and that the well had thereafter remained substantially in the same condition until the accident; that on the day of the accident the deceased boy, with his little brother, who was about five years old, walked down to the livery stable near the premises, where their father's family horse was kept to see the horse, and then walked from there over to these lots, and to the well in question; and the little boy in question, while standing by the well, and without any apparent cause, was seen by one of the witnesses to "just stand and fall into the well, apparently reaching for something;" that the persons employed by the defendant to take care of the premises must have known the condition of the premises, and how it was being used, and the apparent danger from the well. There may be, and often are, circumstances under which one owes some active duty to a trespasser upon his premises. If a man wilfully lies down upon a railroad track, the engineer must not wantonly run his engine over him. One may not set a snare or spring gun for trespassers, and, knowing that some stranger had placed the snare or spring gun, if he wantonly allows it to remain, he will be responsible for the consequences. A well may be so contrived as to act as a dangerous trap, and one who allows it so to remain upon his premises will, under some circumstances, be liable. If adults, or children of such age as to ordinarily be capable of discerning and avoiding danger, are injured while trespassing upon the premises of another, they may be without remedy, while, under similar circumstances, children of three or four years of age would be protected. If I know that there is an open well upon my premises, and know that children of such tender years as to have no notion of their danger are continually playing around it, and I can obviate the danger with very little trouble

to myself, and without injuring the premises, or interfering with my own free use thereof, I owe an active duty to those children; and, if I neglect that duty, and they fall into the well, and are killed, it is through my negligence. I cannot urge their negligence as a defense, even though I have never invited or encouraged them expressly or impliedly to go upon the premises. In *Kinchlow v. Midland Elevator Co.* 57 Kan. 374, 46 Pac. 703, a boy ten years of age, who was, by permission of the company, assisting in sweeping grain cars for which he and other boys were paid by being allowed the grain which they so gathered, went to an exhaust-steam barrel to warm his feet. He had no permission from the company to go there, and in stepping upon the cover (which was loose) the cover tipped, and he fell into the barrel, scalding his feet and legs. The court said: "We think it ought to have been submitted as a question of fact for the jury to determine upon the evidence whether the defendant was guilty of negligence or not in placing the barrel in that position, and in maintaining it with such an insecure cover; and also whether or not, considering the age and incapacities of the plaintiff, he was guilty of contributory negligence in stepping upon the cover." The court also quotes the following from an opinion of the supreme court of Michigan: "A license to come upon one's premises, especially if in the licensor's interest, imposes upon him the duty to warn those who come of any danger in coming of which he knows or ought to know, and they do not." And the court also quoted the following from the supreme court of Pennsylvania: "While it is true, in general, that where no duty is owed no liability arises, this rule varies with circumstances; and where, therefore, an owner has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the question of duty then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence." The demurrer to the evidence, which the trial court sustained, was overruled by the supreme court. In *Hargreaves v. Deacon*, 25 Mich. 1, the cistern into which the child fell was made for the lawful use of the owner, and was then being used in the customary way. There was no evidence of its having been abandoned, or that the owner knew that little children were accustomed to play around it. There was "nothing to indicate any wanton or inhuman disposition in the defendant." The defendant had not allowed the cistern to remain uncovered, but in using the cistern the cover had been temporarily removed. From the very interesting opinion of Mr. Justice Campbell it appears that, if there had been circumstances in the case indicating a wanton or inhuman disposition in the defendant, he would have been held liable. In *Kline v. Niman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223, 54 L. R. A.

a boy of nine years, while playing upon and about a pond of water on defendant's premises, was drowned. In holding the defendant not liable, the court said: "Unless we hold that the defendant was under a legal obligation to fence this pond for the protection of children reaching and playing upon it, there can be no recovery. And it is obvious that the fence would have to be very high and very tight to afford any effectual guard against children having access to the pond. But upon the facts we do not think the law imposed the duty upon the defendant of building a fence or guard to prevent children from reaching the pond." In the case at bar the well was apparently of no use to anyone. It ought to have been filled, or, at any rate, it could easily have been put in such condition as to have prevented this accident.

We are not called upon to say what finding we would make upon the evidence in this record. We think it was for the jury to say whether there was an implied invitation to go upon these lots which included this little boy, and whether there was on the part of the owners of the premises such recklessness of danger to little children as to "indicate a wanton and inhuman disposition in the defendant." The former question was submitted by the trial court with proper instructions, and defendant cannot complain of a failure to submit the latter.

The trial court excluded evidence offered by the defendant to show contributory negligence on the part of the plaintiff. There were circumstances shown in the evidence sufficient to require this question to be submitted to the jury if, under the law, contributory negligence of the plaintiff would constitute a defense in this case; but the court instructed the jury that "contributory negligence on the part of either or both his parents under the law is no bar to this action," and this instruction is complained of as error. Under our statutes, if the "neglect" was such as would have entitled the party injured "to maintain an action and recover damages in respect thereof," then the person who would have been liable if death had not ensued "shall be liable to an action for damages." Under a statute which provides that all causes of action shall survive, an action was brought by an administrator for the benefit of the estate of a child whose death was caused by the negligence of the county. The negligence of the parents contributed to the injury. Neither the father nor mother was a party to the action. The court said: "It is claimed that appellant ought not to recover, for the reason that it is not shown that the parents of the child were free from contributory negligence; and, since they inherited his estate, the rule which would bar a negligent parent from recovering in such a case in his own right ought to apply. But plaintiff seeks to recover in the right of the child, and not for the parents," and "such negligence would prevent a recovery by the

parents in their own right." *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545, 43 N. W. 264. It was clearly shown by the supreme court of Vermont in *Ploof v. Burlington Traction Co.* 70 Vt. 509, 43 L. R. A. 108, 41 Atl. 1017, that the case last cited is not in point under a statute like ours. Under our statutes the intestate's right of action does not survive. No action can be brought for the benefit of his estate. The petition must show a pecuniary injury to the wife and next of kin. *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252, 78 N. W. 514, and cases cited. In this case the father is the next of kin. He is also the administrator, and the plaintiff in the case, suing for his own benefit. Shall the state say to the father: "If you know that your child is in danger of injury from the negligence of others, you are under no legal obligation to protect it from such injury; and, if you allow the child to be killed, you may recover, from one who is equally at fault with yourself, for any pecuniary injury you may suffer by reason of the death?" No such meaning can be derived from the statute. The negligence of the father cannot be imputed to the child, and in an action for the benefit of the child, or of his estate, where such action is allowed, the negligence of the father is no defense. *Huff v. Ames*, 16 Neb. 139, 49 Am. Rep. 719, 19 N. W. 623. But in an action by the father for his own benefit to recover for the pecuniary injury which he has suffered by reason of the death of the child, his own negligence contributing to the death will defeat his recovery. *Atlantic & O. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553, 20 S. E. 550. In the case of *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275, 35 Atl. 899, the supreme court of New Jersey announced a different rule. The supreme court of Vermont, in *Ploof v. Burlington Traction Co.* cited above, criticises the New Jersey case, and says: "The opinion cites—evidently without careful consideration—the Iowa case as supporting the decision." But the New Jersey court of errors and appeals had already reviewed the decision of the lower court, and, being equally divided upon the question here considered, reversed the decision of the lower court upon another point. *Consolidated Traction Co. v. Hone*, 60 N. J. L. 444, 38 Atl. 759. We think that the question of contributory negligence ought to have been submitted to the jury, and for the error of the trial court in refusing to do so it is recommended that the judgment be reversed, and the cause remanded for a new trial.

Oldham and Pound, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded for a new trial.
54 L. R. A.

Harry HICKSON, *Plff. in Err.*,
v.
STATE of Nebraska.

(.....Neb.....)

- *1. An instrument in the following form is the subject of forgery: "Mr. Sage: Please let this boy have a single rig,—a good one,—and oblige. I will bring it back myself. [Signed] George Clinger."
2. Such instrument is not only an order or request for the delivery of chattels over which Clinger had no control, but is also a writing obligatory, within the meaning of § 145 of the Criminal Code.

(May 22, 1901.)

ERROR to the District Court for Cass County to review a judgment convicting defendant of forgery. *Affirmed.*

The facts are stated in the opinion.

Mr. A. N. Sullivan for plaintiff in error.

Messrs. F. N. Front, Attorney General, and Norris Brown, for defendant in error:

Section 145 of the Criminal Code provides, among other things, as follows: "If any person shall falsely make, alter, . . . any order or warrant or request . . . for the delivery of goods and chattels of any kind, every person so offending," etc.

Blackstone defines forgery to be "the fraudulent making or altering of a writing to the prejudice of another man's rights."

4 Bl. Com. 247.

The plain import of the language "for the delivery of goods and chattels of any kind" is the physical release of the possession of the horse and buggy by its owner, and placing the accused in the possession thereof.

Benjamin, Sales, 1st ed. p. 498; 1 Lawrence & Rapalje, Dict. p. 368.

Sullivan, J., delivered the opinion of the court:

Harry Hickson, the plaintiff in error, was convicted of the crime of forgery, and sentenced to imprisonment in the penitentiary for a term of one year. The information upon which he was tried alleges that "James Sage now is, and for more than one year last past has been, engaged in the livery business in the city of Plattsmouth, Cass county, Nebraska, and letting, for hire, horses, harness, and carriages; that in and by the words 'single rig' are meant, in said business, a horse harnessed to a carriage,

*Headnotes by SULLIVAN, J.

NOTE.—For other cases in this series as to what may be the subject of forgery, see *note* to *People v. Munroe* (Cal.) 24 L. R. A. 33; *State v. Evans* (Mont.) 28 L. R. A. 127; *Thomas v. State* (Tex.) 46 L. R. A. 454; and *White v. Wagar* (Ill.) 50 L. R. A. 61.

and such is the custom, usage, and understanding in said business; that one George Clinger, a resident of said city for more than one year last past, has been during all of said time a customer of said James Sage; that one Harry Hickson, late of the county aforesaid, in the county of Cass and state of Nebraska, on the 18th day of July, A. D. 1900, then and there being, then and there did unlawfully, feloniously, maliciously, and falsely, and with intent to defraud, make, forge, and counterfeit a certain paper writing purporting to be an order for the delivery of certain goods and chattels, and being of the tenor and effect following, to wit: 'Mr. Sage: Please let this boy have a single rig,—a good one,—and oblige. I will bring it back myself. George Clinger.' (Meaning thereby an order to said James Sage to deliver a horse, harness, and carriage to the bearer of said instrument for the temporary use of said George Clinger, and that said George Clinger would return said horse, harness, and carriage to the said James Sage, when through with the use thereof.) All contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

It is, on behalf of Hickson, contended that this information does not charge a public offense, and that the judgment of the district court should be, therefore, reversed. "Forgery," says Mr. Bishop, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 2 Bishop, New Crim. Law, § 523. The instrument in question meets the requirements of this definition, and is fairly within the meaning of § 145 of the Criminal Code. If the order had been genuine, if it were what it purported to be, it would doubtless have enabled the defendant to obtain possession of a horse and vehicle, and it would have imposed upon George Clinger the legal duty of returning the same to the liveryman. The authorities are not in entire accord as to the character of instruments which may be the subject of forgery, but according to all the decisions, both English and American, the writing fabricated by the defendant was within the inhibition of the statute. It possessed, not only apparent, but real, legal efficacy. In addition to being apparently capable of effecting a fraud, it would, if it were genuine, have created a legal liability. It was not only an order or request for the delivery of chattels over which Clinger had no disposing power, but it was also a writing obligatory, within the meaning of the law.

The judgment is affirmed.

54 L. R. A.

Oliver S. BROWN, *Appt.*,
v.
O. A. NEILSON *et al.*

(.....Neb.....)

*A stipulation in a lease of a farm for a term of years, as follows: "And it is further expressly agreed and understood by and between the parties hereto that all property of every name, character, and description belonging to said parties, of the second part that shall be on said premises, or brought thereon by said second parties during the term of this lease, shall be holden as security for the payment of the rents above reserved until all be paid, and the same shall be and remain a lien upon the same from year to year until said payments of the rents for said entire term have been fully discharged and paid,"—is ineffectual to create a lien, legal or equitable, in favor of the lessor for rents due and in arrears, on the crops grown thereafter on the leased premises, and other property not *in esse* at the time, and afterwards brought thereon by the lessee.

(May 22, 1901.)

A PPEAL by plaintiff from a judgment of the District Court for Sarpy County in favor of defendants in a suit to enforce an alleged lien on a tenant's property. *Affirmed.*

The facts are stated in the opinion.

Mr. John P. Breen, for appellant:

The parties having agreed that there should be a lien upon the chattel property brought upon the place, and upon the crops raised thereon, equity would decree a specific lien upon the property proved upon the trial to be upon the place, and order a sale thereof to collect the amount of rent found due.

Pom. Eq. Jur. § 1235; Jones, Liens, §§ 540-544; *De Vaughn v. Howell*, 82 Ga. 336, 9 S. E. 173.

Messrs. Duffie, Gaines, & Kelby, for appellees:

In the foreclosure of a lien, the proof should show the property upon which the lien attaches, in order that the court may decree its sale to satisfy the debt. There is no lien upon any specific property by virtue of a clause in a lease like the one in the present case. The contract is nothing more than an agreement between the parties that the lessee will give to the lessor a lien upon the property which comes within the terms of the agreement, upon a breach of

*Headnote by HOLCOMB, J.

NOTE.—For an earlier case in this series as to validity of provision in lease for lien on all personal property afterwards acquired, see *New Lincoln Hotel Co. v. Shears* (Neb.) 43 L. R. A. 588.

As to the efficacy of a mortgage on chattels to be acquired as independent articles, and not as the increase or fruits of existing property, see note to *Deeley v. Dwight* (N. Y.) 18 L. R. A. 298.

the covenant to pay rent, and such an agreement might be enforced in equity, but in doing so the property must be specifically and definitely set forth upon which the lien will attach, in order to decree a foreclosure and sale of it to satisfy the debt.

An equitable lien does not include exemptions unless the same are waived by the agreement.

Gear, Land. & T. § 141; Vinson v. Hallowell, 10 Bush, 538; Seiling v. Gunderman, 35 Tex. 544.

Nor does an equitable lien include property of the lessee which has been disposed of. *Burgess v. Kattleman, 41 Mo. 480.*

An attempted mortgage of personal property or growing crops not *in esse* is void.

New Lincoln Hotel Co. v. Shears, 57 Neb. 475, 43 L. R. A. 588, 78 N. W. 25.

Holcomb, J., delivered the opinion of the court:

Suit was instituted by the plaintiff below (appellant here) for the recovery of the sum of \$900, alleged to be due as rental for the use of a farm occupied by defendants Nelson, appellees, as tenants under a written lease for a term of years. The rent claimed to be due was for the full year beginning March 1, 1895, and the first half year beginning March 1, 1896. The lease of the premises, upon which plaintiff based his right of action, was executed October 30, 1893, and being for the term of four years commencing on the 1st day of March, 1894. In the petition, joined with the allegations for a recovery of a money judgment, the plaintiff pleaded a certain stipulation contained in the lease, which, it is averred, gave to him a lien in equity on all the property of whatsoever description on the leased premises, or brought thereon, and belonging to the lessees, as security for the rent due and in arrears under the terms of the lease; and prayed a decree establishing a lien upon all such property for the amount for which judgment should be rendered in the action. On plaintiff's application a restraining order was also issued enjoining the lessees from transferring or removing any of their property from the leased premises. The answer denied the right of the plaintiff to a lien on any of the defendants' property for any sum, and raised other issues not here necessary to further notice. On the trial of the case the plaintiff recovered a judgment for the money prayed, with interest, but was denied any relief on his application to have the amount found due to be a lien on the defendants' personal property, as prayed for in his petition. From the finding and decree denying him a lien he appeals.

The clause in the lease, which is made the foundation for the plaintiff's claim to the enforcement of a specific lien in his favor on all the property of the defendants Nelson on the leased premises, is as follows: "And it is further expressly agreed and understood by and between the parties hereto

that all property of every name, character, and description belonging to said parties of the second part that shall be on said premises, or brought thereon by said second parties during the term of this lease, shall be holden as security for the payment of the rents above reserved until all be paid, and the same shall be and remain a lien upon the same from year to year until said payments of the rents for said entire term have been fully discharged and paid." Under these sweeping provisions the plaintiff contends that he is entitled to have a lien decreed in his favor for the amount for which he obtained judgment on all personal property of all kinds belonging to the lessees which they had belonging to them on the leased premises at the time of the service of the restraining order issued as aforesaid. Just what this property is, is more or less involved in doubt; but it is claimed by appellant that a schedule of the property and claim of exemption filed by the lessee with the sheriff of the county, who appears to have been about to levy an execution thereon in another action, furnishes sufficient evidence as to the description and identity of the property to which his lien should attach. The claim of exemption was made by the lessee as the head of a family, and filed with the sheriff after the issuance of the restraining order in the case at bar. In it the defendant claimed his specific exemptions allowed him by statute, and, in addition thereto, property of the value of \$500; he being, as alleged, the head of a family, engaged in the business of agriculture, and having no lands or town lots. The schedule of property showed items of personal property ordinarily belonging to one engaged in agriculture,—such as cattle, horses, agricultural implements, and household goods; also about 50 acres of growing corn, and about 1,300 bushels of corn in the crib. It is suggested by counsel for defendants that a stipulation of the character under consideration cannot, in equity, be extended to cover and include the exempt property of the defendant, allowed by law as the head of a family engaged in the business of agriculture; citing in support thereof *Vinson v. Hallowell, 10 Bush, 538, and Seiling v. Gunderman, 35 Tex. 544.* We prefer to address ourselves to the principal question presented by the appeal, and that is whether a valid lien may be created on any property by the method adopted in this case, and, if so, in what manner can the lien be made effective. Whether any of the property was in existence at the date of the execution of the lease is doubtful. Certain it is that all of it was unidentified and in no way described in the instrument, except as it might afterwards be brought on the leased premises; and for the most part the property consisted of growing corn and corn in the crib, not in existence until some time after the defendant occupied the leased premises under the lease by which plaintiff claims. Plaintiff's counsel in his opening

brief, concedes that the instrument conveyed no present lien on the property of the lessee afterwards raised or brought on the demised premises; but contends that the stipulation quoted should be construed as an agreement by the lessee to give a lien on all such property after being brought on the premises, which ought to be enforced in equity in a suit to collect the rents in arrears by a decree in the nature of specific performance, in pursuance of the familiar maxim that "equity regards as done that which ought to be done." In the reply brief by different counsel it is argued that the rule first stated is not broad enough, and that the instrument itself, and by virtue of its own force, should be treated as creating a lien or mortgage on the property, although not in existence at the time of the execution of the lease, and which attaches as an equitable lien when the property comes into being, and within the terms of the stipulation, and that the lien is capable of enforcement in a court of equity. The stipulation does not comprehend within its meaning that the lessee will, after the property is acquired, execute a mortgage or other instrument encumbering the property for the benefit of the lessor. No original and independent contract creating a new lien can be inferred as the intention and contemplation of the parties without doing violence to the language used. It does not purport to be an agreement to give, in the future, a lien on the property then owned by the lessees on the leased premises; but by its own terms and provisions the instrument evidences an attempt to establish a lien *in futuro* on property at the time not *in esse*. It is a contract, or attempt at contract, for a sale and transfer by way of mortgage, and not a contract to give a mortgage. If it is effectual to create a lien on the after-acquired property, we are of the opinion that it cannot, under any well-recognized rule, be made the foundation for a decree in the nature of specific performance, conceding that, in a proper case, a court of equity will decree specific performance of a contract of a sale of, or to give a mortgage on, chattel property. Unless the stipulation under consideration in the instrument can be upheld as creating, in favor of the lessor, a lien, legal or equitable, on the crops grown on the leased premises, or in property brought thereon after the execution of the lease, we think it must entirely fail as having any validity or force for any purpose. It is not argued, nor will it be seriously contended, that the clause quoted conveys any legal interest in or lien on the property of the lessee not then in existence, or owned by him, but which was afterwards brought into existence, and on the leased premises. The authorities are numerous that a legal estate or interest cannot be conveyed in property which has no existence.

The question, then, is, Will such an agreement create a lien of an equitable character, attaching to the property when it comes into existence and is brought within the terms of the stipulation in other respects? On this the authorities are divided. The exact 54 L. R. A.

nature of the contract, therefore, becomes material in arriving at a proper conclusion. Such a contract is usually defined as executory in character, requiring something further to be done in the future by the parties thereto before a good title will pass to and be perfected in the lessor or mortgagee. In an early case, and one that is frequently cited by the courts holding to the doctrine that property not *in esse* is not the subject of transfer by way of mortgage, it is said regarding the nature of such contracts: "A stipulation that future-acquired property shall be holden as security for some present engagement is an executory agreement of such a character that the creditor with whom it is made may under it take the property into his possession when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that, such act being done and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner in such case is a continuing agreement, so that when the creditor does take possession under it he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good." *Moody v. Wright*, 13 Met. 17, 32, 46 Am. Dec. 706. In deciding the validity of a contract executory in character, under which a lien was claimed, this court, in an early case, *Lanphere v. Lowe*, 3 Neb. 131, 138, citing with approval a decision of the supreme court of Massachusetts, held that a valid lien could not thus be created. Gantt, J., speaking of a stipulation in a lease of real estate similar to the one under consideration, says: "But it was an effort on the part of the defendant to create a lien somewhat in the nature of a chattel mortgage upon a something not *in esse*. Can a valid charge be made upon a thing not in existence? I think it cannot. It is a very ancient rule of law that a man cannot grant or charge that which he has not; and in *Jones v. Richardson*, 10 Met. 488, it is said that this 'is a maxim of law too plain to need illustration, and which is fully supported by all the authorities.' Bacon, Abr. *Grants*, D, 2; *Codman v. Freeman*, 3 Cush. 309; 2 Kent, Com. 703; *Head v. Goodwin*, 37 Me. 187; *Robinson v. Macdonnell*, 5 Maule & S. 228; *Chynoweth v. Tenney*, 10 Wis. 400. This doctrine is applied to mortgages of goods which may be subsequently acquired by the mortgagee. It is equally applied to sales of personal property and rights of property. *Chesley v. Josselyn*, 7 Gray, 490; *Rice v. Stone*, 1 Allen, 569." And again, after mature consideration, the doctrine enunciated in the *Lanphere Case* was approved, followed, and reiterated in *New Lincoln Hotel Co. v. Shears*, 57 Neb. 478, 43 L. R. A. 588, 78 N. W. 25. Speaking on the

same subject, says Cobb, J., who delivered the opinion of the court in *Cole v. Kerr*, 19 Neb. 553, 555, 26 N. W. 598: "There is, to say the least of it, great confusion of the authorities on the point being considered, but, after a careful examination of those cited on either side in this case, I have reached the conclusion that, as a question of law, the lien of a chattel mortgage of a crop of corn not planted at the time of its execution and delivery will not attach to the corn when it comes into existence until it is seized by the mortgagee, or until, in the language of a member of the court in the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, 'a new intervening act.' Until then it remains a mere license, and, until acted upon, it conveys neither a lien nor a right of property which the mortgagee can assert against a purchaser or execution creditor of the mortgagor." The authorities appear to be almost, if not entirely, unanimous in support of the rule announced in the case last cited, to the effect that no legal estate or interest in or lien upon property not in existence at the time of the execution of the instrument passes to the grantee therein named by virtue of the instrument itself, and that the agreement purporting to convey the property or give a lien on such property when not in existence is executory in character, in the nature of a license or continuing agreement requiring a further and new act in order to transfer any legal title or lien to the grantee or mortgagee. In addition to the authorities cited in the two decisions of this court heretofore quoted from, the following are directly in point: *Chapman v. Weimer*, 4 Ohio St. 481; *Long v. Hines*, 40 Kan. 220, 19 Pac. 796; *Lunn v. Thornton*, 1 C. B. 379; *Williams v. Briggs*, 11 R. I. 476, 23 Am. Rep. 518, and cases therein cited.

The more difficult question, as heretofore stated, arises with respect to an equitable lien being thus created which attaches to the property when it comes into being and title thereto is acquired by the grantor, and regarding which there exists an irreconcilable conflict in the authorities. It is contended by counsel for plaintiff in the case at bar, and held by many respectable authorities, that, notwithstanding the property on which he seeks a lien was not *in esse* when the lease was executed, after the crops were raised on the demised premises, belonging to the lessor, and still remaining thereon, a lien in equity attached thereto, the enforcement of which should be permitted by resort to and the application of equitable rules and principles. The same argument, of course, applies to the other personal property afterwards acquired, and, subsequent to the execution of the lease, brought on the premises. What counsel contends for amounts substantially to the enforcement of a landlord's lien, not only on the crops grown on the leased premises, but also on all the personal property of the lessee brought thereon after the execution of the lease, without any statutory authority therefor. This is sought to be accomplished by the very general terms of the stipulation in the lease heretofore

quoted. It is admitted that no legal title passed when the lease was signed, and that there then existed no property on which a lien could operate. But it is said that the stipulation will in equity establish what in law it is incapable of doing. That is, although under the law no valid interest or lien passes to the lessor, yet an equitable lien arises in his favor and attaches to the property when it comes into existence; that notwithstanding it is void in law,—without a new act,—it is valid in equity; that, by the application of the equitable doctrine contended for, a valid equitable lien may be created, not only on the crops raised on the leased premises for the year in which the lease was executed, but also as many years thereafter as the term of the lease covers,—two, five, ten, or a quarter of a century; and that such lien covers, not only the crops raised on the premises, but as well all other property acquired and brought thereon by the lessee. We do not think this can be accomplished by the application of any sound equitable principle. In the view of the case now under consideration, the expression of Judge Cobb in *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 596, becomes pertinent: "Soil alone," says he, "does not produce crops of corn in this degenerate age, if it ever did. It now requires, in addition to soil, seed and labor, both of man and beast. So that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach and come into efficacy, without 'a new intervening act,' upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed,—something which I never heard contended for in this country, but which is a right which, under the name of peonage, is recognized in our sister republic to the south of us." In *New Lincoln Hotel Co. v. Shears*, 57 Neb. 478, 43 L. R. A. 588, 78 N. W. 25, it was contended by those arguing for the validity of a clause in a lease similar in its general terms to those in the present case that the subsequent mortgagees of the property, who it is admitted had notice of the provisions for a lien in the lease, could not, therefore, question its validity. To this it is observed by Ryan, C.: "We cannot see that the validity of the provision of the lease is affected by this consideration. Whether or not a chattel mortgage, or its equivalent, can be made so as to affect future-acquired property, is a question entirely dependent upon general principles independent of statute." In *Steele v. Ashenfelter*, 40 Neb. 770, 59 N. W. 361, Post, J., speaking for the court on the same subject, says: "It will be seen from this statement that the question presented is whether, as against Hale, the execution plaintiff, the mortgage includes the after-acquired property of the mortgagor. The question thus presented is one upon which the authorities are by no means harmonious. The doctrine of *Holroyd v. Marshall*, 10 H. L. Cas. 191, has been recognized by many of the courts in this country. In those jurisdictions the rule is that while, at

law, a mortgage of after-acquired property confers no rights as against purchasers and attaching creditors, in equity it is effectual to charge the property, when acquired by the mortgagor, with an equitable lien, which will prevail, not only as against the latter, but also as against attaching creditors. The distinction above noted between the rule at law and in equity can, of course, have no place under our practice, where the two remedial systems are blended into one. Therefore, if the corporation, for which the plaintiff stands, by its mortgage acquired a lien which is enforceable in equity as against the execution plaintiff, such lien is available to him in this action. If the question was an open one in this state, the cases which recognize the rule in *Holroyd v. Marshall* would be entitled to great consideration; but we regard it as settled by the case of *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 598, in which it is distinctly held that a mortgage of a crop to be planted conveyed no lien upon crops subsequently raised by the mortgagor as against judgment creditors of the latter." Says the supreme court of Wisconsin in *Chynoweth v. Tenney*, 10 Wis. 397, 403: "But it is contended further that, although this interest may be inoperative at law, yet that it was effectual to establish an equitable lien, and the decision of Judge Story in *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673, and the authorities by him cited, are relied upon to support this position. But we think the doctrine of this case had been so fully denied by subsequent cases that it cannot be considered as law,"—citing a number of cases. "And in *Congreve v. Evetts*, 10 Exch. 307, Parke, B., says that such a conveyance 'gave no legal title, nor even equitable title, to any specific goods.' Other cases to the same effect might be cited, but we deem it unnecessary." The rule adopted by the Wisconsin court, just cited, has been approved and followed in *Farmers' Loan & T. Co. v. Commercial Bank*, 11 Wis. 207; *Single v. Phelps*, 20 Wis. 399; *Mowry v. White*, 21 Wis. 417; *Lamson v. Moffat*, 61 Wis. 153, 21 N. W. 62; and other cases. See also *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711; *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83. *Loftin v. Hines*, 107 N. C. 360, 10 L. R. A. 490, 12 S. E. 197, is a case involving the validity of a lien by virtue of an instrument in the nature of a mortgage on crops to be grown two or three years in the future, in which it is stated in the syllabus: "A mortgage executed in 1888 on crops to be cultivated during 1889, 1890, and 1891 conveys no title, legal or equitable, which can be enforced by claim and delivery." And in the opinion says Clark, J., voicing the views of the court: "Unless said mortgage conveyed to the plaintiff either a legal or equitable title to the crop of 1889, the plaintiff cannot recover. It is held by Davis, J., in *Wooten v. Hill*, 98 N. C. 52, 3 S. E. 846, that 'the authorities do not warrant the conveyance of an indefinitely prospective unplanted crop, and we 54 L. R. A.

think it should be limited to crops planted, or about to be planted, as the crops next following the conveyance,'—that is, the crops of the years current when the mortgage is executed. This case is to the same purport as the opinion by Pearson, Ch. J., in *Martin v. Marlow*, 65 N. C. 695, and it has been cited and approved by Smith, Ch. J., in *State v. Garri*, 98 N. C. 733, 4 S. E. 633; by Shepherd, J., in *Smith v. Coor*, 104 N. C. 139, 10 S. E. 486; and by Avery, J., in *Taylor v. Hodges*, 105 N. C. 344, 11 S. E. 156. We think the mortgage was invalid as a conveyance of title, either legal or equitable, to the crop of 1899, and the proceeding by claim and delivery must fail." It seems in that state that a valid mortgage may be executed on unplanted crop for the current year. In an early English case the rule is stated as follows: "That, if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant so as to prevent its passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but, if it was only an agreement to mortgage furniture to be subsequently acquired,—to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity." *Mogg v. Baker*, 3 Mees. & W. 195.

The natural and logical deduction to be made from the authorities above cited is that the agreement under which the plaintiff claims, being executory in its nature, and not wholly executed, is insufficient to pass any legal interest in or equitable lien on the property on which the lien is claimed, because not then in existence, and that the trial court committed no error in denying the plaintiff any relief by way of enforcement of a specific lien thereon for the amount for which he obtained judgment. Our court has long been committed to this doctrine, and there appears no sufficient reason to depart therefrom. Our Code has blended the remedies at law and in equity, both of which are now to be administered by one form of action, denominated a civil action. It is a familiar maxim that "equity follows the law." Applying this maxim, it is frequently held that a contract imposing no legal obligation cannot be enforced in equity (Snell, Eq. p. 17); this rule, of course, having its proper application and limitations. The contract in the present instance is not the result of a mistake or failure of the parties to correctly express their intentions in the stipulation creating the alleged lien. It amounts only to a mere license, which, to become effective for the purpose of creating a valid lien, requires a change of possession of the property when or after acquired. Until a new act intervenes, no sufficient title passes to the lessor which he can enforce at law or in equity, nor is he entitled to relief by the application of any recognized rule of equity, under the doctrine

of specific performance. In the examination of the case we have not been unmindful of the authorities to which our attention has been directed, as well as many others examined in our consideration of the questions involved, in support of the plaintiff's contention that the stipulation creates in his favor an equitable lien, which ought to be recognized. This line of cases is not in harmony with the doctrine of this court as heretofore expressed, and must, for that reason, be disregarded as authority. The precedents which we have heretofore established should, in our judgment, be followed and adhered to.

It is claimed by the appellant that the affidavit and claim of exemption made by the lessee, heretofore referred to, established a ratification and affirmance of the lien of the plaintiff under his lease. The affidavit was made in another case, and in no wise related to or connected with the contract of lease, except as referring to it as being a paramount lien on the property. It was made and filed with the sheriff holding an execution to save the property from levy on the ground that it was exempt under the statute. After claiming his specific exemptions, which were enumerated, the appellee stated that certain growing corn, describing it, and a quantity of corn in the crib, was claimed under the statutory exemption of property of the value of \$500, the affiant not being the owner of lands or lots; and that all of said property (*i. e.* the property claimed under the exemption of \$500 in value) "is encumbered by and subject to a lien for accrued rent due from me for the premises upon which the said corn was raised and is located to the owner of the land in the sum of \$900, and that the same is an encumbrance upon all of said property prior and paramount to any claim for exemptions which I now assert or claim against it; that the encumbrance and lien for said rent upon said property was created and established by myself and wife signing a written contract to that effect long prior to the levy of the execution levied by you on said property." While the affidavit was, perhaps, evidence of the construction the defendant put upon the contract of lease, it in no way changes the legal relations of the parties, and, so far as the statement that a lien existed on the property by virtue of the stipulation in the lease is concerned, it, at most, was only his opinion of its legal force and effect, which would not alter or change the principles of law involved and applicable under the issues joined in the present action. The lien referred to could only be perfected by a new act, which had not then been performed.

The judgment of the District Court is affirmed.

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Edgar M. WESTERVELT, Receiver, etc., of
Citizens' National Bank of Grand Island,
Appt.,

v.

William J. HAGGE *et al.*

(.....Neb.....)

- *1. Where an attachment is levied on real estate fraudulently alienated by the attachment debtor and grantor for the purpose of hindering, delaying, and defrauding creditors, even though the legal title of record is in another, the attachment creditor acquires thereby a lien upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovery of judgment.
2. Where, after attachment proceedings on land fraudulently alienated, the real estate is reconveyed and restored to the fraudulent grantor, the lien of the attachment becomes thereby effective and enforceable, the same as though the conveyance in the first instance had not been made.
3. Held, under the facts as disclosed by the record, attachment creditor not guilty of laches in enforcing the lien acquired by virtue of his attachment.
4. Where, pending litigation, after the levy of an attachment on real estate, a lien has been acquired by another on the same property, the person in whose favor the lien is created is charged with notice, and takes subject to the rights of the plaintiff in the action wherein the attachment was levied and final judgment rendered.
5. Where a copy of an order of attachment is left with the actual occupant of lands attached, having possession of the premises and apparent authority over and control of the same, the act will be a compliance with the provisions of the statute, requiring that, "where the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order," although such occupant be not the owner or lessee of such premises.
6. Where real estate is attached by a creditor of a fraudulent grantee to whom the legal title has been conveyed in fraud of the rights of the creditors of the fraudulent grantor, and who has no actual interest therein, and who restores and reconveys the real estate to the fraudulent grantor, who voluntarily encumbers the same for the benefit of his creditors, such attachment creditor thereby acquires no valid lien on the property as against such creditors of the grantor under their liens thus acquired.
7. An attachment lien on land, the legal title to which is in the attachment debtor, is subject to every equity which exists against the debtor at the time of the levy of the attachment, and courts of equity will limit the lien to the actual interest of the attachment debtor in such real estate.

(April 10, 1901.)

*Headnotes by HOLCOMB, J.

NOTE.—For levy on land fraudulently conveyed, see *Wagner v. Law* (Wash.) 15 L. R. A. 784, especially authorities cited in briefs.

For levy on property after void assignment for creditors, see *McCord-Brady Co. v. Mills* (Wyo.) 46 L. R. A. 737.

APPEALS by plaintiff and defendant City of Grand Island from a decree of the District Court for Hall County in favor of defendant Taylor in a proceeding to foreclose a mortgage lien on property belonging to defendant Hagge upon which Taylor claimed a lien by attachment. *Affirmed.*

The facts are stated in the opinion.

Mr. O. A. Abbott, for the appellant receiver:

Where the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order.

Neb. Code, § 203; *Shoemaker v. Harvey*, 43 Neb. 75, 61 N. W. 109.

To sustain this levy the court must read into this statute the words "or any member of his family."

The legal title being in Mr. Vieths at the time of the attempted levy, it created no lien on the land.

Neb. Code, § 476, title, *Execution.*

Only the legal title of the judgment debtor can be levied on, not an interest of any other kind.

Dworak v. More, 25 Neb. 735, 41 N. W. 777; *Connell v. Gallagher*, 36 Neb. 749, 55 N. W. 229; *Nessler v. Neher*, 18 Neb. 649, 26 N. W. 471.

The same rule that governs in regard to executions must govern levies under writs of attachment. The legal title, and that alone, can be levied on in either case.

Shoemaker v. Harvey, 43 Neb. 75, 61 N. W. 109; *First Nat. Bank v. Tighe*, 49 Neb. 299, 68 N. W. 490. See also *Baird v. Kirtland*, 8 Ohio, 21; *Loring v. Melendy*, 11 Ohio, 355; *Morris v. Way*, 16 Ohio, 469; *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 827; *Modisett v. Johnson*, 2 Blackf. 431; *Terrell v. Prestel*, 68 Ind. 86. *Contra*, see *Jackson ex dem. Cook v. Shepard*, 7 Cow. 88, 17 Am. Dec. 502; *Jackson ex dem. Cary v. Parker*, 9 Cow. 73; *Gorrell v. Kelsey*, 40 Ohio St. 117; *Lowry v. Wright*, 15 Ill. 95; *Dworak v. More*, 25 Neb. 735, 41 N. W. 777.

Lands to which a party had an equitable claim were not bound by a levy made before the legal title was acquired, although it was acquired soon after.

Gorrell v. Kelsey, 40 Ohio St. 117.

Taylor by this levy alone cannot acquire a lien on the lands, but must file his creditors' bill before he secures any interest in them.

This is the case of the three creditors.

Boynton v. Rawson, Clarke, Ch. 584; *Corning v. White*, 2 Paige, 567, 22 Am. Dec. 659; *Miers v. Zanesville & M. Turnp. Co.* 13 Ohio, 197; *Loring v. Melendy*, 11 Ohio, 355; *Rapple v. International Bank*, 93 Ill. 396; *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 827; *Lyon v. Robbins*, 46 Ill. 276.

How can this defendant claim a lien under these attachment proceedings when he could not have acquired a lien by the levy of the execution?

Lyons v. Robbins, 46 Ill. 276; *Weed v. Pierce*, 9 Cow. 722; *Wait*, Fraud. Conv. § 392.

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The property was not Vieths' property, and should not in equity be taken to pay his debts, to the exclusion of the debts owed by Hagge.

Roberts v. Robinson, 49 Neb. 717, 68 N. W. 1035; *Berkley v. Lamb*, 8 Neb. 399; *Dorsey v. Hall*, 7 Neb. 460; *Gahway v. Malchow*, 7 Neb. 285.

On motion for rehearing.

An execution cannot be levied on real estate conveyed by the judgment debtor to defraud his creditors.

Dworak v. More, 25 Neb. 735, 41 N. W. 777.

An attachment cannot be levied on property conveyed to a third party to defraud creditors.

Shoemaker v. Harvey, 43 Neb. 75, 61 N. W. 109; *First Nat. Bank v. Tighe*, 49 Neb. 299, 68 N. W. 490; *Foster v. Durant*, 2 Gray, 538; *Baird v. Kirtland*, 8 Ohio, 21; *Lowry v. Wright*, 15 Ill. 95; *Loring v. Melendy*, 11 Ohio, 355.

An instrument that transfers all the title of the grantor, whether legal or equitable, to a third party, and thereby forever shuts the doors of the courts in his face when he seeks at law or in equity to get it back, cannot be void.

Nessler v. Neher, 18 Neb. 649, 26 N. W. 471; *Dworak v. More*, 25 Neb. 735, 41 N. W. 777.

If levies can be made on one man's land (or on land standing in his name on the records) for another man's debts, he may, by means of this writ, judicially hold up any number of people by clouding their titles. They cannot be allowed to appear in the suit and discharge the property.

Kimbrow v. Clark, 17 Neb. 403, 22 N. W. 783.

Messrs. F. W. Ashton and E. E. Thompson for the appellant city.

Mr. W. A. Prince for appellee Taylor.

Mr. J. H. Woolley for defendant Hagge.

Mr. E. C. Glanville for First National Bank.

Mr. C. G. Ryan for C. I. Banking Company.

Holecomb, J., delivered the opinion of the court:

One William Hagge was the owner of certain real estate situated in Hall county, upon which different alleged liens and their priorities are involved in this controversy. At or about the time of the transactions hereinafter narrated, Hagge became financially distressed, because of his connection with, and liability as a stockholder in, the Citizens' National Bank of Grand Island, which closed its doors and suspended business about December 4, 1893. On December 6 there was placed on record in the office of the county clerk a warranty deed, conveying the real estate in controversy from Hagge and wife to one D. H. Veiths, a relative of Hagge, for an expressed consideration of \$10,500. The deed bore date August 9 preceding, and was acknowledged on the 24th of the same month. A mortgage from Veiths and wife on the premises

was executed at the same time for an expressed consideration of \$9,500, and recorded December 26, 1893. Soon after the recording of the instrument conveying the land from Hagge to Vieths, attachment suits were instituted by the appellee Taylor and appellant city of Grand Island, and the real estate was attached at the instance of Taylor as the property of Hagge; it being alleged that he had and was about to convey his property for the purpose of defrauding his creditors, and hindering and delaying them in the collection of their debts. In the suit brought by the city, the property was attached as the property of Vieths on a contract liability claimed to be due the city on a bond, on which he was an obligor, in favor of the city, given by one West, as city treasurer. Each of these two suits was prosecuted to final judgment, and the property attached was ordered sold in satisfaction of the judgments so rendered. On January 26, 1894, Vieths and wife transferred the real estate to Hagge, excepting in the covenants of warranty any lien or liens thereon by virtue of attachment proceedings in favor of the city of Grand Island, and all taxes. Afterwards, through a third party or trustee, the land was conveyed to Mrs. Hagge, the wife of William Hagge. Mortgages were then executed by Mrs. Hagge and her husband, one in favor of James H. Woolley, to secure certain notes evidencing an indebtedness against Hagge, and one to the appellant, as receiver of the Citizens' National Bank, to secure \$6,000 of a judgment rendered against Hagge on his stockholders' liability in said bank. The receiver then brought an action in equity to foreclose his lien by virtue of the mortgage securing the judgment, making all others claiming an interest in or lien on the land parties to the action, and claiming a prior lien on the premises, except as to the mortgage executed in favor of Woolley, which, it was admitted, was superior to the lien in favor of the receiver. Issues were joined, in the formation of which Taylor and the city of Grand Island set up their attachment suits and the judgments rendered therein, claiming a lien on the land by virtue thereof superior to those created by reason of the mortgages subsequently executed. On the trial the court found in favor of Taylor, awarding him a first lien; in favor of the assignees of the indebtedness secured by the Woolley mortgage, giving them a second lien. The receiver was decreed to have a third lien. The court dismissed the action as to the city of Grand Island and one other cross petitioner, whose case is not here for review. The receiver and the city of Grand Island appeal from the decree.

In determining the respective rights of the appellants, we are required to consider different and distinct propositions of law, and it is therefore proper to treat the appeal under two heads. The decree of the trial court, giving to the appellee Taylor, on his cross petition, a first lien on the property by virtue of the attachment proceedings in-

stituted by him December 8, 1893, and the judgment rendered thereon, is objected to on the ground, as argued, that the legal title to the property, at the time the attachment was levied, being in the said Vieths, and Hagge having only an equitable interest therein, attachment would not lie, and the plaintiff in the attachment suit acquired no lien on the property by reason of the levy on the land while standing in the name of Vieths, the grantee of Hagge. In *Shoemaker v. Harvey*, 43 Neb. 75, 61 N. W. 109, it is held in the second paragraph of the syllabus: "If there is no possession of real property by an attachment defendant having an equitable interest therein, no valid levy and sale can be made upon such equitable interest; neither can it, under such circumstances, be subjected otherwise than by invoking the aid of the court of chancery." The opinion in the case sustains the proposition thus announced in the syllabus, and we have no disposition to modify or recede from same, and, if it be proper to apply the same principle to the facts in the case at bar, then the decree pronounced by the trial court cannot stand.

But is the principle applicable? In the *Harvey Case* and all similar cases, the underlying principle is that where the interest of the attachment debtor in real estate is purely equitable, uncoupled with possession, then an attachment or execution cannot be validly levied, but resort must be had to a court of equity to bring together the legal and equitable estate, and decree the property to belong to the actual owner. To illustrate: In the *Harvey Case*, the legal title to the property had never been invested in the Harveys. Their interest and estate, if any, in the property sought to be attached, was equitable only, and could not be reached by the attachment as "lands and tenements" of the attachment debtor. In the case at bar, Hagge was the legal and equitable owner of the property, save only as his title may have been devested by the conveyance made by him to the said Vieths. By the conveyance he attempted to convey all his interest in the land, both legal and equitable. He evidently sought to put it out of the reach of his creditors, either by process out of a court of law or in an action in equity. Taylor levied his attachment on the land on the ground that Hagge had fraudulently disposed of his property with the intent to cheat, hinder, delay, and defraud his creditors. By § 17 of the statute of frauds, such a conveyance is fraudulent and void as to the creditors of the grantors. As to such creditors, the conveyance may be treated as absolutely void and a nullity, as though it had never been made, and the property remained, as it actually was, the property of the debtor. The conveyance is, at most, only a cloud on the title of the debtor, and, if required, may be removed in any proper proceeding brought for that purpose. The attachment laws would be ineffectual, and the provision for the attachment of property which has been fraudulent-

ly conveyed would be meaningless, if the construction contended for should prevail.

The proposition under consideration seems, however, to have been quite firmly settled by the prior decisions of this court. In *Keene v. Sallenbach*, 15 Neb. 200, 18 N. W. 75, it is held: "Where an attachment is levied upon real estate belonging to the debtor, whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor in the land which he may enforce after he recovers judgment." Says Maxwell, J., the author of the opinion: "But where sufficient cause is shown for an attachment, and one is issued and levied upon real estate belonging to the debtor, whether held in his own name or not, the creditor acquires a lien upon the interest of the debtor in the land, which he may enforce after the recovery of judgment. Where in such case it is necessary to set aside a conveyance alleged to be fraudulent as to creditors, an action may be commenced for that purpose against the alleged fraudulent grantee and other proper parties, and it is the duty of the court to render such decree in the premises as the testimony will justify." In *Kimbrow v. Clark*, 17 Neb. 403, 22 N. W. 783, on the same subject, it is observed (at page 406, 17 Neb., and page 789, 22 N. W.), by Reese, J., who wrote the opinion: "If the title to the property is held by another as a secret trust for the benefit of the debtor, who is the real owner, and if such ownership is merely colorable, such property will be deemed to be held for the benefit of creditors, and the conveyance, while good as between the parties, will be held void as to them (*Sturdivant v. Davis*, 31 N. C. [9 Ired. L.] 365; *Bump. Fraud. Conv.* 215; *Power v. Alston*, 93 Ill. 587), and is subject to the process of attachment." To the same effect is *Kennard v. Hollenbeck*, 17 Neb. 302, 22 N. W. 771, where the facts are quite similar. It is stated in *Gormley v. Potter*, 29 Ohio St. 597, 599: "The land in controversy was subject to levy on execution, and the levy upon it was properly made. The conveyance to Flynn by the judgment debtor, and by Flynn to the debtor's wife, having been made with intent to defraud creditors, . . . the land was still the property of the judgment debtor, and subject to execution, as fully as if the conveyance had not been made." Says the supreme court of Illinois in the case of *McKinney v. Farmers' Nat. Bank*, 104 Ill. 181, 183: "The statute says such fraudulent conveyances shall be held void as against creditors. Creditors have the right to treat such conveyances as void. The moment appellees levied their attachments especially upon these lands, as the property of Patterson, their election to treat the former conveyances as void was declared, and such attachments became a lien against the lands, with the same effect as if the fraudulent conveyances by Patterson had never been made." The following authorities also sustain the proposition as announced by the prior decisions of this court, heretofore referred to: *First Nat. Bank v. Hollerin*, 31 54 L. R. A.

Neb. 558, 43 N. W. 392; *McVeigh v. Ritenour*, 40 Ohio St. 107; *Westerman v. Westerman*, 25 Ohio St. 500; *Sockman v. Sockman*, 18 Ohio, 302; *Scott v. Hartman*, 26 N. J. Eq. 89; *Terhune v. Hackensack Sav. Bank*, 45 N. J. Eq. 344, 19 Atl. 377; *Pratt v. Wheeler*, 6 Gray, 520; *Arper v. Baze*, 9 Minn. 108, Gil. 98.

These cases are all distinguished from the *Harvey Case*, and those similar, in that in the one class the attachment or execution debtor, being the owner of the legal and equitable estate, has sought to alienate his interest in the property in fraud of the rights of creditors, who may treat the transaction as a nullity, and enforce their rights in, and claims to, the property, notwithstanding the fraudulent transfer; while in the other class of cases the attachment debtor has only an equitable interest in the property, which can be reached only by resort to a court of equity, which can take hold of the legal and equitable title at the point of divergence, and direct them into the one channel of actual ownership. We reach the conclusion, therefore, that Taylor acquired a valid lien on the real estate by virtue of the levy of his attachment thereon as the property of Hagge, which might be enforced in that action or in subsequent proceedings, and that, if required, a resort might be had to a court of equity to remove the cloud on the title caused by the fraudulent conveyance to Veiths. In the case at bar proceedings for this purpose were rendered unnecessary by reason of the reconveyance of Veiths to Hagge, which again restored to and vested in him full and complete title of record to the property to the same extent as though the conveyance in the first instance had not been made.

It is suggested that the attachment creditor has slept on his rights, and ought not in equity to be given a lien in priority to that of appellant under the mortgage security. The record discloses that the attachment was levied on December 8, 1893; that final judgment was not rendered until December 2, 1895; that after the levy, and during the pendency of the action, the appellant obtained his judgment and mortgage security therefor. On April 4, 1896, he began an action in equity, and made Taylor a party defendant, who came in and pleaded his attachment suit as giving him a lien on, and interest in, the land, which he asked to have adjudicated. We do not think there was any such laches as would forfeit his prior lien, and that the equity action begun by plaintiff afforded him an opportune time to adjust by decree the priorities of liens on the premises involved in the proceedings. The appellant, having acquired its lien *pendente lite*, was charged with notice, and took subject to the rights of the plaintiff in the action wherein the attachment was levied and final judgment rendered. *Wright v. Smith*, 11 Neb. 341, 7 N. W. 537.

An objection is urged as to the validity of the levy of the writ of attachment, because, as claimed, a copy of the order was not left with the occupant of the land at-

tached. The return of the officer shows a copy of the order to have been left with the occupant of the premises on which the writ was levied. The evidence shows that the person occupying the premises as tenant was absent from the county, and that the person to whom a copy of the order was delivered was occupying the premises with the tenant, and had the apparent control and possession, and had the actual possession, of the premises at the time of the levy. This is sufficient. The law does not require the officer to determine who may be the lessee and legal tenant of the owner. The person who is in possession and occupying the premises with the apparent authority and control thereof may be served with the order, and compliance is thereby had with the provisions of the statute, viz.: "Where the property attached is real, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order." The person upon whom the order was served at the time of the service was the actual occupant of the lands attached, and the demands and object of the statute were met and complied with by service upon him. The objection to the manner of service of the writ is not, we think, well taken.

With respect to the city of Grand Island, and its interest in the lands involved in controversy by virtue of the writ of attachment by it levied on the land as the property of the grantee, Veiths, it is argued, as it is by the appellant, the receiver, that the Taylor attachment could be levied only on an equitable interest in the property belonging to the grantor, Hagge, and therefore it was invalid, and no rights accrued to Taylor by reason of the proceedings taken by him in that suit. What has been said with relation to the contention of counsel for receiver in this regard applies with equal force and pertinency to the claims of counsel for the city. We are therefore under the necessity of inquiring only as to the relative rights of the city as an attaching creditor of the grantee, Veiths, and the mortgagees claiming as creditors of Hagge. It is argued, in a very elaborate brief by counsel for the city, that the mortgagees of Hagge and wife, after the reconveyance by Veiths to Hagge, take their rights to an interest in the property through the fraudulent conveyance from Hagge and wife to Veiths, and, in turn, from Veiths and wife to Hagge, and that, as a proposition of law, those claiming under the grantor, by way of deed, mortgage, or other security or conveyance, either directly or remotely, are conclusively bound by the transfers and the recitals contained in the fraudulent conveyances, and are estopped from questioning, except on the ground of fraud, the validity or legal effect of the different instruments of conveyance through which title, interest, or lien is claimed. The propositions announced are supported by well-considered cases, which are entitled to great weight as authority. If the premises upon which the argument is based are sound and well founded, we are

of the opinion that the conclusion arrived at, as stated in the proposition, would be inevitable and logically follow. But do the mortgagees of Hagge claim through fraudulent conveyances, from the consequences of which they cannot escape, and by the recitals of which they are bound? That Hagge's property is morally and equitably pledged to pay his debts rather than the debts of some third party is a proposition that will not be seriously controverted. In fact, it is admitted by counsel for the city; but it is contended that the proper steps have not been taken to avoid the effect of the conveyance to Veiths, and subject the property to the payment of the debts of Hagge, the fraudulent grantor. On the trial of the case, the court found the conveyance was fraudulent and void as to the creditors of Hagge. This is made manifest by the decree in favor of Taylor, an attaching creditor. The conclusion reached by the trial court is the only proper one, under the evidence. The question is one of fact, properly triable by the trial court. *Sherwin v. Gaghagen*, 39 Neb. 238, 57 N. W. 1005; *Houck v. Heinzelman*, 37 Neb. 463, 55 N. W. 1062; *Goldsmith v. Erickson*, 48 Neb. 48, 66 N. W. 1029; *Crites v. Hart*, 49 Neb. 53, 68 N. W. 302.

It is shown by the evidence quite conclusively that Hagge transferred the property to Veiths wholly without consideration, and for the purpose of placing it beyond the reach of creditors, and that Veiths had no interest in the land whatever, save the naked legal title by reason of the transfer, colorable only, made by Hagge, as he says, to hold for him, and to be reconveyed whenever he requested it, and to avoid it being taken in satisfaction of his liability on a bond to which his signature was obtained, as he claims, by misrepresentation. Veiths had no real ownership in the property, made no attempt to exercise any authority as owner, and took no steps to reduce the land to actual or constructive possession under the conveyance. The conveyance being in fraud of the rights of the creditors of Hagge, it was evidently so recognized by the parties thereto, and on January 26 following the whole transaction was repudiated, and the property restored to its rightful owner. The deed of reconveyance was grounded on no new or valid consideration. It involved no new agreement or contract based on any good consideration. It was an undoing of that which had been wrongfully done, thus placing the parties in the situation in which they were prior to the first fraudulent conveyance. The legal effect was to restore the property to the legal owner, and render unnecessary any action or proceeding to annul and vacate the fraudulent conveyance. No action in the nature of a creditors' bill would lie, and the fraudulent grantee had relieved himself of being charged as trustee of the property for the benefit of the creditors of Hagge. Such an action would have been useless and barren of results, because the grantee had done all that a court of equity could, by order or

decree, require him to do. *Swift v. Hol-
dridge*, 10 Ohio, 230, 36 Am. Dec. 85;
Bump, Fraud. Conv. 4th ed. § 500; *Dolan
v. Van Demark*, 35 Kan. 304, 10 Pac. 848.

Can an attachment against Veiths, while he held the naked legal title under such circumstances, be held superior to that of the creditors of Hagge, the actual owner, whether a lien on the property was acquired through the voluntary act of Hagge, or by decree or process of court in litigation brought for the purpose of enforcing the rights of creditors and establishing a lien thereon? What the rights of Hagge are, or those claiming under him as subsequent creditors, grantees, or otherwise than as creditors at the time of the fraudulent alienation, it is unnecessary here to discuss or determine. In *Dolan v. Van Demark*, 35 Kan. 304, 10 Pac. 848, it is said by Valentine, J.: "While generally a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person, who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a pre-existing debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a bona fide purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment or partial payment of a bona fide debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale. *Butler v. White*, 25 Minn. 432; *Boyd v. Brown*, 17 Pick. 453; *Murphy v. Moore*, 23 Hun, 95; *Stark v. Ward*, 3 Pa. St. 328; *Webb v. Brown*, 3 Ohio St. 246; Bump, Fraud. Conv. 3d ed. 499, 500. The fraudulent vendee may lawfully dispose of the property in any manner in which the fraudulent vendor himself might have disposed of the property if the fraudulent sale had not occurred." It follows, then, that, if the property may lawfully be disposed of by the fraudulent grantee in satisfaction of the claims of the creditors of the fraudulent grantor, it may be reconveyed to the fraudulent grantor, and by him disposed of in any lawful manner for the same purpose.

The attachment lien of the city as a creditor of Veiths, the holder of the naked legal title, like the lien of a judgment against him, can only attach to his actual interest as the holder of the legal title as against the creditors of Hagge, and this interest, as we have seen, is nothing, the transfer being colorable only. In *Roberts v. Robinson*, 49 Neb. 721, 68 N. W. 1035, says this court, in speaking of the lien of a judgment, and where the principle involved is applicable to the case at bar: "By § 477 of the Code of Civil Procedure, a judgment is made a lien upon the land of the judgment debtor; that is, the land owned by him. True enough, if the record shows the legal title
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to land to be in the debtor, the judgment is an apparent lien upon that land; but the fact that the record shows the legal title to land to be in a debtor is not conclusive evidence that the debtor actually owns the real estate. The rule is that, where the legal title to real estate is in the name of the judgment debtor, nevertheless the lien of the judgment against him attaches only to the actual interest which he has in the real estate. *Uhl v. May*, 5 Neb. 157; *Mets v. State Bank*, 7 Neb. 165; *Galway v. Malchow*, 7 Neb. 285; *Dorsey v. Hall*, 7 Neb. 460; *Mansfield v. Gregory*, 8 Neb. 432, 1 N. W. 382; *Berkley v. Lamb*, 8 Neb. 392, 1 N. W. 320; *Harral v. Gray*, 10 Neb. 186, 4 N. W. 1040; *Dewey v. Walton*, 31 Neb. 819, 48 N. W. 860; *Mundt v. Hagedorn*, 49 Neb. 409, 68 N. W. 610." In *Galway v. Malchow*, 7 Neb. 285, says Lake, J.: "It is well settled that a judgment lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment, and courts of equity will always limit the lien to the actual interest of the judgment debtor,"—citing *Freeman, Judgm.* § 357; *Swarts v. Stees*, 2 Kan. 236. See also *Smith v. McCann*, 24 How. 398, 16 L. ed. 714. We are of the opinion, therefore, that the city in this action cannot invoke the principle sought to be applied as against the creditors of Hagge claiming under the liens sought to be established by them on the property in controversy, and that the attachment on the real estate as the property of Veiths was unavailing to create a lien as against such creditors, because the fraudulent grantee had no actual or substantial interest in the property, to which, at the time, he held the legal title of record. The equities are clearly in favor of the creditors of the fraudulent grantor.

The decree of the District Court should in all respects be affirmed.

Rehearing denied.

Charles M. CHAMBERLAIN, *Plff. in Err.*,
v.

Florence M. BUTLER, Admx., etc., of Robert L. Butler, Deceased.

(.....Neb.....)

*One may lawfully insure his own life, and afterwards assign the policy to another having no insurable interest, if done in good faith, and not by way of cover for a wager policy.

(May 22, 1901.)

*Headnote by NORVAL, Ch. J.

NOTE.—For other cases in this series as to validity of assignment of an insurance policy to one who has no insurable interest in the life insured, see also *Rittler v. Smith* (Md.) 2 L. R. A. 844; *Roller v. Beam* (Va.) 6 L. R. A. 136; *Johnson v. Alexander* (Ind.) 9 L. R. A. 860, and note; *Hewlett v. Home for Incurables* (Md.) 17 L. R. A. 447; *Mutual Reserve Fund Life Assn. v. Hurst* (Md.) 20 L. R. A. 761; *Steinback v. Diepenbrock* (N. Y.) 44 L. R. A. 417; and *Clement v. New York L. Ins. Co* (Tenn.) 42 L. R. A. 247.

ERROR to the District Court for Johnson County to review a judgment in favor of plaintiff in an action brought to recover the amount which had been collected upon a policy of life insurance which plaintiff's intestate had assigned to defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. Isham Reavis, J. W. Doweese, and Davidson & Giffen, for plaintiff in error:

Butler had a perfect right to procure the issuance of the policy upon his own life. The policy thus obtained, like any other chose in action, was subject to sale and assignment, or to being pledged as security. The sale and transfer were complete and absolute, with the entire consent of, not only the insured, but also the insurer. Such a sale is not against public policy.

Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co. 95 Wis. 583, 70 N. W. 819; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; *Hurd v. Doty*, 86 Wis. 1, 21 L. R. A. 746, 56 N. W. 371.

The company having consented to the assignment and paid the policy without objection, no third person can raise that question.

Shryock v. Shryock, 50 Neb. 889, 70 N. W. 517; *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066.

The assignment was valid and binding.

Mutual L. Ins. Co. v. Allen, 138 Mass. 26, 52 Am. Rep. 245; *Eckel v. Renner*, 41 Ohio St. 232; *Souder v. Home Friendly Soc.* 72 Md. 511, 20 Atl. 138; *Rittler v. Smith*, 70 Md. 261, 2 L. R. A. 844, 16 Atl. 890; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657; *Olmsted v. Keyes*, 85 N. Y. 598; *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066; *Fitzpatrick v. Hartford Life & Annuity Ins. Co.* 56 Conn. 116, 13 Atl. 673, 17 Atl. 411; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *MoFarland v. Oreath*, 35 Mo. App. 112; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. 272; *Cunningham v. Smith*, 70 Pa. 450; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 31, 64 Am. Dec. 529; *Valton v. National Fund Life Assur. Co.* 20 N. Y. 82; *Murphy v. Red*, 64 Miss. 614, 60 Am. Rep. 68, 1 So. 761; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Martin v. Franklin F. Ins. Co.* 38 N. J. L. 140, 20 Am. Rep. 372; *Fairchild v. North-Eastern Mut. Life Asso.* 51 Vt. 613.

The policy in controversy is in no sense a wager policy.

Messrs. Edward C. Hall and M. E. Cowen, also for plaintiff in error:

The plaintiff was bound to pay or tender defendant the amount paid out by him as assignee of the policy.

Alexander v. Rundle, 75 Ill. 85; *Talty v. Freedman's Sav. & T. Co.* 93 U. S. 321, 23 L. ed. 886; *Lewis v. Mott*, 36 N. Y. 401; *Fraker v. Reeve*, 36 Wis. 85.

Mr. A. M. Appelget, for defendant in error:

If the allegations of the petition are true, 54 L. R. A.

that the assignment was absolute, in consideration of the sum of \$75, the transaction was a nullity, the assignee having no insurable interest in the life of the insured, and for that reason constitutes a gambling transaction void, independent of statute law, on the grounds of public policy.

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *Ulrich v. Reinoehl*, 143 Pa. 233, 13 L. R. A. 436, 22 Atl. 802; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 121, 13 Am. Rep. 313; *Stevens v. Warren*, 101 Mass. 564.

The assignment of the policy, to be valid as against the personal representatives of the assured, can only be made to one having some of the attributes recognized as constituting an insurable interest.

Missouri Valley L. Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761; *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 329, 1 So. 581; *Roller v. Moore*, 86 Va. 512, *sub nom. Roller v. Beam*, 6 L. R. A. 136, 10 S. E. 241; *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217, 12 S. W. 621; *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 597, 29 L. ed. 999, 6 Sup. Ct. Rep. 877; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116, 13 Am. Rep. 313.

If the assignee, having no insurable interest in the life of the insured, pays the premiums and dues on the policy, the transaction is void.

Franklin L. Ins. Co. v. Sefton, 53 Ind. 380; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

The sum insured cannot be grossly disproportionate to the interest the holder of the policy has in the life of the assured without having the transaction open to the imputation of being a speculation or wager upon the hazard of a life.

Wainwright v. Bland, 1 Moody & R. 481; *Miller v. Eagle Life & Health Ins. Co.* 2 E. D. Smith, 268; *Grant v. Kline*, 115 Pa. 618, 9 Atl. 150; *Basye v. Adams*, 81 Ky. 368; *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 637, 15 S. W. 478.

The administrator is entitled to recover the value of the policy less the amounts paid by Chamberlain, with interest thereon.

Helmetag v. Miller, 76 Ala. 183, 52 Am. Rep. 316; *Stevens v. Warren*, 101 Mass. 564; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655.

The rights of the administratrix are the same whether the assignment is absolute or conditional.

Cooper v. Shaeffer (Pa.) 9 Cent. Rep. 601, 11 Atl. 548; *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Rison v. Wilkerson*, 3 Sneed, 565; *Hodge v. Ellis*, 76 Ga. 272; *Lewy v. Gilliard*, 76 Tex. 400, 13 S. W. 304; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244.

Whenever Chamberlain put the policy beyond his own control, even if his possession of it was rightful no matter for what purpose or what the consideration, he made himself liable for the value of the policy.

Wheeler v. Pereles, 43 Wis. 332, 40 Wis. 424.

Trover is the proper remedy to recover the value of things represented by valuable papers, such as certificates, etc.

Ayres v. French, 41 Conn. 151; *Payne v. Elliot*, 54 Cal. 342, 35 Am. Rep. 80; *Liptrot v. Holmes*, 1 Ga. 381; *Thompson v. Currier*, 24 N. H. 237.

Messrs. W. H. Kolligar and E. Fermeau, also for defendant in error:

A wager policy is defined to be "a pretended insurance founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against."

2 Bouvier, Law Dict. p. 694; 3 Kent, Com. 225; Beach, Ins. 1142.

Butler had a right to insure his life. He did so. This policy was valid. Having this policy, he had a right to assign it to Chamberlain to secure anything he might owe to him, or anything Chamberlain might agree to assume or pay for him. Chamberlain had a right to agree to pay Butler's premium, and to take an assignment of the policy to secure his reimbursement. While the law will allow such transactions, it will not, we maintain, allow Chamberlain to go further, and by agreement and assignment acquire what has been fitly termed an interest in the death of the assured.

Cammack v. Lewis, 15 Wall. 643, 21 L. ed. 244; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 329, 1 So. 561; *Basye v. Adams*, 81 Ky. 368; *Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47; *Tate v. Commercial Bldg. Asso.* 97 Va. 74, 45 L. R. A. 245, 33 S. E. 382; *Roller v. Moore*, 86 Va. 512, sub nom. *Roller v. Beam*, 6 L. R. A. 136, 10 S. E. 241; *Long v. Meriden Britannia Co.* 94 Va. 594, 27 S. E. 499; *New York L. Ins. Co. v. Davis*, 96 Va. 737, 44 L. R. A. 305, 32 S. E. 475; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213.

The assignee of a policy of insurance having no insurable interest in the life of the insured can collect only the amount of his debt or other advances.

Missouri Valley L. Ins. Co. v. McCrum, 30 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Price v. Supreme Lodge K. of H.* 68 Tex. 361, 4 S. W. 633; *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217, 12 S. W. 621; *Exchange Bank v. Loh*, 104 Ga. 446, 44 L. R. A. 372, 31 S. E. 459; *Crotty v. Union Mut. L. Ins. Co.* 144 U. S. 621, 36 L. ed. 566, 12 Sup. Ct. Rep. 749; *Morris v. Georgia Loan, Sav. & Bkg. Co.* 109 Ga. 12, 46 L. R. A. 506, 34 S. E. 378; May, Ins. 2d ed. 398, p. 599; *Schonfield v. Turner*, 75 Tex. 324, 7 L. R. A. 189, 12 S. W. 626; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274; *Clement v. New York L. Ins. Co.* 101 Tenn. 22, 42 L. R. A. 247, 46 S. W. 561; *Trinity College v. Travelers' Ins. Co.* 113 N. C. 244, 22 L. R. A. 291, 18 S. E. 175.

Where the disproportion between the

amount of a policy taken out by a creditor on the life of a debtor and the debt thereby secured is very great, it is the duty of the court to declare the transaction a wager as a matter of law.

Cooper v. Shaeffer (Pa.) 9 Cent. Rep. 601, 11 Atl. 548; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Grant v. Kline*, 115 Pa. 618, 9 Atl. 160.

Mr. Frank Irvine, for the Home Life Insurance Company:

The assignments were both valid.

A contract of life insurance is an absolute agreement to pay a stated sum on the death of the insured, and if valid in its inception, and if the premiums are paid, the company must, upon the death and compliance with the terms of the policy, pay this sum to the persons entitled, although the insurable interest no longer exists.

Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251.

The burden was not upon Chamberlain to show that the assignment to him was in good faith. The plaintiff, in order to recover, must affirmatively show that Chamberlain's possession of the policy and his disposition thereof were wrongful.

The want of insurable interest can be raised in only one of two ways: In the first place, the company, when sued upon the policy, may plead the fact in defense; in the second place, in some jurisdictions a want of insurable interest does not affect the validity of the policy, but the beneficiary recovers upon the policy as the trustee of the personal representative of the deceased.

There is no foundation for this action, provided Mrs. Butler had a remedy either against the insurance company or Crandall, the recipient of the money.

Want of insurable interest is a defense available only to the insurer.

Meyers v. Schumann, 54 N. J. Eq. 414, 34 Atl. 1066; *Handyside v. Hadden*, 36 Scot. L. Rep. 524; May, Ins. 398 A.

Norval, Ch. J., delivered the opinion of the court:

Florence M. Butler, as administratrix of the estate of Robert L. Butler, brought action in the district court of Johnson county against Charles M. Chamberlain and the Chamberlain Banking House, alleging in her petition, substantially, that said Robert L. Butler, in his lifetime, procured to be issued to him a policy of insurance on his life by the Home Life Insurance Company of New York in the sum of \$5,000, payable to his executors, administrators, or assigns; that, after the issuance of this policy, said Butler assigned it to Chamberlain as security for the payment of a loan of \$75, made by defendants to said Butler; that afterwards Butler died, the insurance policy being at that time in full force, and that plaintiff was the duly-appointed administratrix of his estate; that plaintiff made due proof of the death of Butler, but the company refused

to pay the amount of the policy to her, and had in fact paid it to one Crandall, to whom the policy had been assigned by Chamberlain; and that the latter had converted the policy and insurance to his own use; and she prayed for judgment against the defendants in the sum of \$4,750, with interest and costs. Chamberlain answered, alleging that the policy was by Butler sold and assigned to him absolutely for the sum of \$75, paid Butler by defendant, and that by such sale and assignment Chamberlain became the owner thereof, and paid all premiums and dues thereon from the time of assignment to the death of Butler; that, after such death, defendant assigned the policy to one Crandall, of New York, who prosecuted a suit in said state against said company on said policy, secured judgment for the amount thereof, which was by the company paid to Crandall in full; that when suit was commenced the latter gave due notice thereof to plaintiff, who failed to appear therein. To this answer a reply in the nature of a general denial was filed, except she alleged that she was financially unable to appear in the case in New York. On trial in the district court the following statement of facts (not copying unnecessary documents) was agreed upon: "It is agreed: That on the 8th day of December, 1891, the policy in controversy, then being in force and subsisting, was sold and assigned to defendant Charles M. Chamberlain for the agreed price of \$75. That an assignment thereof was then made and executed by said Robert L. Butler in due form, which was immediately forwarded to the insurance company to be examined, and, if approved, recorded by the company in the office of its secretary. That afterwards said assignment was so approved and recorded,—the assignment, in the first place, being executed in duplicate, both copies of the assignment being sent to the insurance company; and afterwards the same was approved and recorded, one copy was returned to the defendant Chamberlain with an indorsement upon it that it had been recorded by the company, and immediately upon the receipt of the assignment thus approved and recorded the said \$75 was paid to said Butler by Charles M. Chamberlain. That said Chamberlain continued to hold and own said policy, which was turned over to him with the assignment, until the 12th day of November, 1895, when the same was sold and assigned and delivered to one Elbert Crandall, of the city of New York, by said Chamberlain, by written assignment duly and properly executed at that time; which assignment is in words and figures as follows. [Here copy of assignment follows.] That on the 12th day of November, 1895, said policy, with said assignment to Crandall, was forwarded to said Elbert Crandall at New York city, who thereafter brought suit in his own name in the supreme court of the county of New York in the state of New York, and recovered a judgment against the insurance company for the amount of the policy, interest thereon, and costs. That after the commencement of said suit, and be-

fore the trial thereof, and before answer day, the plaintiff in this case was notified by the said insurance company of the pendency of said suit, and she was requested to intervene, and assert whatever interest she had in and to said policy. This she declined to do, alleging as her reason that she was financially unable to go to the state of New York and maintain her case. This plaintiff was not made a party defendant in the suit brought in the supreme court of New York, and no service of summons was made upon her in that suit. After said judgment was rendered against said insurance company, the same was collected by said Crandall, no part of the amount of which has ever been paid to or received by these defendants, or either of them. After the original assignment of said insurance policy to said Charles M. Chamberlain, and while he remained the holder thereof under said assignment, he paid the annual premiums thereon as follows, to wit, \$135.95 about the 12th day of December, 1891, \$135.95 on November 26, 1892, \$135.95 on November 26, 1893, \$135.95 on November 26, 1894. It is further agreed: That after the death of said Robert L. Butler, which occurred on the 29th day of October, 1895, the plaintiff in this case notified the insurance company not to pay the amount of said policy to defendant Chamberlain, as administratrix of the estate of her husband. Both said Elbert Crandall and this plaintiff, as administratrix of the estate of her husband, made proof of the death of said Robert L. Butler, and forwarded the same to the insurance company at its office in New York city, and each demanded the payment of the amount of the policy from the company. After the death of said Robert L. Butler, the insurance company notified the plaintiff that, as the assignment to Chamberlain of the policy was recorded in their office, that she was not the proper party to make the proof of death. That the said insurance company did not deny its liability to pay the amount mentioned in the policy. It is also mutually agreed that Mr. Charles M. Chamberlain and Mr. Elbert Crandall are cousins." On trial the court found in favor of the Chamberlain Banking House, and rendered judgment against the defendant Charles M. Chamberlain and in favor of the plaintiff for the value of the policy, less premiums paid, and the money paid by him to Butler. Chamberlain brings the judgment here for review.

Several interesting questions are presented in the briefs of counsel, but we think it unnecessary to decide more than one, owing to the position we shall take on it. While the petition alleges that the policy was merely pledged, it is agreed by the stipulation quoted that it was in fact sold and assigned absolutely by Butler to Chamberlain. If such assignment was valid, then the latter was the owner of it, and had the right to dispose of it as he saw fit. We think the law is that under the facts it was lawful for Butler to dispose of the policy. We are aware that there is a sharp conflict of authorities in the several American courts

relative to the validity of a sale of life insurance policy by one having an insurable interest to one not having such interest. In all the states, perhaps, it is held against public policy for one not having an insurable interest to procure insurance upon the life of another, even though it be with the consent of such person. In some of the states it is held against public policy for one who has taken out insurance upon his own life to transfer it to one having no insurable interest. In some of the states such a transaction is prohibited by express legislative enactment. But the question to be decided here is, assuming that Chamberlain had no such interest in the life of Butler, could he legally buy the policy in question, such policy in its inception having been valid, and taken out in good faith by Butler, with no intention or design on his part of assigning it subsequently to Chamberlain. Those courts which hold such a transaction void proceed on the ground of public policy. Originally, at common law, choses in action that were assignable were exceedingly few, but the tendency is now reversed, and those not assignable are the exception, rather than the rule. The modern policy being, then, as above stated, the reason for a rule contrary to such tendency should be exceedingly strong before a court, where the question is yet unsettled, should adopt a contrary rule in any given case. While public policy is a salutary thing, it has its limitations and dangers. Among them is the fact that it is an exceedingly indefinite term, has no lines of distinct demarkation, and may readily lend its aid to a court anxious to make a good case, rather than a safe precedent. For that reason, before a case is decided upon that ground solely, courts should be very sure that the reasons for so doing are clear, strong, and admit of no doubt concerning their reasonableness or applicability. Now, the principal reason for branding assignments of this nature as inimical to sound public policy is that the interest of a stranger in the death of the insured is so strong as to tempt to murder of the latter, the earlier to participate in the avails of the policy. Such interest doubtless tends to such a desire. But the same desire would exist on the part of a creditor, who has an insurable interest, or of one who advanced money on the policy, where his only hope of reimbursing himself for the loan might be the policy. It is exceedingly doubtful if strangers are any more apt to either desire or seek to accomplish the death of others than are those nearly related to them. The strength of this desire, where it exists, depends not so much upon the consanguinity of the parties as upon the moral stamina of him who holds the expectancy, be that expectancy an insurance policy, a devise, a remainder, or other acquisition which may not be had until the death of another. Another reason sometimes assigned for holding such assignments illegal is that an assignee having no insurable interest is in the position of one who, in the first instance, takes out a wager policy. But we think not. If an insurable

interest exists in the beneficiary at the time the policy is issued, and it is taken out in good faith, the object and purpose of the rule against wager policies would seem to have been sufficiently attained (16 Am. & Eng. Enc. Law, 2d ed. p. 846), and there is no more reason to apply the rule to policies taken out in good faith, and afterwards assigned in good faith, than there would be were the assured to retain it in his own hands.

Counsel rely upon *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, as an authority to uphold the judgment of the lower court. That case and this present two very different questions. In that case the insured took out the policy in pursuance of an agreement that a third party, having no insurable interest in his life, should, in consideration of certain payments to be made by it, receive at his death nine tenths of the insurance money. In the opinion Justice Field says: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name." Under the facts involved in that case the language was appropriate, for there was collusion between the insured and the party to be benefited by his death by a receipt of the amount above mentioned. But the language is not applicable to this case, for there was no agreement between Butler and Chamberlain, at the time the policy was procured, that the latter should participate in its avails. The transaction with him was wholly independent of and subsequent to the original one between Butler and the insurance company. If their agreement had existed prior to the issuance of the policy, or contemporaneous therewith, then the words quoted would be applicable; otherwise not. That this is the meaning of the words is clear when we read *Mina L. Ins. Co. v. France*, 94 U. S. 567, 24 L. ed. 287, and *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251. In the *France Case* that court lays down the rule applicable to the facts in this case, viz., that any person has a right to procure insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy. The intention and good faith of the parties are the governing principles. In the *Schaefer Case* the court held that a life insurance policy originally valid does not cease to be so upon the intermission of the assured party's interest in the life insured. It was certainly not intended in the *Warnock Case* to overrule or modify either of them. They are not in conflict with that case when the facts are remembered. The language of the court in the *Warnock Case* is unfortunately somewhat misleading in several instances, although the ultimate conclusion reached is right. The comments therein on the New York cases (*Valton v. National Fund Life Assur. Co.* 20 N. Y. 32, and *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 31, 64 Am. Dec. 529, are uncalled for, and not involved in the issues, for the questions of law decided in those cases are very different from, and not necessarily con-

ficting with, the law involved in the *War-nock Case*. We are aware that several eminent American courts disagree with the New York cases cited, and with other courts of this country which agree with the latter. It seems that to hold contrary to that rule would have the effect mentioned in *St. John v. American Mut. L. Ins. Co.*,—"without the right to assign, insurances on lives lose half their usefulness;" a fact that should not be lost sight of in this day, when almost every person carries life insurance of some character, the commercial value and usefulness of which should be fostered, rather than crippled or minified. If such choses in action may be legally sold absolutely, it is plain that more can be realized from them in the day of need than if valuable only as securi-

ty for loans. And until it shall be made to appear that in those jurisdictions where such policies are assignable absolutely crimes committed by such assignees are more frequent than in those where assignments of the nature of the one here involved are illegal, we are of opinion that the reasons for holding such transactions void are insufficient. Chamberlain, then, being, under the facts agreed on, the absolute owner of the policy, had the right to transfer it to Crandall, and such act was not a conversion of the policy or insurance, for he was entitled to the whole of the proceeds thereof, free from all claims of the plaintiff or the estate of the deceased.

The judgment is therefore reversed.

UTAH SUPREME COURT.

Edward McLAUGHLIN, Exr., etc., of Cornelius McLaughlin, Deceased, *et al.*,
Respds.,

v.

PARK CITY BANK.

Thomas CUPIT, Intervener, *Appt.*

(22 Utah, 473.)

*1. While a creditor is under no obligation to accept the provisions of an assignment made for his benefit, yet he cannot hold an assignment good in part and bad in part. Neither can he receive the benefits of the assignment while he is in actual hostility to it, claiming in the courts that it is fraudulent and void, and refusing to accept its benefits.

2. A creditor is not entitled to two in-

*Headnotes by MINER, J.

NOTE.—*Right of creditor to participate under assignment or deed of trust for the benefit of creditors which he has repudiated.*

I. When creditor has successfully assailed assignment or deed of trust.

II. When creditor's attack on assignment or deed of trust has failed.

III. When creditor's attack on assignment or deed of trust is still pending and undetermined.

Upon the general question as to the necessity of acceptance of an assignment or deed of trust for creditors, see note to the case of *Alliance Milling Co. v. Eaton* (Tex.) 24 L. R. A. 869.

I. When creditor has successfully assailed assignment or deed of trust.

When, as in *McLAUGHLIN v. PARK CITY BANK*, the creditor has successfully assailed the assignment, and has avoided it, so far as it prejudicially affects him, it is clear that he is precluded by the doctrine of election from subsequently claiming any benefit under or through it.

Collumb v. Read, 24 N. Y. 515, referred to in the opinion in this case, was in principle somewhat like it. In that case a judgment creditor, who had succeeded in having an assignment for creditors set aside as to him upon the 54 L. R. A.

consistent, adverse, or conflicting rights. If he accepts the benefit of an assignment knowing the facts, he cannot, ordinarily, impeach or repudiate it thereafter on the ground that it is illegal and fraudulent; nor can he, having repudiated it, take under its provisions as other creditors who have accepted it.

3. An attaching creditor as well as a receiver has an insurable interest in the attached property, but in either instance the insurance would be a personal contract between the company and the party insuring, and, unless there be some contract or trust relation between them, in the event of loss the insurance money collected would belong to each in his individual or official right.

4. While an assignee, or a receiver as his successor, holds the assigned property in trust for such creditors as accept the provisions of the assignment, the trust relation cannot exist between the re-

ground that it was fraudulent, tried to hold the assignee liable for rents, collected before the commencement of his action, of land included in the assignment. The court, however, held that he could not hold the assignee for such rents because, having claimed in hostility to the assignment, he must treat the assignee as a stranger.

So, also, it was held in *People v. Chalmers*, 60 N. Y. 154, that the sureties upon the bond of an assignee for creditors were not liable for the failure of the principal to account for assets of the assigned estate in his hands pursuant to judgments in favor of certain creditors, holding the assignment void as to them and directing the assignee to pay over the funds in his hands to apply on their debts.

A similar decision was made in *Re Cantor*, 31 App. Div. 19, 52 N. Y. Supp. 382, where it was held that a judgment creditor, who had procured a decree setting aside an assignment for creditors, as to him, and directing the assignee to pay over to the receiver appointed in the action a specified sum (which presumably represented the value of the assets that the assignee had received), was not entitled to have such sum paid out of a fund which a substituted assignee recovered from the sureties of the original assignee, the latter having absconded without paying over the amount in question to the receiver as directed by the decree, or otherwise

ceiver and a creditor who repudiates the assignment as well as the trust relation.

5. An execution creditor is not entitled to possession and rents of the property levied upon, before sale and before the time for redemption has expired.
6. An attachment creditor who sits back during the pendency of legal proceedings, and allows the receiver of the estate to insure the attached property for the benefit of the estate, and who all the time is maintaining a hostile attitude towards the receiver and the assignment under which he holds, cannot, after money is collected by the receiver on an insurance policy, claim a trust in his favor on account of his attachment on the burned building, which might have satisfied his execution had it not burned.

(December 10, 1900.)

accounting for the assets that he had received. The court, in justification of the decision (which had the effect of giving to the other creditors, at the expense of the judgment creditor, a benefit that they would not have received but for the default of the original assignee), said that the attacking creditor could have shared with the other creditors, acting under the assignment, in the fund, but for the fact that he had lost that right by repudiating the assignment and obtaining a decree which, so far as he was concerned, wholly destroyed it.

The Massachusetts supreme court, in *New England Bank v. Lewis*, 8 Pick. 113, while holding that the prosecution, by a creditor who was preferred in a deed of trust, of an attachment action pending at the time of the execution of the deed, to a judgment adverse to him, did not show a waiver of his right to take under the deed, said that if he had prevailed in the action, and had then elected to rely on his attachment rather than on the deed of trust, it would undoubtedly have amounted to a waiver and disaffirmance of the trust.

So, also, it was held in *Iselein v. Henlein*, 16 Abb. N. C. 73, that a creditor who, after an assignment for the benefit of creditors, attached a part of the property, asserting that the assignment was fraudulent, and prevailed in the action, could not thereafter claim under the assignment.

See also *Belfeld v. Martin*, 4 Colo. App. 578, 37 Pac. 32, *infra*, II.

It is apparent, however, that a creditor may claim that he has certain rights paramount to the assignment without attacking the assignment itself or assuming an attitude hostile to it, and it is obvious that when that is the case his claim, even if successful, will not operate to preclude him from claiming under the assignment.

Thus, *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354, held that a creditor of an assignor for creditors, who obtained a decree subjecting property in the hands of the assignee to a trust in his favor because it was bought by the assignee with his money, was not estopped to claim under the assignment. The court said that it could not be assumed that the assignor intended to dispose of that which was not his, or that he intended, even if he could lawfully do so, to cut the creditor off from participating in the property assigned, by imposing the condition that he should purchase his share by parting with his own property.

So, also, in *Comer v. Tabler*, 44 Fed. 467, it was held that a creditor was not precluded from claiming under a deed of trust because certain preferences had been declared at his 54 L. R. A.

A PPEAL by intervener from a judgment of the District Court for Salt Lake County dismissing his petition to intervene in proceedings for the settlement of the affairs of the insolvent Park City Bank, upon the assets of which petitioner claimed a prior lien by reason of attachment proceedings which he had instituted. *Affirmed*.

Statement by *Mimer, J.*:

On July 12, 1893, the Park City Bank made an assignment of its property to Edwin Kimball, who qualified as such assignee, and subsequently, in October following, said assignee died. On July 12, 1893, Thomas Cupit, the petitioner, and a creditor of the bank, commenced an action in attachment

instance to be illegal. The court admitted that where one beneficiary interested under an assignment, mortgage, or deed of trust attempts to set aside the conveyance, he is not entitled to take anything under it, but said that the creditor in this case did not seek to invalidate the deed, and therefore was not within the rule.

In *Patty v. City Bank*, 15 Tex. Civ. App. 475, 41 S. W. 173, it was held that a creditor was not precluded from taking under an assignment for creditors by the fact that, after the assignment, he attached certain property of the assignor which was exempt by law from it, and which was so scheduled in the assignment, and so established on the trial. This decision, also, was upon the ground that the attachment, under the circumstances, was not an attack on the assignment, and could not be considered an election by the creditor not to take under it.

And it was held in *Re Sawyer*, 7 App. Div. 198, 40 N. Y. Supp. 204, that a foreign creditor who, after knowledge of the debtor's failure, but before knowledge that he had made an assignment for creditors, attached property of the debtor in the state where the creditor was domiciled, was not estopped to claim under the assignment, notwithstanding that the assignee intervened in the attachment action claiming the property, and was defeated therein because the court held that the creditor, having attached the property before knowledge of the assignment, had a prior right. It was held, however, that such creditor, before sharing under the assignment, must credit the amount collected on the distributive share. The ground of the decision is that the attachment in the foreign state did not constitute an attack on the assignment. See also *Clark v. Gbboney*, 3 Hughes, 391, Fed. Cas. No. 2,821, *infra*, II., and *Coverdale v. Wilder*, 17 Pick. 178, *infra*, II.

There is a class of cases, instances of which will be found in each of the subdivisions of this note, where one who has sold goods to an assignor for creditors rescinds the sale after the assignment, and replevies the goods, or part thereof, and subsequently seeks to claim under the assignment. In some of these cases it will be observed that the right of the creditor to claim under the assignment has been denied; but such decision is not necessarily based on the ground that the seller has elected to repudiate the assignment, and therefore cannot claim under it. Unless the assignment or deed of trust expressly provides, or clearly implies, that such property shall be deemed assets of the assigned estate, the act of the seller in rescinding the sale and claiming as his own property that, upon this theory, did not pass

to recover \$6,000 from said bank, and levied his attachment upon the property in question in this case, consisting of real estate and a bank building located thereon. The attachment proceedings were subsequently held regular by a decision of this court. See *Cupit v. Park City Bank*, 10 Utah, 204, 37 Pac. 564. In July, 1896, Cupit recovered judgment for \$7,256.88, and \$441.75 costs, and in October, 1897, brought a suit in equity to set aside the assignment of the bank, claiming that it was fraudulent as to him, and to subject the property levied upon to his attachment lien, and the supreme court directed a decree in his favor, and for the enforcement of the lien against the property. See 20 Utah, 292, 58 Pac. 839. On October, 1893, after the death of Kimball,

D. C. McLaughlin was appointed receiver to hold and take charge of the assigned property, and has since continued to act as such receiver. When the receiver took possession the bank building in question was insured, and thereafter, in the years 1895, 1896, 1897, and 1898, said receiver kept the property insured in his name as receiver. The insurance agent knew of the situation of the property and of the attachment upon it. The premiums were paid out of the funds in the hands of the receiver. In June, 1898, the bank building was destroyed by fire, said building being covered by \$5,000 insurance, which was paid to the receiver. Mr. Cupit knew of the insurance, but paid nothing towards the premiums. The receiver occupied the building after his appointment

under the assignment, would not seem to involve a repudiation of the assignment, precluding him from claiming thereunder. Thus far, there is no room for the application of the doctrine of election because the two remedies invoked by the seller may be perfectly consistent; but at this point another factor enters into the problem. While the replevin action is not inconsistent with, and does not involve a repudiation of, the assignment, yet such action is inconsistent with a claim, whether against the buyer himself or his assignee, for the purchase price of the goods, as such claim necessarily assumes a valid sale as its basis. Therefore, while it would seem that a seller, under such circumstances, would not be precluded from making any claim against the assignee which he might have made against the assignor, had there been no assignment, he may be precluded from making a claim against the assignee for any part of the purchase price, not because he has repudiated the assignment, but because, leaving the assignment out of the question, he has assumed two inconsistent positions, and would be precluded from making such a claim against the assignor. It is not intended to assert here that the seller would, in fact, be precluded by bringing such an action from holding the buyer for any part of the purchase price. That question is not treated in this note.

The distinction above suggested seems to be supported by *Farwell v. Myers*, 59 Mich. 179, 26 N. W. 328, where it was held that a seller of goods who, after an assignment for creditors by the purchaser rescinded the sale, brought an action of replevin to recover the goods, and procured a judgment in his favor, but was unable to find all the goods, could not properly file against the assignee a claim as for goods sold and delivered, deducting the price of the goods replevied. This decision was not put upon the ground that the seller had repudiated the assignment, but upon the ground that, having elected to rescind the sale, and having procured a judgment on that theory, he could not base a claim on the theory of a sale. That the court made the distinction above suggested is shown by its concession that a claim based on the conversion of such of the goods as were not replevied would have been good. It will be observed that such a claim would be consistent with the theory on which the action was based, but if the bringing of the action were deemed to constitute an election not to take under the assignment, it would be as fatal to a claim based on a conversion as to one based on a sale. See also *Wright v. Zeigler*, 70 Ga. 501, *infra*, II.; *Hargadine-McKittick Dry Goods Co. v. Warden*, 151 Mo. 578, 52 S. W. 593; and *Re Wilcox*, 1 Am. Bankr. Rep. 544,—*infra*, III.

54 L. R. A.

A creditor does not, by proving his claim in bankruptcy without disclosing that he was entitled to a *pro rata* dividend under a general assignment by the debtor, waive his right to a dividend under the assignment, where he did not know of his rights under the assignment at the time he proved his claim in bankruptcy. *Re Woodward*, 67 How. Pr. 359.

II. When creditor's attack on assignment or deed of trust has failed.

There is an irreconcilable conflict between the authorities upon the question whether a creditor whose attack on the assignment has failed, and has been finally determined by an adverse decision, or by a discontinuance or dismissal, is thereafter precluded from claiming under the assignment. The affirmative of this proposition, *i. e.*, that the creditor is precluded under such circumstances, is supported by the following cases, which will be hereafter cited at greater length: *Adler-Goldman Commission Co. v. People's Bank*, 65 Ark. 380, 46 S. W. 536; *Belfield v. Martin*, 4 Colo. App. 578, 37 Pac. 32; *Vernon v. Morton*, 8 Dana, 247; *Valentine v. Decker*, 43 Mo. 583; *Fellows v. Greenleaf*, 43 N. H. 421; *Furman v. Fisher*, 4 Coldw. 626, 94 Am. Dec. 210; *Farquharson v. McDonald*, 2 Helsk. 419; *Ewing v. Cook*, 85 Tenn. 333, 8 S. W. 507; *O'Bryan Bros. v. Glenn Bros.*, 31 Tenn. 107, 17 S. W. 1030; *White v. Sterling*, 11 Tex. Civ. App. 553, 32 S. W. 909.

In *Adler-Goldman Commission Co. v. People's Bank*, 65 Ark. 380, 46 S. W. 536, *supra*, a creditor who attached part of the assigned property and prosecuted the attachment action to a judgment adverse to himself was held to have lost his right to take under the assignment, notwithstanding that in attaching the property he acted on the advice of the assignee's attorney to the effect that he had better attach the property as a matter of precaution, and that his rights under the assignment would not be affected by so doing. The court took the position that a creditor who thus repudiates an assignment is estopped to claim under it upon the same principle that if he accepts a benefit under it he is estopped to repudiate it (but see *Re Van Norman*, 41 Minn. 494, 43 N. W. 334, and *Mills v. Parkhurst*, 126 N. Y. 89, 13 L. R. A. 472, 26 N. H. 1041, *infra*, III.). The court also said in support of its position that the right of a creditor to share in the benefit of an assignment is based, in part, upon his assent, and that while ordinarily his assent will be presumed, such presumption is not conclusive.

In *Belfield v. Martin*, 4 Colo. App. 578, 37 Pac. 32, a creditor after an assignment for creditors attached part of the property and prosecuted the attachment suit to a judgment

for his own purposes as receiver, and for the benefit of the bank, and collected rents from tenants occupying portions of it, and paid the taxes, insurance, and for the repairs thereon. The appellant claims:

That the receiver occupied the building for fifty-six months, and that a fair rental value would be.....	\$ 2,800 00
That said receiver collected rents of.....	4,346 45
Received insurance money.....	5,000 00
Total.....	\$12,146 45
That he paid for taxes..	\$1,803 67
Paid insurance.....	240 00
Repairs.....	281 91
Heat, light, water, etc..	2,768 40
	5,093 98

Leaving a balance in his hands of \$ 7,052 47

In his own favor, under which the property was sold and the proceeds of the sale turned over to the creditor, who, so far as appears, still retained them. The case is therefore, upon its facts, one of a successful attack on the assignment; but the court takes the broad position that a seizure and sale by one creditor, under summary process, of a portion of the assets, diminishes to that extent the general fund out of which the debts are to be paid. It says: "And it is immaterial whether the attempt of the petitioners by their attachment proceedings to secure a preference for themselves results in ultimate success or failure. By success they will have appropriated to themselves assets which should have been administered for the equal benefit of all the creditors, and a failure does not restore property which has been sold, and the value of which it may require a considerable outlay of expense and costs on the part of the estate to recover from the petitioners." The court also said that the presumption of the assent of the creditor to the assignment was not conclusive.

In *Vernon v. Morton*, 8 Dana, 247, *supra*, bills were filed by certain creditors to set aside a deed of trust which was limited to the benefit of such creditors as should come in and assent to its provisions. The court, after holding that the deed was valid, said that if there were any probability that the proceeds of the effects would more than pay the assenting creditors and other liens upon them, it would direct the case to be retaken to ascertain the surplus and grant relief to that extent under the general prayer; but, as it was evident that there would be no surplus, the bills were dismissed.

In *Valentine v. Decker*, 43 Mo. 583, *supra*, a creditor attached property in possession of an assignee under an assignment for creditors, and the attached property was sold and the proceeds applied to the payment of the debt. The creditor, however, had given an indemnifying bond to the sheriff, and the assignee had brought suit on that bond which was pending at the time of the decision in this case (which was rendered on appeal from a decision below approving the rejection by the assignee of the claim filed by the creditor). It thus appears that the creditor's attack on the assignment had not been determined at the time he filed his claim, but the opinion is broad enough to exclude his right to file the claim, even if his attack had been finally determined adversely to him. The court says: "If they [the attaching creditors] succeed in their proceeding, they swallow up and appropriate the assets; but if they fail, can they be permitted, after having sacrificed the goods, perhaps at a forced sale, and accumulated costs by their litigation, to come in on an

On January 29, 1900, Mr. Cupit's judgment aggregated \$10,266.55, and on that day the land was sold on execution for \$4,500, which sum was credited upon the judgment, leaving unpaid thereon \$5,766.55, with interest. The petitioner in this proceeding claims that this sum should be paid him by the receiver out of the \$7,052.47 so claimed to be in his hands.

The general creditors, with the exception of Cupit, have all assented to the assignment, and have received from the funds of the bank their respective dividends, amounting to 25 per cent of their respective claims; but Cupit, the petitioner, refused to receive any of said dividends, and has denied the validity of the assignment, and the right of the receiver to the title or possession of the property, claiming that the as-

equality with the other creditors for a *pro rata* share? The very proposition is monstrous, and its bare statement carries with it a sufficient refutation."

In *Fellows v. Greenleaf*, 43 N. H. 421, *supra*, the court said that the assent of a creditor to an assignment for creditors is ordinarily presumed in the first instance, but that the presumption is not conclusive, and if a creditor dissents, sues the debtor, and summons in the assignee, he will only take the surplus in the hands of the assignee after all the other creditors who do not dissent are paid.

Furman v. Fisher, 4 Coldw. 626, 94 Am. Dec. 210, *supra*, held that creditors, named in a deed of trust for the benefit of certain creditors, who attach the property conveyed by the deed, thereby reject its provisions, and are entitled to nothing under it. The attachments in this case proved ultimately unsuccessful, the deed of trust being upheld.

In *Farquharson v. McDonald*, 2 Helsk. 404, *supra*, certain creditors filed bills of attachment attacking a deed of trust for creditors, and praying that it be set aside. The trustee filed a cross bill in which he insisted that if the deed should be declared valid the attaching creditors had forfeited all right to claim benefits under it by attacking its validity. The validity of the deed was upheld, and the court, apparently in approval of the prayer of the cross bill, said that all beneficiaries under a trust deed are presumed to accept its benefits, but they may repudiate and reject it, and that any distinct and unequivocal act of renunciation by any of the creditors intended to be benefited will operate as an estoppel against further claims under the deed.

In *Ewing v. Cook*, 85 Tenn. 332, 3 S. W. 507, *supra*, a creditor brought a bill to have his debtor's right of redemption in property sold under execution sold and the proceeds applied to the payment of his debt. Pending the bill the debtor made an assignment for creditors which secured the debt in question so far as the "debt has a priority or is a lien on said property, by reason of levy, sale, or otherwise, but no further." The court held that a bill in equity would not lie to subject such an equity to the payment of a debt, and that the debt was not a lien on the land at the time of the assignment, and therefore was not secured by the assignment; but expressed the opinion that the same result would have been reached, even if the debt had been a lien, since the creditor had not accepted the assignment, but had resisted it in every way possible, and ought not to be permitted to claim under it.

In *O'Bryan Bros. v. Glenn Bros.* 91 Tenn. 107, 17 S. W. 1030, *supra*, the court held that

assignment was fraudulent, and was made for the purpose of defrauding the creditors of the bank, and was invalid, illegal, and inequitable. In his petition in intervention the petitioner alleged that said assignment was fraudulent and void as to the petitioner, and that he, the said Thomas Cupit, had never assented or in any way participated in said assignment, or the benefits thereof, and prayed that said assignment be declared fraudulent and void as to the petitioner and all other creditors joining with him in this request, and that the property levied upon by virtue of said execution against the bank be discharged from such receivership. This court held, on appeal of said cause, that neither the assignee nor receiver acquired any title to the property in controversy, and that it was subject to petitioner's attach-

ment lien. The petition in intervention in this cause was denied by the lower court, and petitioner, Cupit, appeals to this court.

Messrs. Richards & Varian, with Mr. W. I. Snyder, for appellant:

The title to this property never passed to or vested in the assignee or the receiver.

Cupit v. Park City Bank, 20 Utah, 292, 58 Pac. 839; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 236, 34 L. ed. 346, 10 Sup. Ct. Rep. 1013; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019.

When the receiver took possession he found the property charged with the attachment lien, and it was manifestly his duty to hold and preserve the property for

creditors, intended to be benefited by a deed of trust for the benefit of certain creditors, elected to renounce and repudiate the benefits of the deed and could not thereafter claim thereunder, where they filed an attachment bill to have the deed declared fraudulent and void, with a full knowledge of the facts, though under a mistaken view of the law, induced by the advice of their attorney that the deed of trust was invalid, notwithstanding that the bill was dismissed before any loss or injury had occurred in consequence of filing the same. The court in this case stated the general proposition that any distinct and unequivocal act of renunciation of the benefits of a deed of trust by any of the creditors intended to be benefited will operate against any further claims under the deed.

In *White v. Stersing*, 11 Tex. Civ. App. 553, 32 S. W. 909, *supra*, a creditor named in a deed of trust for the benefit of certain creditors attached property in the hands of the trustee. The latter brought an action of trover against him, and the creditor sought to reduce the damages by having credited upon the same the share to which he would have been entitled under the deed. The court rejected the contention upon the ground that, by attaching the property, he had waived his right to take under the deed.

The official report of *Jones v. Burgess*, 115 Ala. 700, does not embody the opinion, but the opinion is reported in 19 So. 851. It was there held that a creditor who, after an assignment for creditors, sued out an attachment, and had it levied upon property included in the assignment, but, before the meeting of the court to which the attachment was returnable, released and discharged his levy, which release and discharge were carried into effect by the court, did not do enough to determine his election not to take under the assignment. The voluntary character of the discharge is pointed out, and it is intimated that the result might have been different if the attachment had been prosecuted, though unsuccessfully. The court said: "It will not be denied, the general assignment having been voluntarily made for the benefit of creditors, that appellants, as creditors of the assignor, had the right of election to accept its provisions, or to assert their rights independently of the assignment; that, being free to accept or reject the assignment, they could not at one and the same time claim and repudiate its benefits. The extent of this principle, as declared in our adjudged cases, is, not that a creditor may not question the validity of a conveyance at any time without being forever thereafter estopped from acknowledging its validity, and claiming a benefit under it; but it is, as the expressions run, 'he cannot claim under it and against it,' 54 L. R. A.

he cannot elect to accept the rights and benefits it confers, and at the same time have its uses set aside, and the property appropriated to other and different uses; 'it is not permissible to take both under and against an assignment made for the benefit of creditors.'"

In *Wright v. Zeigler Bros.* 70 Ga. 501, the court said: "A creditor cannot be permitted both to assail and claim under an assignment: one or the other of these alternatives he must take. His election should be made before he commences his proceedings, and he should not be permitted to wait the result of his suit in order to make his election." This was an action of trover against the assignee in his individual capacity by one who had sold goods to the assignor, the seller having attempted to rescind the sale for fraud. The point arose by reason of the refusal of the plaintiff to answer a cross-interrogatory as to whether, if he failed to recover in the action, he would still claim to be a creditor of the assignor to the amount of the sale. The court held that the refusal was immaterial, apparently upon the ground that the plaintiff had made his election by bringing the action, and, as a matter of law, could not thereafter claim under the assignment. It is doubtful, however, whether this case is authority for anything more than the proposition that if a creditor, under such circumstances, elects to rescind the sale and bring an action of trover, and fails in such action, he cannot thereafter base a claim against the assignee on the theory of a sale. If this is the extent of the decision, the case, for the reasons pointed out in subdivision I., is not an authority for the position that the commencement of the action of trover under such circumstances is a repudiation of the assignment precluding the creditor from claiming thereunder.

Even in those jurisdictions which maintain the doctrine that an attack by a creditor upon the assignment or deed of trust, though unsuccessful, is an election of remedies which precludes him from thereafter claiming under the assignment or deed of trust, such doctrine is undoubtedly subject to the same qualification as the general doctrine of election, *i. e.*, the creditor must act with a full knowledge of the facts. Thus, in *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564, the court, while holding that one who attached property included in a bill of sale to a third person, and attached that sale as fraudulent, could not obtain relief in the attachment suit upon the ground that, by virtue of an extrinsic agreement of which he had no knowledge when he commenced his attachment action, the bill of sale was converted in a voluntary assignment for creditors, said that his ignorance of

the benefit of those who should eventually be adjudged to be entitled to subject it to their claims; either Cupit on the one hand, or the creditors on the other.

High, Receivers, § 440, p. 402, ¶ 5, p. 6; *Crine v. Davis*, 68 Ga. 138.

If it had been exempt to the debtor making the assignment, the debtor would have been entitled to the property or to the proceeds of the insurance thereon as against the receiver, unless he had waived his exemption.

Beach, Receivers, § 205 (c); High, Receivers, § 442; *Tillotson v. Wolcott*, 48 N. Y. 188.

Assignees and receivers take subject to all liens.

2 Beach, Trusts & Trustees, § 615; Beach, Receivers, § 202; High, Receivers, § 440.

It is as much the duty of a receiver, in

administering an estate, to protect valid preferences and priorities, as it is to make a just distribution among the general creditors.

American Trust & Sav. Bank v. McGettigan, 152 Ind. 582, 52 N. E. 793; *Gluck & B. Receivers*, §§ 28, 48; *First Nat. Bank v. E. T. Barnum Wire & Iron Works*, 58 Mich. 315, 24 N. W. 543, 25 N. W. 202; *People ex rel. Atty. Gen. v. Security L. Ins. & Annuity Co.* 79 N. Y. 267; *Lenox v. Notrebe*, Hempst. 225, Fed. Cas. No. 8,246b.

Wherever it is necessary to prevent fraud, regardless of the intention of the parties, equity will create and enforce a constructive or implied trust.

10 Am. & Eng. Enc. Law, p. 2; 1 Pom. Eq. Jur. § 155; *Bispham*, Eq. p. 118.

Money received by a trustee upon a policy

that agreement might be a very good reason why he should not be precluded from proving up his demands in a proper proceeding.

A creditor who, under a bona fide belief that certain property in the hands of an assignee for creditors belonged to a firm of which the assignor was a member, attaches the same as property of the firm, does not lose his right to a distributive share in the assigned estate, although it is finally adjudged that the property belonged to the assignor individually, and therefore passed to the assignee. The decision is upon the ground that the election, to be binding, must be made with a full knowledge of the facts, and that in this case the creditor did not have a full knowledge of the facts. *Anderson v. Risdon-Cahn Co.* 13 Wash. 494, 43 Pac. 337.

So, also, *Tennant v. Stoney*, 1 Rich. Eq. 224, 44 Am. Dec. 213, held that a simple contract creditor, secured by a bond and indenture for the benefit of certain creditors containing a provision that they should be void if the debtor paid the debts secured within a specified time, did not waive his right to take thereunder by bringing an action on his claim before the expiration of the time mentioned. The decision was upon two grounds, one that the bringing of the suit was no infringement of the terms of the bond and indenture, and the other, that it was brought in ignorance of their execution, and was abandoned as soon as the creditor learned thereof. See also *Re Woodward*, 67 How. Pr. 359, *supra*, I.

Haliday Bros. v. Croom, 9 Lea, 349, limits the rule that a creditor who attacks a deed of trust for creditors must stand by his election, and, if he fail, can take nothing under the deed, to cases where the entire deed is impeached, and denies its application to a creditor who merely attacks a preferred claim secured by the deed.

So, also, *Cowan v. Gill*, 11 Lea, 675, holds that a creditor who unsuccessfully seeks to set aside, as fraudulent, a prior deed of trust recognized by an assignment for creditors is not thereby precluded from claiming under the assignment.

In *McKindley v. Nourse*, 67 Iowa, 118, a seller of goods rescinded the sale after an assignment for creditors by the purchaser, and replevied the goods from the assignee. Pending the action, the plaintiff therein filed a claim with the assignee, giving credit therein for the goods taken in the replevin action, and received his *pro rata* share on the claim. Subsequently the replevin action was determined against him, and he then, but after the expiration of the time allowed for filing claims, filed a claim for the amount for which he had given credit when his 54 L. R. A.

first claim was filed, i. e., the value of the goods which in accordance with the judgment in the replevin action he had paid to the assignee. The court held that he was not entitled to the allowance of the last claim; but this decision was upon the ground that it was not filed in time.

So, also, in *Lovenberg v. National Bank*, 67 Tex. 440, 2 S. W. 874, 5 S. W. 816, it was held that a creditor who took property from the possession of the assignee by virtue of a chattel mortgage, which was subsequently held invalid as in contravention of the assignment law, had lost the benefit of the assignment because he had delayed too long in filing his claim, the court holding that the pendency of the action in which the chattel mortgage was finally adjudged invalid was not a sufficient excuse for the delay. Any implication that there may be in this decision that the creditor in question might have taken under the assignment if he had filed his claim in time, notwithstanding his claim under the mortgage, may, doubtless, be reconciled with the doctrine that a creditor, by attacking the assignment, even if unsuccessfully, thereby waives his right to take under it, upon the ground that the assertion of the chattel mortgage was not inconsistent with, and did not involve a repudiation of, the assignment.

A number of courts, however, have held that where a creditor's attack on the assignment has been unsuccessful, and has been finally determined against him, he is not thereafter precluded from claiming under the assignment. It is so held in *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354. This doctrine is also supported by the following cases, which will be hereafter cited at greater length: *New England Bank v. Lewis*, 8 Pick. 113; *Re Van Norman*, 41 Minn. 494, 43 N. W. 334; *Jewett v. Woodward*, 1 Edw. Ch. 195; *Mills v. Parkhurst*, 126 N. Y. 89, 13 L. R. A. 472, 26 N. E. 1041; *Sternfeld v. Simonson*, 44 Hun, 429; *Clark v. Ward*, 12 Gratt. 440.

In *New England Bank v. Lewis*, 8 Pick. 113, *supra*, a creditor who was given a preference by a deed of trust for creditors thereafter continued an attachment action that was pending against the debtor at the time of the execution of the deed of trust, until a judgment was rendered against him. It was held that the creditor by so doing did not waive his right to take under the deed. As already shown in subdivision I., the court in this case intimated that if the attachment had been successful the creditor could not have claimed under the assignment.

In *Re Van Norman*, 41 Minn. 494, 43 N. W. 334, a creditor, after an assignment for credit-

covering the trust property is the property of the *cestuis que trust*.

1 Wood, Fire Ins. 2d ed. § 306, p. 685; *Lerow v. Wilmarth*, 9 Allen, 384.

The title which Cupit sold to satisfy his lien operates as of July 15, 1893,—the date of the levy of his writ of attachment. Whatever mutations have affected the property since then do not change his position, but inure to his benefit until his lien is satisfied.

Williams v. Lilley, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765; *Gilbert v. Port*, 28 Ohio St. 276.

The receiver did insure, whether he was bound to or not. What did he insure for? Manifestly, as the interests should appear. The petitioner knew of the insurance, and was not obliged to effect a double insurance in order to protect the estate.

Hawes v. Lathrop, 38 Cal. 493.

The receiver, as such, had an insurable interest, but what was it? It could not attach for the general creditors until Cupit's debt was paid.

California Ins. Co. v. Union Compress Co. 133 U. S. 337, 33 L. ed. 730, 10 Sup. Ct. Rep. 365. See also *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606, 6 Am. Rep. 146; *Herkimer v. Rice*, 27 N. Y. 180; *Pennefeather v. Baltimore Steam-Packet Co.* 58 Fed. 481; *Quarles v. Clayton*, 87 Tenn. 308, 3 L. R. A. 170, 10 S. W. 505; *Barber, Ins.* ¶ 50, p. 72; *Parsons, Maritime Law*, 29; *Snow v. Carr*, 61 Ala. 363, 32 Am. Rep. 3; *Siter v. Morris*, 13 Pa. 218; *Stillwell v. Staples*, 19 N. Y. 406.

McLaughlin's possession all this time was subject to the lien of Cupit. Therefore it was quasi-wrongful to that extent as

ors, pursued in the Federal court an attachment that was levied the day of the assignment but was apparently subordinate to the assignment if the latter was valid, and successfully resisted a motion by the assignee in the Federal court to dissolve the attachment. He recovered a judgment, and caused the attached property to be sold on execution, but subsequently paid the assignee the value of the property because of a judgment recovered by the assignee in the state court in an action against the marshal who levied the attachment. It was held that the creditor had not lost his right to take under the assignment. This decision was the logical result of the view taken by the court of the doctrine of election. The court said in that connection: "A mere attempt to pursue a remedy or claim a right to which a party is not entitled, and without obtaining any legal satisfaction therefrom, will not deprive him [the attaching creditor] of the benefit of that which he had originally a right to resort to or claim."

In *Jewett v. Woodward*, 1 Edw. Ch. 195, *supra*, it was held that a creditor did not, by commencing proceedings against an assignee as an absent debtor and giving the assignee notice, lose his right to come in under the assignment where the proceedings proved unavailing or were abandoned. The court said: "The doctrine of election does not apply to a case like the present; where the question is merely as to the remedy or mode of proceeding. If one remedy fails, the party may oftentimes resort to another. Nothing is more common than to leave a party to his bill in equity after a fruitless attempt at law, and *vice versa*."

In *Mills v. Parkhurst*, 128 N. Y. 89, 13 L. R. A. 472, 26 N. E. 1041, *supra*, the court held that the pendency of an appeal by a creditor from a decree sustaining an assignment in an action brought by him to set it aside as fraudulent did not prevent him from coming in and sharing in the distribution under the assignment. In this case it was urged that the creditor, by bringing his suit to set aside the assignment, was precluded, under the doctrine of election, from taking under it; but the court of appeals held that the doctrine of election did not apply, saying: "The basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. . . . So, it is conceivable that the rule may be so extended as to apply to the case where a creditor comes in under an assignment by his debtor for the benefit of creditors, in such way and with such attitude as 54 L. R. A.

should preclude him from thereafter assailing its validity." The court also points out that an assignment for creditors is involuntary as to creditors, and does not depend for its validity upon their assent. Again, the court says: "If there is any election for him [the creditor] to make it can only be with respect to what remedies may be available to him in order to right himself upon his judgment against the assignor, and to avoid the assignment."

In *Sternfeld v. Simonson*, 44 Hun, 429, *supra*, it was held that the commencement of an action by the creditor upon his claim against the assignor for creditors, in which an attachment was issued, but not levied, did not prevent him from claiming under the assignment, although the action proceeded to judgment in favor of the creditor, the execution and attachment being returned *nulla bona*. The court takes the same view of the doctrine of the election as *Re Van Norman*, 41 Minn. 494, 43 N. W. 334, *supra*. It said that if the creditor by means of the attachment had secured any of the property covered by the assignment a different question might be presented, and distinguishes *Iselin v. Henlein*, 16 Abb. N. C. 73, *supra*, 1, upon the ground that that case proceeds expressly upon the ground that the attacking creditor had seized and obtained possession of the assignee's estate under his attachment.

That a creditor secured by a deed of trust for specified creditors sues out an attachment and attacks the deed of trust as invalid does not, if he fails on such attack, preclude him from demanding and receiving of the trustees his ratable portion of the proceeds of the property in their hands in accordance with the provisions of the deed. *Clark v. Ward*, 12 Gratt. 440, *supra*.

Re Hobson, 81 Iowa, 392, 11 L. R. A. 255, 46 N. W. 1095, held that the holder of a note was not estopped to claim under an assignment by its maker for the benefit of creditors by the fact that, being compelled either to permit the sureties to bring suit or to release them, he permitted them to bring an attachment in his name and attack the validity of the assignment, where the attachment suit has been dismissed. The decision in this case, however, was based, in part at least, upon the fact that the permission granted by the holder of the note to the sureties to bring the suit in his name was involuntary.

A creditor does not waive his rights under an assignment for creditors by bringing an action, which has been dismissed, on a note secured by the assignment. *Clark v. Gibboney*, 8 Hughes, 391, Fed. Cas. No. 2,821. In this case, however, the court held that the remedies were

against him, excepting in so far as Cupit sees fit to ratify his action; and to that extent, and *pro hac vice*, Cupit is a superior cestui *que trust* for the amount of his claim.

2 Pom. Eq. Jur. § 1058; *Diamond Match Co. v. Taylor*, 83 Md. 394, 34 Atl. 1015; *Kimmel v. Dickson*, 5 S. D. 221, 25 L. R. A. 309, 58 N. W. 561.

This property, in the form of money, is still in the hands of the receiver, a dividend not having been paid since the fire. It is not dissipated, and may be traced and appropriated to Cupit's superior claim.

Ferchen v. Arndt, 26 Or. 121, 29 L. R. A. 664, 37 Pac. 161; *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 504; *Williams v. Lilley*, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765; *Fanning v. Equitable F. & M. Ins. Co.* 46 Ill. App. 215.

This money represents that property.

Williams v. Lilley, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765; *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 504; *Ferchen v. Arndt*, 26 Or. 121, 29 L. R. A. 664, 37 Pac. 161; *Fanning v. Equitable F. & M. Ins. Co.* 46 Ill. App. 215; *Kimmel v. Dickson*, 5 S. D.

221, 25 L. R. A. 309, 58 N. W. 561; *Grange Mill Co. v. Western Assur. Co.* 118 Ill. 398, 9 N. E. 274; *People's Street R. Co. v. Spencer*, 150 Pa. 85, 27 Atl. 113; *Diamond Match Co. v. Taylor*, 83 Md. 394, 34 Atl. 1015.

The rule of equity in such cases is that the proceeds go to the one who suffered the loss, and in the order the property would have gone, regardless of who effected the insurance.

Williams v. Lilley, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765; *Gilbert v. Port*, 28 Ohio St. 276; *Pennefeather v. Baltimore Steam Packet Co.* 58 Fed. 481; *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. ed. 868.

Suppose a fire had occurred during the lifetime of the policy in force when the assignment was made. Since the insurance money merely represents the property, there would be no question but that Cupit would get it.

Wyman v. Wyman, 26 N. Y. 253; *Herkimer v. Rice*, 27 N. Y. 103; *High, Receivers*, § 442; *Beach, Receivers*, § 205.

This being so, the same rule must neces-

concurrent, and were not inconsistent, and therefore the doctrine of election would not apply in any view.

In *Coverdale v. Wilder*, 17 Pick. 178, a deputy sheriff had levied an attachment upon certain property. The debtor subsequently made an assignment for creditors, which provided that the assignee should first pay all claims or encumbrances that such deputy sheriff might have upon the property. The latter became a party to the assignment, but the attachment action proceeded and, upon the death of the assignor, was continued against his administrators, and finally resulted in a judgment in the plaintiff's favor. Execution, however, was staid upon a suggestion of the insolvency of the estate. It was held that the continuance of the attachment action did not amount to a waiver of the right to take under the assignment. The decision, however, was upon the ground that the intention of the assignor as expressed in the assignment was not merely that the lien of the attachment should be discharged, but that the debt should be paid.

In *Eppright v. Kaufman*, 90 Mo. 25, it was held that where a claim of a creditor has been submitted to the assignee and allowed by the latter, thus passing *in rem judicatum*, the creditor's right to a dividend cannot be affected by the fact that he subsequently recovers a judgment against the assignor, and attempts by legal procedure to have the judgment satisfied out of what, at that time, were not considered as passing as assets into the hands of the assignee, though it was afterwards held that they did pass to him.

In *Golden's Appeal*, 110 Pa. 581, 1 Atl. 660, it was held that the fact that after an unauthorized and invalid reassignment by an assignee to an assignor for creditors, a creditor procured the issuance of an attachment execution against a debtor of the assignor, did not amount to a waiver of such creditor's right to insist upon the enforcement of the assignment. The court said that the issuance of the attachment execution was doubtless prompted by the unauthorized reconveyance of the trust property, and was resorted to for the purpose of acquiring a lien on the fund in case the reassignment should be adjudged effective for the purpose of reinvesting the assignor with the title to the property.

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It is apparent from the cases cited in this division that the determination of the question whether an unsuccessful attack on the assignment that has been finally determined will preclude the creditor from claiming thereunder, assuming that the creditor acted with a full knowledge of the facts, depends upon the view that the court takes of the general doctrine with respect to the election between inconsistent remedies. If the mere commencement of an action attacking the assignment, though unfounded in fact or law, be deemed the election of a remedy, such remedy is inconsistent with a claim under the assignment, and under the general doctrine of election must be held to exclude such a claim. If, however, the view expressed in *Re Van Norman*, 41 Minn. 494, 43 N. W. 334, *supra*, is correct, a mere attack upon the assignment which proves unsuccessful does not constitute an election of remedies, because in such a case what is supposed to be a remedy is in fact no remedy at all, and therefore, though the position of the creditor in attacking the assignment is inconsistent with a claim under it, yet the doctrine of election does not apply because there has been in fact no choice between remedies.

III. When creditor's attack on assignment or deed of trust is still pending and undetermined.

It is obvious that in those jurisdictions, in which it is held that an attack on the assignment, even if it has been determined adversely to the creditor, precludes him from thereafter claiming under the assignment, the pendency of an attack not yet determined will, *a fortiori*, preclude him.

It is held in *Lehman v. Meyer*, 67 Ala. 396, that a bill filed by certain creditors for their own benefit cannot be properly framed in a double aspect, so as to have a conveyance executed by the debtor declared in one alternative fraudulent and void, and in the other alternative, to have the same sustained as a general assignment inuring equally to the benefit of all creditors. The decision is upon the ground that the two reliefs sought are inconsistent, and a contrary decision in *Crawford v. Kirksey*, 50 Ala. 590, is overruled. The doctrine of *Lehman v. Meyer*, 67 Ala. 396, was approved in *Moog v. Talcott*, 72 Ala. 210, and applied to the case of a general creditor's bill, the court

sarily apply when a mere trustee, an officer of the court, for the court, and as the act of the court, procures the policy.

Waring v. Indemnity F. Ins. Co. 45 N. Y. 606, 6 Am. Rep. 146; *Williams v. Lilley*, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765; *Gilbert v. Port*, 28 Ohio St. 276.

As between vendor and vendee under an executory contract of purchase, the interest of the vendee relates to the date of the contract, and upon the exercise of his right to purchase, any insurance money received for damage or loss to the property, by equitable conversion represents the property itself.

Williams v. Lilley, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765; *Gilbert v. Port*, 28 Ohio St. 276; *Reynard v. Arnold*, L. R. 10 Ch. 386; *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 504; *Grange Mill Co. v. Western Assur. Co.* 118 Ill. 398, 9 N. E. 274.

The primary purpose of insurance money is to rebuild the property.

Williams v. Lilley, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765.

Since as between vendor and vendee the insurance money represents the property it-

self, and goes to the one entitled thereto, the same rule must apply as between a receiver and a creditor whom he in his trust capacity represents, and who has during all the receivership a superior lien on the corpus of the property, which equity follows into the insurance money.

Grange Mill Co. v. Western Assur. Co. 118 Ill. 398, 9 N. E. 274; *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425; *Hill v. Cumberland Valley Mut. Protection Co.* 59 Pa. 474; *People's Street R. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113; *Gleason v. First Nat. Bank*, 13 Fed. 719; *Pennefeather v. Baltimore Steam-Packet Co.* 58 Fed. 481; *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. ed. 868; *Hawes v. Lathrop*, 38 Cal. 493.

The loss therefore inures to the benefit of those creditors who would take the property, and in the order that they would take it.

Perry, Tr. § 487; *Mosher v. Lansing Lumber Co.* 112 Mich. 517, 71 N. W. 161; *Lerow v. Wilmarth*, 9 Allen, 382; *London & N. W. R. Co. v. Glyn*, 1 El. & El. 652; *Pennefeather v. Baltimore Steam-Packet Co.* 58 Fed. 481; *Williams v. Lilley*, 67 Conn. 50, 37 L. R. A.

holding that the principle is the same whether the suit is by a general creditor's bill or a bill filed by one or more creditors for their own benefit.

In *Leinikauff v. Forchheimer*, 87 Ala. 258, 6 So. 149, it was held that a creditor who attacks a sale of property by his debtor to a third person and attaches the property cannot, at least while prosecuting such remedy, claim under the agreement of the purchaser to pay, out of the purchase price, certain specified sums to certain creditors including the creditor in question. See also *Valentine v. Decker*, 43 Mo. 583, *supra*, II.

A seller who, after an assignment for creditors by the buyer, rescinds the sale and repleves the goods from the assignee cannot, while action is still pending, have a claim as for goods sold and delivered against the assigned estate. *Hargadine-McKittrick Dry Goods Co. v. Warden*, 151 Mo. 578, 52 S. W. 593.

In *Ke Wilcox*, 1 Am. Bankr. Rep. 544, the referee in bankruptcy for the district of Tennessee held that the pendency of a replevin action by the seller of goods against the assignor and the assignee in an assignment for creditors, in which goods of a certain value have been repleved, does not deprive the seller of the right to a *pro rata* share under the assignment upon the amount of his entire claim, less the value of the goods repleved. The decision rests upon the ground that the replevin action was not an attack upon the assignment, and did not seek to withdraw from the hands of the assignee any property which was confessedly an asset of the assignor. The Tennessee cases cited in subdivision II. are distinguished upon the ground that in those cases the attitude assumed by the creditors who were held to be precluded from taking under the assignment was necessarily hostile to and involved a repudiation of the assignment. In this case the claim exceeded the demand of the complaint in the replevin suit. With respect to this excess, as is pointed out in the opinion, there could be no pretense for denying the right of the creditor to a *pro rata* share, unless upon the principle that any claim, no matter of what nature, is forfeited by the bringing of the replevin suit. With respect to so much of the claim as was covered by the demand in the replevin suit, it would seem that the distinction pointed out in subdivision I. 54 L. R. A.

might apply, and that, as to this part of the claim, the decision that the creditor had not waived the benefits of the assignment would not necessarily be conclusive, unless the claim filed with the assignee was based on a conversion of the goods. If the claim were for part of the purchase price based on the theory of a valid sale, another question would be presented, which would not be materially affected by the assignment, namely, whether the seller, having elected to rescind and replevin the goods, could take the inconsistent position that there was a valid sale, and file a claim for the purchase price.

An assignee, under an assignment for creditors who shall accept their proportionate share of the assigned estate and discharge the debtors, properly refuses to act upon an acceptance by a creditor which, in effect, reserves the right to maintain garnishment proceedings for a debt due the assignor instituted after the assignment; and if the creditor does not give an unconditional acceptance he is precluded from sharing in the trust estate. *Moody v. Templeman*, 23 Tex. Civ. App. 874, 56 S. W. 588.

While, as already pointed out, the position that a creditor, even by an unsuccessful attack on the assignment, is precluded from claiming thereunder, necessarily involves a denial of the right to claim under the assignment pending an attack thereon, the contrary position that an unsuccessful attack does not preclude the creditor leaves that question open, and different views may be taken of it by courts which hold in general that an unsuccessful attack will not preclude the creditor. Thus, the general term of the supreme court in *Mills v. Parkhurst*, 30 N. Y. S. R. 138, 9 N. Y. Supp. 109, while conceding that if the attack on the assignment in that case had terminated it would not be held to have constituted an election precluding the creditor from claiming under the assignment, yet held that the creditor could not claim under the assignment pending an appeal from a decree adverse to him and sustaining the assignment. The court of appeals, however, in the same case (126 N. Y. 89, 13 L. R. A. 472, 28 N. E. 1041) held that the pendency of the appeal did not preclude the creditor.

G. H. P.

150, 34 Atl. 765; *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736; *Chipman v. Carroll*, 53 Kan. 163, 25 L. R. A. 305, 35 Pac. 1109; *Miller v. Aldrich*, 31 Mich. 408; *Sampson v. Grogan*, 21 R. I. 174 sub nom. *Sampson v. Bagley*, 44 L. R. A. 711, 42 Atl. 712; *Welsh v. London Assur. Corp.* 151 Pa. 607, 25 Atl. 142; *Brough v. Higgins*, 2 Gratt. 409; *Graham v. Roberts*, 43 N. C. (8 Ired. Eq.) 99; *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606, 6 Am. Rep. 146; *Stillwell v. Staples*, 19 N. Y. 401; *Herkimer v. Rice*, 27 N. Y. 163; *DeForest v. Fulton F. Ins. Co.* 1 Hall, 84; *Siter v. Morris*, 13 Pa. 218; *Miltenerger v. Beacom*, 9 Pa. 198; *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. Rep. 365; *State Mut. F. Ins. Co. v. Updegraff*, 21 Pa. 513.

The doctrine of equitable conversion applies here by analogy as well as by direct application.

1 Pom. Eq. Jur. §§ 161, 371; 3 Pom. Eq. Jur. § 1159; *Lorillard v. Coster*, 5 Paige, 172; 7 Am. & Eng. Enc. Law, 2d ed. p. 477, note 4.

Where the established rights of the parties cannot be worked out in any other way, and where a fraud upon the law and the rights of the parties would result if the application of the doctrine were not recognized, and (in such cases) where a conversion has taken place, whether by sale under order of court, a power, or resulting from an action of the elements, so to speak, the money, the proceeds of the land, goes as the land would have gone if not converted.

7 Am. & Eng. Enc. Law, 2d ed. pp. 473, 474; *Chapin, Petitioner*, 148 Mass. 589, 2 L. R. A. 768, 20 N. E. 195; *Holland v. Cruft*, 3 Gray, 162; *Simonds v. Simonds*, 112 Mass. 157; *Haves v. Lathrop*, 38 Cal. 493; *Tullit v. Tullit*, 1 Ambl. 370; *Eagle v. Emmet*, 4 Bradf. 117; *Jagger v. Bird*, 42 Hun, 423; *Hovey v. Dary*, 154 Mass. 7, 27 N. E. 659.

Since the lien holder is entitled to the property and its fruits until the entire amount of his claim is satisfied, rents collected by a general receiver in the meantime go to the lien holder in satisfaction of his claim.

Loos v. Wilkinson, 110 N. Y. 195, 1 L. R. A. 250, 18 N. E. 99; 15 Am. & Eng. Enc. Law, p. 819; *Williams v. Bartlett*, 4 Lea, 620; *Young v. Hall*, 6 Lea, 179; 20 Am. & Eng. Enc. Law, p. 37; *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 542, 23 L. ed. 869.

Messrs. Brown & Henderson, for respondent:

At the inception of the assignment the intervener was one of the class for whose benefit it was made, and if he had accepted it he could have claimed under it; but he has repudiated it, and has not only contested it, but has obtained a decree of the courts that as to him it is void, and therefore he can claim no rights under it.

Burrill, Assignm. p. 762, § 476; *Beifeld v. Martin*, 4 Colo. App. 578, 37 Pac. 32; *Valentine v. Decker*, 43 Mo. 583; *Jefferis's Appeal*, 33 Pa. 39; *Fellows v. Greenleaf*, 43 N. 54 L. R. A.

H. 421; *Adler Goldman Commission Co. v. People's Bank*, 65 Ark. 380, 46 S. W. 536; *O'Bryan Bros. v. Glenn Bros.* 91 Tenn. 107, 17 S. W. 1030.

McLaughlin, the receiver, owning the fee in the land subject only to such claim as the intervener had under his inchoate lien by attachment and execution, was entitled to the possession of the property, subject thereto, until the lien ripened into a title.

He was entitled to use it, and entitled to the rents, issues, and profits thereof. It must be remembered that the building was consumed by fire, and that the receiver received the money in dispute long before there was any sale under the execution, the sale only having occurred the day before this hearing. The execution or attachment creditor had also an insurable interest.

There was no obligation whatever on the part of either to insure for the benefit of the other.

An attachment creditor has an insurable interest which he can insure for his own protection.

1 May, Ins. § 83, p. 150; *International Trust Co. v. Boardman*, 149 Mass. 158, 21 E. 239; *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 26 L. ed. 473.

The owner of the equity of redemption also has an insurable interest to the full value of the property, notwithstanding it may be encumbered by a mortgage or other liens.

Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044.

The insurance is a personal contract between each insured and the insurers, and unless there is some contract between the debtors and creditors to the contrary, they each hold their insurance in their own right.

Ibid.; *International Trust Co. v. Boardman*, 149 Mass. 158, 21 N. E. 239; *Plimpton v. Farmers' Mut. F. Ins. Co.* 43 Vt. 497, 5 Am. Rep. 297; *White v. Brown*, 2 Cush. 412; *King v. State Mut. F. Ins. Co.* 7 Cush. 1, 54 Am. Dec. 683; *Suffolk F. Ins. Co. v. Boyden*, 9 Allen, 123; *Carter v. Rockett*, 8 Paige, 437; 1 Jones, Mortg. § 401; *McDonald v. Black*, 20 Ohio, 185, 55 Am. Dec. 448; 2 May, Ins. § 449; *Ames v. Richardson*, 29 Minn. 333, 13 N. W. 137; *Nichols v. Baxter*, 5 R. I. 491.

Miner, J., delivered the opinion of the court:

By his petition, Thomas Cupit seeks to obtain the proceeds of the fire insurance policies, amounting to \$5,000, in the hands of the receiver of the Park City Bank, and received by him at a time when Cupit, by virtue of his attachment levy, had a lien upon the property upon which the buildings were burned; and claims that McLaughlin, the receiver, was a trustee, and a representative of a court of equity, and, whether he was Cupit's trustee for any other purpose than merely to see that this insurance money should go in satisfaction of the debt which the property it represented would have paid, and to see justice done, he was certainly Cupit's trustee for that purpose, and should

be held liable for the insurance money; that, as the court had possession of the property through its receiver, whose title is fraudulent as to Cupit, equity will convert him into a trustee, to prevent fraud, and to restore the insurance money to the lienors; that because Cupit had rights under the attachment as a creditor of the bank, and because the insurance was upon the property he had attached, although his equity of redemption had not expired, he was still entitled to the insurance money, although he paid nothing towards the premiums, and refused to recognize the rights of the receiver in the premises. We cannot concede such asserted rights upon the part of Mr. Cupit, the intervener. At the inception of the assignment Mr. Cupit was one of a class of creditors who were entitled to its benefits, and, had he accepted it, and claimed under it, he would have been entitled to the rights of a general creditor. So, also, after the attachment proceedings against the property of the debtor, if they had proved unavailing, or when they were abandoned, a creditor may, under certain circumstances, still assent, and take under the assignment. But the petitioner did not accept or claim under the assignment; on the contrary, he rejected the assignment, and has continually refused to claim under it, and has obtained a decree of court, which, as to him, rendered the assignment void.

The right of a creditor to share in the benefits of an assignment is based in part upon his assent. This is one of the conditions upon which he takes under an assignment, and this assent is presumed, unless his repudiation is made known. While a creditor is under no obligation to accept the provisions of an assignment made for his benefit, yet he cannot hold an assignment good in part and bad in part. If he ratifies it at all, he must stand by it. He cannot accept that part which is beneficial to him, and repudiate the balance of it. Nor can he receive the benefits of the assignment while he is in actual hostility to it, claiming in the courts that it is fraudulent and void, and refusing to accept its benefits. He cannot claim benefits under it, and at the same time attack it for fraud, and utterly destroy its validity as to him. *Burrill, Assignm.* §§ 476-479; *Jefferis's Appeal*, 33 Pa. 39; *Valentine v. Decker*, 43 Mo. 583; *Beifeld v. Martin*, 4 Colo. App. 578, 37 Pac. 32; *Adler-Goldman Commission Co. v. People's Bank*, 65 Ark. 280, 46 S. W. 530; *O'Bryan Bros. v. Glenn Bros.* 91 Tenn. 107, 17 S. W. 1030. If a creditor accepts the benefits of an assignment knowing the facts, he cannot, ordinarily, impeach or repudiate it thereafter, on the ground that it is illegal and fraudulent. So, having repudiated it altogether, he cannot take under its provisions as other creditors would do who have accepted it. The reason of this rule is that he is not entitled to two inconsistent, adverse, or conflicting rights. One is necessarily a denial of the other. *Burrill, Assignm.* 6th ed. 441; *Adler-Goldman Commission Co. v. People's Bank*, 65 Ark. 380, 46 S. W. 530.

Because of the continued, open, and hostile acts of the petitioner towards the assignment, and his continued refusal to accept its terms, he is not in a position to claim benefits under it, as other creditors who have assented to it are entitled to.

But Mr. Cupit still claims that he is entitled to the \$5,000 insurance obtained by the receiver on a policy of insurance procured by said receiver when he held an attachment lien upon the property. The property in question was assigned by the bank. The receiver had possession of it, and received the rents, and repaired it as receiver. As to the creditors of the bank who had accepted the assignment, the receiver had title, and was entitled to take charge of the property, and hold it until such time as Mr. Cupit's attachment lien would ripen into title by sale thereunder, and until the time for redemption from the sale should expire. The receiver had the same right to the property that the bank would have had had no assignment been made. As such receiver, he had the right to insure the property for the benefit of the creditors of the bank, and to pay the premiums from any assets in his hands. He had an insurable interest in the property, and was entitled to use it, receive rents from it, repair it, and preserve it from loss, the same as any other owner would have; and this right would continue until the title was lost by sale on the execution and the time for redemption had expired. So Mr. Cupit, as attaching or execution creditor, and owner of an equity of redemption, had an insurable interest in the property. 1 May, Ins. § 83; *International Trust Co. v. Boardman*, 149 Mass. 158, 21 N. E. 239; *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 26 L. ed. 473; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044. The receiver and the attaching creditor had an insurable interest, and could insure the property for their own benefit. Under such circumstances the insurance would be a personal contract between the insurance company and each party insuring; and, unless there be some contract or trust relation between the insured parties to the contrary, each would hold the money derived by loss of the property by fire in their individual or official right. In such cases the contract is personal, and does not run with the title to the property. As held in *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044, the insurance is a mere special agreement with a party seeking to insure himself against apprehended loss on account of his interest in a particular subject-matter, and not at all incidental to and transferable with the subject-matter, and in case of loss satisfaction must be to the person insured. 2 May, Ins. § 6; *International Trust Co. v. Boardman*, 149 Mass. 158, 21 N. E. 239; *Plimpton v. Farmers' Mut. F. Ins. Co.* 43 Vt. 497, 5 Am. Rep. 297; *King v. State Mut. F. Ins. Co.* 7 Cush. 1; *McDonald v. Black*, 20 Ohio, 185, 55 Am. Dec. 448; *Charles v. Clayton*, 87 Tenn. 308, 3 L. R. A. 170, 10 S. W. 505. There are many cases holding that, as be-

tween a vendor and vendee, the insurance money, in case of a distribution of the property, represents the property itself, because of some express or implied contract relation existing between the parties. Many cases so hold because of a contract, express or implied, existing between the parties. In this case no such relation is shown or exists. See *Grange Mill Co. v. Western Assur. Co.* 118 Ill. 396, 9 N. E. 274. Had the petitioner insured the property in his own right to cover his interest therein, it could not be claimed that the receiver would have any right therein. So, where the receiver insured it, and paid the premiums out of funds in his hands belonging to the estate, the insurance became a personal indemnity to the receiver for the benefit of the creditors of the estate he represented. Mr. Cupit is not one of the creditors who had acquiesced in the assignment. He had never consented to the assignment in any manner, and has continually opposed it on all occasions, and still continues to do so. He is not now asking to come in as a common creditor, and receive his just proportion of the estate, including the insurance money, in accordance with the provisions of the assignment; but he now demands at the hands of the court the entire fund received under the policy of insurance, while refusing to acquiesce in the assignment, and while still holding the proceeds of the sale of the real estate under his execution. The property of the bank was, in effect, conveyed in trust for such creditors of the bank as should come in and accept the provisions of the assignment. The assignee and receiver no doubt held the property in trust for such creditors, and this trust relation could not exist between the receiver and a creditor who wholly repudiates the assignment as well as the trust relation. There was no contract relation between the receiver and Mr. Cupit. The real estate in controversy was rightfully held by the receiver with the right to the use, rents, and profits thereof for the benefit of the estate until Cupit should acquire title by a sale on his execution. He held an equity of redemption, and had and would have the same rights as the bank would have had no assignment been made. An execution creditor is not entitled to possession and rents of the property levied upon before sale, and before the time for redemption has expired.

The case of *Cupit v. Park City Bank*, 20 Utah, 292, 58 Pac. 839, is not in conflict with this position. In that case it was no doubt the intention of the court to hold that the receiver acquired no title to the property that conflicted with the right of Cupit under his attachment lien, and it did not intend to hold that Mr. Cupit would have the right to the title of the property, and the possession thereof, before sale upon his execution. Under such circumstances Cupit had no right to charge the receiver with the rents and use of the premises, which at most would about cover the expense of operating and keeping the building, etc., in repair; nor has he any right to recover the in-

surance money claimed in this case. As said in *Collumb v. Read*, 24 N. Y. 515: "If the plaintiff and the other creditors had affirmed the assignment, the trustee would have been compelled to account for these rents according to its provisions; but the plaintiff, claiming in hostility to it, must treat the trustee as a stranger, whose only fault has been in suffering himself to be made an instrument by means of which the debtor has been enabled to apply the rents towards the payment of other creditors." The receiver was not a trustee for Mr. Cupit in the sense that it was his duty to see that the money collected on these insurance policies should be held for the benefit and be paid over to Mr. Cupit to satisfy the execution which the property might have paid if the building had not been consumed by fire. After careful consideration of the very able arguments and briefs of counsel, we can arrive at no other conclusion than as before expressed.

The judgment of the District Court is affirmed, with costs.

Baskin, J., and McCarty, District Judge, concur.

John ANDRUS, Appt.,

v.

John BLAZZARD et al., Respts.

(.....Utah.....)

- *1. A guardian has no power to make a contract binding upon the ward or upon his estate, however beneficial to the ward the contract may be; and such contracts made by him impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditures to the ward's estate in his account.
2. Neither guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the person or estate of such persons unless expressly authorized to do so by law.
3. Under the provisions of § 4007, Rev. Stat. 1898, a guardian may only mortgage the real estate of his ward when necessary to provide for the suitable maintenance of the ward and his family.
4. Section 4008, Rev. Stat. 1898, makes it the duty of the guardian to pay all just debts of the ward out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate; and § 4015 provides that, when a sale of the property of the ward is necessary to pay the debts and expenses of guardianship, the guardian may sell, upon the order of the court, the ward's real estate for that purpose.
5. Sections 4013, 4014, Rev. Stat. 1898, provide for the expenses and compensation of the guardian, and for allowance of such items in his account.
6. Nowhere in the statutes is there a provision allowing the guardian to mort-

*Headnotes by BASKIN, J.

NOTE.—For another case in this series as to right of guardian to mortgage ward's property, see *Warren v. Union Bank* (N. Y.) 43 L. E. A. 266.

gage the real property of his ward for the purpose of paying debts, and the guardian who so acts binds himself, and not the ward.

7. When the facts are within the knowledge of both parties to a written contract, and the language used is such as they intended, a mistake as to the legal effect of the contract or that its legal effect is different from that intended, is not available as a defense at law, and is not ground for a reformation of the contract in a court of equity, and cannot be shown by parol.

8. Inasmuch as the terms of the note in question were such as the parties intended to use, and their legal effect was to bind the guardian personally, parol evidence showing a different understanding was inadmissible.

9. An order of a probate court, made without authority of the statute, is void.

10. Inasmuch as parol evidence is not admissible to defeat the legal effect of a written contract the terms of which are such as the parties intended to use, such evidence, if the beneficiaries of the note in question had brought suit thereon, would not have been admissible over their objection, and is therefore not admissible in a suit by any subsequent owner and holder thereof for value.

(*Minor, Ch. J., dissents.*)

(February 4, 1901.)

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion.

Mr. H. J. Dimiany, for appellant:

When an administrator undertakes to bind the estate, and fails to do so for want of authority, he binds himself personally, and may be sued upon his contract individually; and in such case it avails him nothing that he intended only to bind himself in his representative capacity.

McCalley v. Wilburn, 77 Ala. 549; *White-side v. Jennings*, 19 Ala. 784.

Neither a guardian nor a trustee can bind anyone but himself by a note signed by himself as guardian or trustee for another, unless he provides in the note that it is payable out of the estate which he represents. He is not an agent, and the rule of law as to agents does not apply.

Norton, Bills & Notes, p. 67; *Dan. Neg. Inst.* 4th ed. § 271; 1 *Randolph, Com. Paper*, §§ 134, 443; 1 *Parsons, Notes & Bills*, pp. 89, 90; *Roger Williams Nat. Bank v. Groton Mfg. Co.* 16 R. I. 504, 17 Atl. 170; *Taylor v. Davis*, 110 U. S. 333, *sub nom. Taylor v. Mayo*, 28 L. ed. 163; *Thacher v. Dinamore*, 5 Mass. 299, 4 Am. Dec. 61; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Fessenden v. Jones*, 52 N. C. (7 Jones, L.) 14, 75 Am. Dec. 445; *Rollins v. Marsh*, 128 Mass. 116; *Patterson v. Craig*, 1 Baxt. 291; *Steele v. McElroy*, 1 Sneed, 341; *Hodgson v. Dexter*, 1 Cranch, 345, 2 L. ed. 130; *Ogden City Street R. Co. v. Wright*, 31 Or. 150, 40 Pac. 976; *Massachusetts General Hospital v. Fairbanks*, 132 Mass. 414; *Wallis v. Bardwell*, 126 Mass. 366; *Poole v.* 54 L. R. A.

Wilkinson, 42 Ga. 539; *Hunt v. Maldonado*, 89 Cal. 636, 27 Pac. 56; *Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479; *Reading v. Wilson*, 38 N. J. Eq. 446; *Woodward's Appeal*, 38 Pa. 322; *Blackstone Nat. Bank v. Lane*, 80 Me. 165, 13 Atl. 683; *Child v. Monins*, 2 Brod. & B. 460; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101; *Lalib v. Ferry*, 32 N. J. Eq. 791.

Trustees acting under the provisions of a will making it their duty to indorse notes, who indorse a note without stipulating in it that the estate they represent shall be liable, are personally liable.

Roger Williams Nat. Bank v. Groton Mfg. Co. 16 R. I. 504, 17 Atl. 170; *Lucas v. Williams*, 3 Giff. 150; *Lalib v. Ferry*, 32 N. J. Eq. 791; *Wild v. Davenport*, 48 N. J. L. 129, 7 Atl. 295; *New v. Nicoll*, 73 N. Y. 127; *Ex parte Garland*, 10 Ves. Jr. 110; *Owen v. Delamere*, L. R. 15 Eq. 134; *Fessenden v. Jones*, 52 N. C. (7 Jones, L.) 14, 75 Am. Dec. 445.

A creditor has no remedy against the ward on the contract of his guardian; the guardian alone is liable.

Hunt v. Maldonado, 89 Cal. 636, 27 Pac. 56; *Fish v. McCarthy*, 96 Cal. 484, 31 Pac. 529.

If a person makes a contract, either representing a company or an individual, which he has no authority to make, he binds himself according to the terms of the contract.

Frankland v. Johnson, 147 Ill. 520, 35 N. E. 480; *Wheeler v. Reed*, 36 Ill. 91; *Mott v. Hicks*, 1 Cow. 513, 13 Am. Dec. 550; *McCalley v. Wilburn*, 77 Ala. 549; *White-side v. Jennings*, 19 Ala. 784.

Parol evidence cannot be introduced to vary the clear and settled legal effect and meaning of a contract.

Brandon Mfg. Co. v. Morse, 48 Vt. 322; *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936, 50 Am. St. Rep. 889, and notes; *Faukner v. Lew Smith Wall Paper Co.* 88 Iowa, 169, 55 N. W. 200; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Ruis v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Gorrell v. Home Ins. Co.* 11 C. C. A. 240, 24 U. S. App. 188, 63 Fed. 371; *Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166; *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647; *Brown v. Wiley*, 20 How. 442, 15 L. ed. 905; *Prescott v. Hixon*, 22 Ind. App. 139, 53 N. E. 391; *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496; *San José Sav. Bank v. Stone*, 59 Cal. 183; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *Durland v. Pitcairn*, 51 Ind. 426.

Parol evidence cannot be introduced to contradict or vary whatever the law implies from the contract.

Bryan v. Duff, 12 Wash. 233, 40 Pac. 936; *Faukner v. Lew Smith Wall Paper Co.* 88 Iowa, 169, 55 N. W. 200.

Parol evidence of an understanding that a note signed by a person as executor was to be paid out of the estate is not admissible.

Kessler v. Hall, 64 N. C. 60; *Wren v. Hoffman*, 41 Miss. 616.

Parol evidence that the payee in the note told the maker at the time of signing that

it was understood that the maker of the note was not to be liable is not admissible.

Leonard v. Miner, 120 Cal. 403, 52 Pac. 655; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Tacoma Mill Co. v. Sherwood*, 11 Wash. 493, 39 Pac. 977; *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 53 N. E. 881; *Hall v. First Nat. Bank*, 173 Mass. 16, 44 L. R. A. 319, 53 N. E. 154; *Davy v. Kelley*, 66 Wis. 452, 29 N. W. 232; *Dolson v. DeGanahl*, 70 Tex. 620, 8 S. W. 321; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; 3 *Randolph*, Com. Paper, 2d ed. § 1901.

The purchaser of a negotiable instrument before due, in the usual course of business, for a valuable consideration, is entitled to recover on it, though he took it under circumstances that ought to have excited suspicion in the mind of a prudent and reasonable person, unless such circumstances further show that he acted in bad faith or with a want of honesty.

Kitchen v. Loudenback, 48 Ohio St. 177, 26 N. E. 379; *Second Nat. Bank v. Morgan*, 165 Pa. 199, 30 Atl. 957; *Richards v. Monroe*, 85 Iowa, 359, 52 N. W. 339; *Rosemond v. Graham*, 54 Minn. 323, 56 N. W. 38; *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148.

When a party signs the contract he intends to sign, without any mistake as to the facts, but in law incurs a greater liability than he expects to incur or is represented to exist, he is bound by the contract.

Fish v. Cleland, 33 Ill. 238; *Mears v. Graham*, 8 Blackf. 144; *Martin v. Wharton*, 38 Ala. 637; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203.

Messrs. Bennett, Harkness, Howat, Sutherland, & Van Cott, for respondents:

The note on its face is the note of John Blazzard. It does not purport to bind the defendant Hurd; it contains no words of personal obligation on the part of the defendant Hurd. An agent or trustee cannot be held upon a contract which he assumes to execute for another, unless there are apt words of personal obligation on the part of such agent or trustee in said contract.

Hall v. Orandall, 29 Cal. 567, 89 Am. Dec. 64; *Lander v. Castro*, 43 Cal. 497; *Johnson v. Smith*, 21 Conn. 627; *Mechem, Agency*, § 550.

It is not true that somebody must be bound by the note. This note fails to bind the ward for want of authority upon the part of the guardian to execute it, and it fails to bind the guardian, not only for the reason that it does not contain words of personal obligation, but also because the payee, with a knowledge of all the facts, relied on the power of the guardian to make a binding contract for his ward, and the mistake was one of law.

Mechem, Agency, §§ 540, 550; 1 *Am. & Eng. Enc. Law*, 2d ed. p. 1127; *Michael v. Jones*, 84 Mo. 578; *Western Cement Co. v. Jones*, 8 Mo. App. 373; *Humphrey v. Jones*, 54 L. R. A.

71 Mo. 62; *Johnson v. Smith*, 21 Conn. 627; *Taylor v. Shelton*, 30 Conn. 122; *Oyden v. Raymond*, 22 Conn. 379, 56 Am. Dec. 429; *Barnum v. Frost*, 17 Gratt. 398.

It was competent to introduce parol testimony, not for the purpose of varying the terms of the instrument, but to show who was bound thereby.

Mechem, Agency, §§ 441 *et seq.*; 1 *Randolph*, Com. Paper, § 147; *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, 5 L. ed. 100; *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182.

McGurrin was not a bona fide purchaser for value, (1) because he was the original payee of the note, and his subsequent purchase from the owners did not alter such relationship, and (2) because he had actual and constructive notice of the equities on the part of Hurd.

4 *Am. & Eng. Enc. Law*, p. 255.

Parol evidence is admissible to explain an ambiguity.

2 *Am. & Eng. Enc. Law*, 2d ed. 289-294; *Mechem, Agency*, p. 288; 1 *Randolph*, Com. Paper, § 147; *Kessler v. Hall*, 64 N. C. 60; *Wren v. Hoffman*, 41 Miss. 616.

Baskin, J., delivered the opinion of the court:

It appears that a promissory note, at the date thereof, was made in the following manner and form, to wit:

Salt Lake City, Utah, Aug. 19, 1893.

Two years after date, we jointly and severally promise to pay Frank E. McGurrin, or order, at McCornick and Co.'s Banking House, in Salt Lake City, eleven hundred and fifty-four dollars, with interest thereon at the rate of eight per cent per annum, payable quarterly at the said bank, for value received. If the interest be not paid as stipulated, the legal holder of this note may declare the principal due, and proceed by law to recover both principal and interest.

James Blazzard,

by Edward B. Critchlow, His Attorney in Fact.

Thomas Blazzard,

by J. L. Rawlins, His Attorney in Fact.

John Blazzard,

by Joseph H. Hurd, His General Guardian.

Mariam Blazzard Steers.

On the same date a mortgage on certain real estate was made and signed in the same manner as said note, to secure the payment of the same. This note and mortgage was, after the maturity of the note, assigned to plaintiff. The amended complaint contained three counts. The first was based upon the note and mortgage, and prayed that the mortgage be adjudged to be a valid and subsisting lien upon the interest of the said John Blazzard in the premises mortgaged, and that the same be sold to satisfy the plaintiff's debt, interest, costs, and attorney's fees; the second was

on the note alone, and sought to charge the said John Blazzard and Joseph H. Hurd personally thereon; and the third was on the note alone, and sought to charge the said Joseph H. Hurd personally thereon, as one of the several obligees thereof. On motion of the said Joseph H. Hurd the first and second counts were stricken out on the ground that the ward was not bound by either the note or mortgage. Thereupon the said Joseph H. Hurd answered the third count, and, among other matters, alleged that: "For a further and separate answer and defense, defendant alleges that on or about the 19th day of August, 1893, the probate court of Salt Lake county, Utah territory, duly made an order in the matter of the estate and guardianship of John Blazzard, an incompetent person, authorizing, ordering, and directing this defendant, in the name and for the act and deed of the said John Blazzard, to execute said note, and, to secure the payment of the same, likewise, in the name and as and for the act and deed of the said John Blazzard, to secure said mortgage upon his undivided five twenty-eighths interest of, in, and to the real estate described in the mortgage; that in obedience to the said order of the said probate court, and not otherwise, this defendant signed to the said note and to the said mortgage the name of the said John Blazzard by himself as general guardian, upon the express and distinct understanding and agreement, however, that this defendant should not thereby be or become personally obligated or bound in any manner whatsoever by reason thereof, but that the same should, if legally sufficient and competent therefor, bind the estate of the said John Blazzard, and nothing more, which said understanding and agreement was then and there expressly brought to the attention of and assented to by the said McGurrian, and was also well known to and perfectly understood by the plaintiff at the time of the assignment of said note to him as alleged in the complaint. Defendants further allege that neither the said principal sum of \$1,154, nor any part thereof, was ever paid to or received by this defendant or the said John Blazzard, and that the said note and mortgage were directed by the said court to be given in the manner and form aforesaid for the purpose of paying the attorney's fees incurred by Mariam Blazzard Steers as guardian *ad litem* of the said John Blazzard in the prosecution of certain litigation in behalf of herself and others."

It appears from the evidence that previous to the execution of said note the said James Blazzard, Thomas Blazzard, John Blazzard, and Mariam Blazzard Steers were parties to five cases pending in the third district court of the territory of Utah, and which were consolidated into one, in which were involved their titles to a certain estate; that in pursuance of the mandate of the supreme court of the territory the said district court awarded to each of the makers of said note and other parties to the

action certain interests in the real estate involved, and ordered conveyances to be made in accordance with the decree, and that the said James Blazzard, Thomas Blazzard, John Blazzard, and Mariam Blazzard Steers, who were plaintiffs and interveners in said actions, pay to the defendants therein \$8,500; that the defendant in the pending case, Joseph Hurd, as the general guardian of the said John Blazzard, on the same day that said note was executed filed in the probate court of Salt Lake county a petition setting out the foregoing facts, and in addition thereto the following, to wit: "That neither the plaintiffs nor interveners have any estate or money other than the land decreed to them, and, except as hereinafter stated, are unable to comply with the decree requiring them to pay the money aforesaid. That \$1,000 which has been in the hands of the receiver had been paid. That it is necessary to raise by mortgage the sum of \$7,500 to comply with said decree. That in addition the sum of \$2,325.88 is required to pay Messrs. Rawlins & Critchlow and C. S. Varian, attorneys and counsel for plaintiffs, being the balance due them of the sum agreed by plaintiffs (John Blazzard, by his guardian *ad litem*, agreeing) to be paid. That the services of said counsel were contingent, of great value, and resulted in securing the property in lot six aforesaid, and that the compensation agreed upon was and is reasonable. That said property is not worth less than \$40,000. That plaintiffs and interveners have now an opportunity to procure a loan upon a mortgage on said property for the purposes aforesaid. That the amounts necessary to be raised, as estimated, are as follows: On the whole property, \$7,500; commissions, \$200; expenses of examining title, \$100; on $\frac{1}{4}$ interest of plaintiff, \$2,325.88. That all the parties in interest are now ready to complete the loans and perfect the title, and the deeds cannot be exchanged, nor the decree against the plaintiffs and lot 6 satisfied, until your petitioner is authorized with power in behalf of John Blazzard." That on the same day said probate court made and entered the following order: "Now, therefore, it is ordered, adjudged, and decreed that Joseph H. Hurd, guardian of the person and estate of John Blazzard, a person of unsound mind, be, and he is hereby, authorized, as guardian aforesaid, and for John Blazzard, to execute with the plaintiffs and interveners aforesaid a note or notes, and a mortgage or mortgages, of the premises in lot 6, block 69, hereinbefore described, to procure a loan or loans sufficient to pay the sums hereinbefore mentioned, upon such terms and for such time as may be reasonable, and to execute the conveyances hereinbefore and in said decree mentioned. And it is further ordered that the said guardian report his acts and doings in the premises to this court." On the same day the aforesaid note and the mortgage on said lot were executed. While the said McGurrian was named as the mortgagee and payee of the note, it is admitted

that the real beneficiaries were Joseph L. Rawlins, E. B. Critchlow, and C. S. Varian, the attorneys of the said James Blazzard, Thomas Blazzard, John Blazzard, and Mar-iam Blazzard Steers, in the cases before mentioned, and the consideration of the note and mortgage was their services as such in said cases, and that the note and mortgage were made to the said McGurrian as their trustee, and for their accommodation; that afterwards, and before the maturity of the note, the said McGurrian paid to said attorneys the full amount of said note, and became the legal holder and owner thereof; and that he, for a good and valuable consideration, subsequently and after maturity of the note transferred the same, and also the mortgage, to the plaintiff. In addition to the above facts the trial court found that at and before the time the said McGurrian purchased and became the owner of said note he understood that the said Hurd was not to be bound personally upon said note, and that the said Hurd, in obedience to said order of the probate court, and not otherwise, signed said note and mortgage with the name of John Blazzard, an incompetent person, by himself as general guardian. The principal question raised by the assignments of error is whether the defendant Joseph H. Hurd is personally liable to the plaintiff on said promissory note. The court below held that he was not, and dismissed the complaint.

It is stated in 15 Am. & Eng. Enc. Law, 2d ed. p. 70, that "the prevailing doctrine is that a guardian has no power to make a contract binding upon the ward or upon his estate, however proper and beneficial the contract may be, but that contracts made by him impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditures to the ward's estate in his account." This text is supported by a very large number of well-considered cases. *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Rolins v. Marsh*, 128 Mass. 116; *Wallis v. Bardwell*, 126 Mass. 366; *Phelps v. Worcester*, 11 N. H. 51; *Hardy v. Citizens' Nat. Bank*, 61 N. H. 34-39; *Turner v. Flagg*, 6 Ind. App. 563, 33 N. E. 1104; *Fessenden v. Jones*, 52 N. C. (7 Jones, L.) 14, 75 Am. Dec. 445; *Hunt v. Maldonado*, 89 Cal. 636, 27 Pac. 56; *St. Joseph's Academy v. Augustini*, 55 Ala. 493, 495; *Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479. The case of *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61, arose on the following agreed statement of facts: "The defendant, as guardian of A. L., signed the notes declared on in the two first counts, for just debts due from the said A. L. to the plaintiffs. At the time of signing them the defendant was guardian of the said A. L., an insane person, having been duly appointed to that office. After the notes were respectively payable, and before the commencement of this action, the defendant showing to the judge of probate that the said A. L. had recovered his reason and was of sane mind,

the judge duly discharged him from his said office of guardian." In the opinion, which was delivered by Chief Justice Parsons, it is said: "The question to be decided on the facts agreed in this case is whether the defendant is liable in this action. If an action is maintainable against any person, it must be the defendant; for the guardian of an insane person cannot make his ward liable to an action as on his own contract by any promise which the guardian can make. . . . The defendant's description of himself in the notes as guardian cannot vary the form of the action; but it is for his own benefit,—that on payment of the notes he may not be precluded from charging the moneys paid to the account of his ward." This case is cited and followed in the foregoing cases, and in many others not mentioned. Neither guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the persons or estates of such persons unless expressly authorized to do so by law. In this state the duties and powers of guardians of incompetent persons are fixed and limited by statutory provisions, as also the duties and powers of the courts. Section 4007, Rev. Stat., provides that, in case the income of the ward's estate is insufficient for the comfortable and suitable maintenance and support of the ward and his family, the guardian may sell, mortgage, or lease the real estate, upon obtaining an order of court therefor. Section 4008 makes it the duty of the guardian to pay all just debts of the ward out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate; and § 4015 provides that, when a sale of the property of the ward is necessary to pay the debts and expenses of guardianship, the guardian may do so upon the order of the court. Section 4014 provides that every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable. Section 4013 provides for the allowance in the guardian's settlement for advancements made by him for the support or education of his ward. There is no provision in the statute authorizing the court to order the guardian to bind either the said John Blazzard personally or his estate by the note or mortgage in question. It was the duty of the defendant Hurd, as guardian, to pay the just debts of his ward out of the latter's estate, in the manner prescribed by the statute; and when he chose to do so in a different way than that prescribed by statute, and liquidated his ward's debt by the execution, as guardian, of a note and mortgage under an unauthorized and void order of the court procured at his instance, he, in the absence of any other controlling circumstances, bound himself as principal, and must look for reimbursement in the settlement of his accounts as guardian in the court which appointed him as such. From the nature

of the relations of guardian and ward, the defendant Hurd could not be the agent of his ward, or act in any other capacity than principal, in making said note, because the foundation of an agency is the delegation by the principal of authority to the agent to act; and as the ward was an incompetent person, he could not delegate any authority to his guardian to bind him personally by any contract. Nor could the court, under the provisions of the statute, authorize the execution of either a note or mortgage by the guardian in payment of the ward's debt.

In the case of *Brown v. Eggleston*, 53 Conn. 110, 119, 2 Atl. 321, the court said: "It has been repeatedly decided in Massachusetts that a guardian has no power to bind the ward or his estate by his contract. *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Wallis v. Bardwell*, 126 Mass. 366. Administrators and guardians in this respect are closely analogous to conservators. The powers and duties of a conservator are defined in a general way by statute. He 'shall have the charge of the person and estate of such incapable person.' 'The conservator shall manage all the estate of his ward, and apply the net income thereof, and, if necessary, any part of the personal estate, to support him and his family and to pay his debts, and may sue for and collect all debts due to him.' The statute neither expressly nor impliedly authorizes the conservator to make contracts in the name of the ward, and the ward is legally incapable of making a contract. A conservator, unlike an overseer, acts independently of his ward, and in all his transactions he alone is the responsible party. He is not, however, bound to contract debts and pay them from his own estate. The law places in his hands ample means for supplying himself with funds to meet all his obligations. If he suffers loss personally, it must be through his own neglect. Sabrina Main being in fact and in law incapable of making a contract when the services were rendered, it is difficult to conceive how she or her estate can be held liable on contractu." In the case of *St. Joseph's Academy v. Augustini*, 55 Ala. 493, the court quotes with approval the following from *Sanford v. Howard*, 29 Ala. 692, 68 Am. Dec. 101: "The purchases of trustees, including executors, administrators, and guardians, when made in obedience to the duties of the trust, impose upon them a personal liability. The seller, or, we may insert, the person to whom a debt is contracted, 'must look to them for payment, and they must look to the trust estate for reimbursement.' This is everywhere, in this country, as well as in England, held to be the law; and appellant's counsel admit it." In *Hardy v. Citizens' Nat. Bank*, 61 N. H. 34, the court said: "In *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61, it is held that a guardian signing a note as guardian cannot bind the estate of the ward. This doctrine was approved in *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87,—the

court there saying that, although the note states that he promises as guardian, yet he is personally bound. To the same effect are *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Jones v. Brewer*, 1 Pick. 314; *Barnaby v. Barnaby*, 1 Pick. 221; *Bicknell v. Bicknell*, 111 Mass. 266; *Thompson v. Boardman*, 1 Vt. 367, 18 Am. Dec. 684; *Dan. Neg. Inst.* § 271; *Schouler*, Dom. Rel. 464; 1 *Parsons*, Contr. 136. In *Phelps v. Worcester*, 11 N. H. 51, 53, the court says: The rule that the guardian, when he undertakes to act for the ward in contracts with others, should alone be liable, is sustained by the soundest reason. A different rule would subject the ward to numerous suits, the merits of which might be wholly unknown to him. In all expenditures arising under such contracts, the ward should be liable only to his guardian. He is then answerable to but one individual, and then only on a decree of court, on settlement of his guardianship account.'" In *Sperry v. Fanning*, 80 Ill. 375, the court quotes with approval the following from 1 *Parsons*, Contr. 136: "A guardian cannot by his own contract bind the person or estate of his ward; but if he promise, on sufficient consideration, to pay the debt of his ward, he is personally bound by his promise, although he expressly promises as guardian. And it is a sufficient consideration if such promise discharges the debt of the ward, and a guardian who thus discharges the debt of his ward may lawfully indemnify himself out of the ward's estate." In the case of *Fessenden v. Jones*, 52 N. C. (7 Jones, L.) 14, 75 Am. Dec. 445, the court said: "The guardian is charged with the duty of controlling and managing the person and property of the ward, and judging of the expenditures which may be needful for either, and he also is informed of the condition of the ward's resources. Hence the contract should be made with the guardian, and hence the guardian ought to be looked to for payment. To allow a departure from the above rule would, in the first place, have the effect to encourage in the youth of the country appeals from the judgments of their guardians, and, in the next, make the right to compensation on the part of the creditor depend upon a condition of things of which he had no means to judge, and therefore uncertain and precarious. . . . It will be seen from the foregoing considerations, a guardian is not in the condition of an ordinary agent or factor, and therefore the same legal relations, in all respects, do not subsist between them and those whom they respectively represent. The former represents one who has no legal capacity to contract for himself; the latter, one who is fully able to contract and bind, were he present. The former is substituted by the law, and stands in *loco parentis*. The latter is the appointee of his principal, and that principal can at any moment abrogate or modify his power. This want of analogies between the two in the sources and limits of their powers makes it obvious there can be no complete analogy between

them as to liabilities or exemptions." In *Hunt v. Maldonado*, 89 Cal. 636, 27 Pac. 56, the court said: "The action is to recover an attorney's fee for services rendered to the guardian of a minor in pursuance of a written contract. The action is against the minor. If the guardian made a valid contract with the attorney, he may be held liable; and if he pays it, and the probate court shall deem the expenditure reasonable and necessary to protect the interests of the ward, it may be allowed from the ward's estate. But it is an expense incurred by the guardian in the performance of his duties, for which he is primarily liable." This language is quoted with approval in *Morse v. Hinckley*, 124 Cal. 168, 56 Pac. 896.

In the case at bar a just indebtedness of the ward to the attorneys heretofore mentioned has been paid, and it was the duty of the guardian to pay the same from the estate of his ward. He performed this duty by executing the note in question as guardian; and notwithstanding the form of the note, on the face of the same, and according to its legal effect, we think it is clear, under the authorities, that the guardian is personally bound, and must look to the estate of his ward in his settlement with the court for reimbursement. The court below, in the opinion rendered, and which appears in the record, evidently entertained the view that the note, unexplained by parol evidence, bound personally the guardian. In that opinion the trial judge said: "I think the words of the note sufficiently show that he signed as guardian, although he signed the name of John Blazzard, by Joseph H. Hurd, guardian. I think it would charge him, under the rule, with personal liability, if in the hands of an innocent indorsee." Respondents' counsel, in their brief, state that it "may be admitted that ordinarily a guardian who makes a contract as guardian binds himself, and not his ward." In the case at bar Hurd acted in the capacity of guardian, as the way in which he signed the note shows. The ward being civilly dead, the execution of the note was the act of the guardian, and the note his own, and not the ward's.

It is, however, claimed by counsel for respondents that notwithstanding a guardian who makes a contract as such thereby binds himself, and not his ward, still the guardian may show by parol evidence, as was permitted by the court, over the objection of the plaintiff, to be done in this case, that the parties did not intend to bind the guardian personally. No parol agreement, in express terms, was made that the guardian should not be personally bound. The only evidence upon that subject was the statements of the guardian and C. S. Varian and E. B. Critchlow, two of the beneficiaries. The guardian, in answer to the question, "What occurred at the time the note was made?" said: "My recollection is not as clear as it might be, but, as I remember it, the papers were all prepared—a petition to the court for authority to execute

this note and mortgage—authorizing and directing the execution of the note on account of the incompetent, and the signing and waiver of notice; that the court, having heard the testimony, made the order. My recollection is that the other papers were prepared at the same time, and I signed them. I remember distinctly Mr. Varian calling my attention to the manner in which it was necessary to sign in order to avoid personal liability in a matter of this kind, and suggested that it be signed in the way it is." In the examination on this matter of C. S. Varian, the following occurred:

Q. Now, I will ask you, in taking that note of Mr. Hurd, whether you understood that he was not to be bound personally upon it.

A. I certainly did.

Q. I will ask you if there was any intention on your part to bind anybody except the person and estate of this incompetent person, by his signature to this note.

A. There was not. Hurd was an entirely independent person acting gratuitously as an act of courtesy.

Q. In taking the note from Mr. Hurd, signed in this way, did you, or did you not, depend entirely upon the order of the probate court?

A. Certainly.

In the examination of Mr. E. B. Critchlow, he stated:

Q. I will ask you whether or not in taking the note, you yourself understood that Mr. Hurd was in no manner personally responsible.

A. I certainly did.

Q. I will ask you to state whether or not Mr. Hurd was procured to act as guardian at the request of yourself, Mr. Rawlins, and Mr. Varian, who were interested in the note.

A. He was. He had absolutely no interest in the matter at all until he was asked to come into it at our request to act as guardian for the incompetent person.

Q. State whether or not he was asked to act as attorney or as guardian simply for your accommodation.

A. I can hardly say that. I suppose the interest of the incompetent needed attention, and he was appointed in his interest as well. As to the execution of the note, he was acting in our interest entirely. It was for our accommodation.

Q. One further question I will ask you,—whether or not it was understood by you that the order of the probate court did bind the estate of this incompetent person.

A. That was a matter of investigation by Mr. Varian and myself. I can't say whether Mr. Rawlins participated in that or not, and we came to the conclusion—formed the judgment—that the guardian of an incompetent person might be authorized by the court, upon proper proceedings taken, to give this note and mortgage; and upon that it was our intention to bind the estate of

the ward, and nobody else, by the signature of Mr. Hurd.

The guardian and beneficiaries of said note were fully aware of all the facts regarding the transaction. There was no mistake respecting the language of the note, but it was in the form and was executed in the manner intended. It is not claimed that there was any fraud or mistake of fact in the transaction. The substance of respondent's claim is that he and the beneficiaries did not intend the note, in legal effect, should bind the guardian personally. When the facts are within the knowledge of both parties to a written contract, and the language used is such as they intended, a mistake as to the legal effect of the contract, or that its legal effect is different from that intended, is not available as a defense at law, and is not ground for a reformation of the contract in a court of equity, and cannot be shown by parol. *Brown v. Wiley*, 20 How. 442, 15 L. ed. 965; *Martin v. Cole*, 104 U. S. 30-38, 26 L. ed. 647-650; *Fackner v. Lew Smith Wall Paper Co.* 88 Iowa, 169, 55 N. W. 200; *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936; *McAninch v. Laughlin*, 13 Pa. 371; *Davis v. England*, 141 Mass. 587-590, 6 N. E. 731; *Oiler v. Gard*, 23 Ind. 212-218; *Kelly v. Turner*, 74 Ala. 513; *Farley v. Bryant*, 32 Me. 474-483; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; *Renner v. Bank of Columbia*, 9 Wheat. 581-587, 6 L. ed. 166, 167; *Moorman v. Collier*, 32 Iowa, 138. There are many other decisions in line with the foregoing cases, but they are too numerous for citation. In the case of *Brown v. Wiley*, 20 How. 442, 15 L. ed. 965, Justice Grier used this language: "When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule." In the case of *Renner v. Bank of Columbia*, 9 Wheat. 587, 6 L. ed. 167, the court said: "There is no rule of law better settled or more salutary in its application to contracts than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement." In the case of *Moorman v. Collier*, 32 Iowa, 138, the legal effect of the terms of a contract was different from what the parties supposed they were, and parol evidence of the mistake was excluded. In the case of *Fackner v. Lew Smith Wall Paper Co.* 88 Iowa, 169, 55 N. W. 200, it was held that whatever the law implies from the language used in a written contract is as much a part of the contract as that which is expressed therein; and if the contract, viewed in the light of

what the law thus implies, is clear, definite, and complete, it cannot be added to, varied, or contradicted by extrinsic evidence. In the case of *Farley v. Bryant*, 32 Me. 483, the court said: "When it is alleged that certain words, letters, or figures have been inserted or omitted by mistake, the proof should establish the facts alleged. If there be a failure to do this, and the testimony shows that by a legal construction the deed may operate contrary to the expectations of the grantor, and convey land which he did not intend to convey, a court of equity would not be authorized to reform the deed; for conveyances are not to be reformed, and made to read in such manner as may best carry into effect the intentions of the parties as ascertained from parol testimony, when there is no satisfactory proof that they did not use the language which they intended to use." In the case of *McAninch v. Laughlin*, 13 Pa. 371, the facts were within the knowledge of both parties, and the mistake was in the judgment they formed of the legal effect of them, but the court held that such a mistake was not a ground of relief. In the case of *Oiler v. Gard*, 23 Ind. 212, this language is used: "It is not proved that the language or import of the note was not well understood, or that either was different from what was intended by the parties when it was written and signed. The testimony of Gard fails to show that there was anything omitted in the writings of the 15th of August and the 10th of October, 1857, which was, at the time of their execution, intended to be inserted. Gard understood the language and import of the papers, but he did not understand their legal effect. This was a mistake of law, unattended by such circumstances as would entitle him to relief in equity. A mistake or ignorance of the law forms no ground of relief from contracts fairly entered into, with full knowledge of the facts, under circumstances raising no presumption of fraud, imposition, or undue advantage taken." In the case of *Davis v. England*, 141 Mass. 587, 6 N. E. 731, the note was, in form, "I promise," etc., and was signed as follows: "W. H. England, Pres. & Treas. of Chelsea Iron-Foundry Co." The defendant offered evidence to show that the consideration of the note was the sale of a bill of goods which was delivered to the company, and that at the time and after the note was given it was understood, intended, and agreed by both parties that the note was the note of the company. The court admitted the evidence over objection thereto. In the opinion rendered, it was said: "The learned justice who presided in the superior court rightly ruled that the note sued on is the note of the defendant, and not of the Chelsea Iron-Foundry Company. *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101. But it was erroneous to admit oral testimony to show that at the time the note was given and afterwards it was understood and agreed by the parties that the note was the note of the Chelsea Iron-Foundry Company." In the case just cited, in

legal effect, the note was the note of W. H. England, and not that of the company. In the case at bar the legal effect of the note in question was, as hereinbefore shown, the note of the guardian. In the case of *Conner v. Clark*, 12 Cal. 171, 73 Am. Dec. 529, the court said: "Story, Promissory Notes, § 63, says: 'As to trustees, guardians, executors, and administrators, and other persons acting *en autre droit*, they are by law generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom or for whose benefit or for whose estate they act; and, hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility by using clear and explicit words to show that intention, but in the absence of such words the law will hold them bound. Thus, if an executor or administrator should make or indorse a note in his own name, adding thereto the words "as executor" or "as administrator," he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate.' Story, Agency, 176, asserts the same doctrine. The question here is not, as the counsel for the appellant has ingeniously suggested, whether a principal can be bound on an unsealed contract where the writing intimates and notifies by general words the fact of agency, and parol evidence explanatory of the fact intimated is given. But here there is no doubt that the person signing as trustee was bound, but he wishes to prove that he was bound only in a certain way; that is, to pay out of a particular fund. It is not pretended that anyone else was bound by this contract. No authority is shown in *Clark* to bind the beneficiaries in this trust by this note. In form and legal effect the note binds him to pay this amount; but he wishes to add to this note another term, namely, that he was only to pay it out of a certain fund, and this, he wishes to prove, was a contemporaneous parol agreement. But the rule is that the written contract is considered the definitive agreement of the parties, and parol conversations and understandings are all merged in it. It is the only authentic evidence of the understanding of the parties."

As the terms of the note in question were such as the parties intended to use, and their legal effect was to bind the guardian personally, the parol evidence showing a different understanding was inadmissible, and the objection of the plaintiff thereto should have been sustained. The order of the probate court, being made without authority of the statute, is void, and does not, therefore, shield the guardian from personal liability. *McCalley v. Wilburn*, 77 Ala. 549; *Whiteside v. Jennings*, 19 Ala. 784, 788; *Hudson v. Helmes*, 23 Ala. 589; *Beal v. Harmon*, 38 Mo. 436-439; *Woerner*, Guardianship, 200, 219. It is elementary that a judgment or order of a court made without authority is void, and confers no

rights on, and affords no protection to, persons acting in pursuance thereof. In the case of *McCalley v. Wilburn*, 77 Ala. 549, the court said: "If his petition to the probate court had contained all the requisite jurisdictional allegations, and the order of the court based on the petition had been otherwise regular, it is very clear that the obligation given by the administrator would have been binding on him only in his representative capacity, and he would not have been in any wise personally liable. Such is the express declaration of the statute. But this is the case only where the proceedings of the court are valid, so as to confer upon the administrator the legal authority to bind the estate by the execution of 'such note, bond, or bill.' Code 1876, § 2432. It is obvious that an administrator cannot shield himself from personal liability, by refuge under an order which is absolutely void. The rule of law which governs his liability is analogous to that governing trustees and agents in general. Where he undertakes to bind the estate, and fails to do so for want of authority, he binds himself personally, and may be sued upon his contract individually. *Whiteside v. Jennings*, 19 Ala. 784. And in such cases it avails him nothing that he intended only to bind himself in his representative capacity."

It appears that McGurrian was made payee of the note only as an accommodation to the attorneys beneficially interested. How this could accommodate them, or what induced them to resort to this indirect method, was not inquired into. It does appear, however, from the face of the note, that two of the beneficiaries signed the same as guardians of their respective wards, who, it is claimed, it was intended should be bound by the note so signed. It also appears that McGurrian had no personal interest in the matter whatever, that he took no part in the negotiations, that the note at its execution was delivered to the beneficiaries, and that previous to the time McGurrian purchased the same, on December 5, 1893, it had not been in his possession. Nor does it appear that he was present at the execution of the note, or that he was advised that it was not intended to bind the guardian personally by the note. The defendant stated in his testimony that he remembered distinctly that he, Critchlow, and Varian were present at the execution of the note, and, to the best of his recollection, McGurrian was there also. On cross-examination he said: "I am not certain about McGurrian being present when I executed the note and mortgage. Am certain as to the others." McGurrian, being placed on the witness stand by the defendants, testified, in substance, that he bought the note from Mr. Varian for a valuable consideration; that neither at nor prior to the time he purchased the same was anything said about his not looking to Hurd; that there was no understanding, express or implied, that he should not be liable on the note; that nothing was said about it at all; that at the

time he saw the note and mortgage, and the manner in which it was signed, he took it for granted that when they signed their names in that way they had the authority; that he did not suppose Hurd was binding himself personally on the note, and understood that what he was getting was the note of John Blazzard, by Joseph H. Hurd, his guardian; that he took the note for what it was worth, and expected to hold Hurd if he had no authority to make the note, and had no understanding by which Hurd was not to be liable, but supposed he had authority to sign the note. It does not appear from the record that McGurrin had any knowledge that it was understood by the interested parties that the guardian was not to be personally bound. Evidently McGurrin supposed that the legal effect of the note was to bind the ward, and not the guardian; but would the fact that he was mistaken in this deprive him of the rights of an innocent holder for value, and prevent him from enforcing the note according to its legal effect? It would not, and, this being so, the plaintiff, notwithstanding he became the owner of the note, for value, after its maturity, is not deprived of such right. As parol evidence is not admissible to defeat the legal effect of a written contract, the terms of which the parties intended to use if the beneficiaries of the note had brought suit to recover on the same, such evidence, to defeat the legal effect of the same, would not have been admissible over their objection, it follows that such evidence would not be admissible, over objection in a suit by any subsequent owner and holder of said note for value. The attorneys have received their fee, and the debt of the ward has been paid; and, if the guardian were not personally liable on the note, the holder of the same for value would have no remedy, for neither can he hold the ward or guardian on implied assumpsit, nor do we know of any other available remedy. The guardian, however, has a remedy. Under the provision of the statute, he has the right to credit himself in his accounts with any sum legitimately expended or advanced in the discharge of his duties, and to have the same satisfied out of the ward's estate.

It is alleged in the answer that the said James Blazzard and Mariam Blazzard Steers, two of the makers of said note, by separate deeds conveyed to the plaintiff certain real estate, and that there was deducted from the consideration of said deeds a sum equal to one half of the amount of said note, and which was retained by plaintiff, who in consideration of such retention agreed to indemnify and save harmless the said James Blazzard and Mariam Blazzard Steers against and from all liability upon said note and the mortgage given to secure the same. The evidence shows that a portion of the consideration of said deeds was so retained, but the exact amount is not shown. Whenever the plaintiff became the owner of said note, whatever amounts were so deducted and retained should, as to him, be regarded and treated as payments on the

note, and the guardian is only liable for the balance. It further appears from the testimony of E. B. Critchlow, before quoted, that the guardian was appointed at the request of the attorneys to whom the fee was due, and that "as to the execution of the note he was acting in [their] interest entirely. It was for [their] accommodation." In view of such action, and the other facts disclosed in the case, in connection with the lack of general authority of the guardian in the premises, the parties to the transaction, as against the holder of the note, who paid a valuable and good consideration for the same, should not have been allowed to say that they intended to bind the ward only.

It is ordered that the judgment be reversed, at respondents' costs, with directions to the lower court to grant a new trial.

Barteh, J., concurs.

Miner, Ch. J., dissenting:

I do not concur in the opinion of my learned associate, Mr. Justice Baskin. While it is true that ordinarily a guardian who makes a contract as such binds himself, and not his ward, yet there are exceptions to the rule that are quite as well settled as the rule itself. The guardian is held responsible where he has bought or contracted for the benefit of his ward, and the law implies an agreement on his part to pay, or where there was a written contract, entered into with apt words, to bind him personally. But the promise under consideration was made in the name of the principal, and as his contract, and not as the individual contract of Hurd. The makers and the payee understood, executed, and accepted the note as the note of the principal, and did not understand that Hurd was to be individually and personally bound as guardian. There are no apt words in the instrument that can be construed into a personal contract binding the guardian. The rule of law is well settled that an agent or trustee cannot be held upon a contract he assumes to execute for another unless there are apt words of personal obligation on the part of such agent or trustee written in the contract. In the present case the note did not contain a personal promise of the guardian to pay. It was not executed by Hurd as guardian, but by John Blazzard himself, by Hurd as general guardian. It was the note of John Blazzard, by his guardian, and not the note of the guardian. The note fails to bind the ward because of want of authority on the part of the guardian to execute it, and it also fails to bind the guardian because it does not contain apt words making it a personal obligation, and because the payee, with knowledge of the facts, relied upon the power of the guardian to make a binding contract for his ward; and therefore the mistake is one of law. While there is a conflict in the authorities on this subject, yet the general rule is as above stated. As to the first proposition, Mechem, Agency,

§ 550, says: "Where the promise is made in the name of the principal, and as his contract, the better opinion is that the agent cannot be held liable upon it, but only for the deceit or breach of warranty, even in the case of a written contract, where the assumed relation of agency appears upon the face of it. . . . The rule sometimes asserted, that wherever the agent fails to create a right of action against his principal upon the contract he makes himself liable thereon, cannot, therefore, be sustained as a general rule. The agent is only liable on the contract in those cases in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the credit was given to him personally." *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Lander v. Castro*, 43 Cal. 497; *Johnson v. Smith*, 21 Conn. 627; *Mechem, Agency*, § 550. In a note to the latter citation many cases are reported sustaining the principle announced. As to the latter proposition above, see 1 Am. & Eng. Enc. Law, 2d ed. p. 1127; *Michael v. Jones*, 84 Mo. 578; *Western Cement Co. v. Jones*, 8 Mo. App. 373; *Humphrey v. Jones*, 71

Mo. 62; *Taylor v. Shelton*, 30 Conn. 122; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Mechem, Agency*, § 546.

I am also of the opinion that evidence was admissible to show the knowledge of the parties that the note was intended as the obligation of the principal, and not of the agent, and that it was given and accepted as such. There is some conflict of authority on this subject, but the weight thereof sustains the doctrine stated. The subject is fully discussed in *Mechem, Agency*, § 441, where the authorities are collected, and the author therein states that the weight of authority sustains the doctrine announced. See also 1 Randolph, Com. Paper, § 147. The cases of *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665, and *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, 5 L. ed. 100, also sustain the same doctrine. See also *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182; 2 Notes on U. S. Reports, p. 34; and *Mechem, Agency*, § 288.

In my opinion the judgment of the district court should be affirmed.

IOWA SUPREME COURT.

Orin BURGESS

v.

SIMS DRUG COMPANY *et al.*, Appts.

(.....Iowa.....)

1. A druggist is not relieved from liability for injuries caused by a prescription negligently put up, by the fact that the negligence was that of a registered pharmacist employed by him, which class alone is allowed by statute to fill prescriptions.
2. Answering questions on cross-examination as to a matter of privilege between physician and patient will not waive the patient's right to object on the ground of privilege to the physician's answering questions as to communications made to him by the patient.
3. A waiver of the patient's privilege as to communications made to his physician must be confined to the trial in which it is made, and cannot avail to make the testimony of the physician competent at a subsequent trial.

(May 27, 1901.)

APPEAL by defendants from a judgment of the District Court for Polk County in favor of plaintiff in an action to recover damages for injuries alleged to have been caused by a physician's prescription erroneously put up by defendants. *Affirmed*.

Statement by McClain, J.:

The defendants, W. D. Sims and George

NOTE.—For other cases in this series as to negligence in sale of drug, see *note* to *Craft v. Parker, W. & Co.* (Mich.) 21 L. R. A. 139; *Meyer v. King* (Miss.) 35 L. R. A. 474; and *Wise v. Morgan* (Tenn.) 44 L. R. A. 548.

As to waiver of privilege as to confidential communications to physician, see *McConnell v. Osage* (Iowa) 8 L. R. A. 778, and *Mellor v. Missouri P. R. Co.* (Mo.) 10 L. R. A. 36. 54 L. R. A.

C. Sims. are sued, as partners doing business under the firm name of the Sims Drug Company, to recover damages for injury alleged to have resulted to plaintiff from the negligence of defendants in putting up a prescription of medicine to be used in plaintiff's eye, the use of which resulted in injury to the eye and loss thereof. Defendants deny the negligence alleged, and aver that the prescription complained of was filled by a skilled, competent, and duly registered pharmacist in their employ. Verdict and judgment for plaintiff for \$900. Defendants appeal.

Messrs. Spurrier & Maxwell, for appellants:

A witness may be asked on cross-examination any question tending to show bias.

Bradner, Ev. 2d ed. p. 32.

The cross-examiner has a right to ask, and require an answer to, any question concerning the situation of the witness with respect to the parties and to the subject of litigation.

Reynolds, Ev. p. 134; *Starkie*, Ev. p. 195; 1 *Greenl. Ev.* § 446; *Taylor*, Ev. § 1235; 1 *Wharton*, Ev. § 545.

Where a party himself testifies as to a consultation with a physician, and pretends to give the circumstances of the privileged interview, the opposite party is not precluded from assailing such evidence by the testimony of such physician.

Marr v. Manhattan R. Co. 56 Hun, 575, 10 N. Y. Supp. 159; *Treanor v. Manhattan R. Co.* 28 Abb. N. C. 47, 16 N. Y. Supp. 536; *Bradner*, Ev. p. 100; *Hunt v. Blackburn*, 128 U. S. 469, 32 L. ed. 490, 9 Sup. Ct. Rep. 125.

If the defendants' registered pharmacist

filled the prescription in controversy, it is apparent that the defendants, who were not registered pharmacists, could have in no manner known or avoided, even by the highest degree of care, the improper filling of the prescription.

When the proprietor of a pharmacy employs such a person as his pharmacist as the law declares competent, and furnishes a suitable place and necessary ingredients, he has done all that reason or the law requires of him for the safety of the public.

Maine v. Chicago, B. & Q. R. Co. 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Eigmy v. Union P. R. Co.* 93 Iowa, 538, 27 L. R. A. 290, 61 N. W. 1056; *First Nat. Bank v. German Sav. Bank*, 107 Iowa, 543, 44 L. R. A. 133, 78 N. W. 195.

Messrs. Vernon O. Ford and Carr & Parker, for appellee:

Statements by the person injured as to the cause of the injury, made to the physician called to treat him, are privileged.

Raymond v. Burlington, C. R. & N. R. Co. 65 Iowa, 152, 21 N. W. 495.

Disclosure in one case of privileged communications without objection does not defeat the right to insist upon the privilege in a subsequent trial.

Briesenmeister v. Supreme Lodge, K. of P. 81 Mich. 525, 45 N. W. 977; *McKinney v. Grand Street, P. P. & F. R. Co.* 104 N. Y. 352, 10 N. E. 544; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372; *McConnell v. Osage*, 80 Iowa, 293, 8 L. R. A. 778, 45 N. W. 550.

The object of the statute is not to prohibit the making of these communications public, but is rather to exclude evidence.

Barker v. Kuhn, 38 Iowa, 392; *Mellor v. Missouri P. R. Co.* (Mo.) 14 S. W. 758; 18 Am. & Eng. Enc. Law, p. 151; *Edington v. Etna L. Ins. Co.* 77 N. Y. 564.

McClain, J., delivered the opinion of the court:

1. Appellants contend that, having employed a skilful, registered pharmacist, they are not liable for his negligence, if any there was, in filling the prescription, and cite as illustrations cases in which it has been held that a railroad company contracting with an employee to furnish surgical aid and attendance in case of an accident was not liable for the negligent acts of the surgeon thus selected and furnished, if due care and diligence were used in the selection (*Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315), and that a bank to which a draft is sent for collection is not liable for the negligence of the notary public to whom the draft is delivered for protest (*First Nat. Bank v. German Bank*, 107 Iowa, 543, 44 L. R. A. 133, 78 N. W. 195). These cases, we think, are not analogous. It was the duty of the railroad company by express contract in the one case, and the duty of the bank by implied contract in the other case, to secure for the other party professional services, which neither the railroad company, in the one case, nor the bank, in the other, held itself out as competent to

perform. The railroad company did not pretend to be a surgeon, nor the bank to be a notary. But these defendants did pretend to be druggists, and held themselves out as able and willing to fill prescriptions. Whether they performed the services individually or by the aid of an employee was immaterial. The master who undertakes to perform a service is liable for the negligence of his servant in performing the service undertaken. This proposition is too elementary to require the citation of authorities. It is true that the legislature has provided, as a police regulation for the protection of the public, that no one who is not a registered pharmacist shall fill prescriptions; but when the defendants undertook, as a part of their regular business, that the prescription should be filled, it was wholly immaterial to the customer, so far as defendants' liability was concerned, whether the prescription was filled by one of the defendants or by an employee. *McCubbin v. Hastings*, 27 La. Ann. 713. In *Martin v. Temperley*, 4 Q. B. 298, it was held that defendant was liable for injury done by barges belonging to him navigated by persons specified by statute as qualified for such purpose, and selected by defendant. The court held that the statutory limitation of defendant's power of choice did not deprive the party injured of a remedy against him. The case is analogous to this, and the decision seems to be perfectly reasonable. We think in this case defendant was not relieved of his responsibility as employer by the fact that he was required by statute to employ a registered pharmacist.

2. Plaintiff claimed that his eye was injured by lime falling into it while he was at work at his trade as a plasterer, and that the application to it of a preparation secured from defendants on a prescription so aggravated the injury that its removal was necessary. When Dr. Amos, the specialist who performed the operation, was put on the stand by defendants as a witness, and asked to state what was said to him by plaintiff with reference to the cause of the injury to the eye, his testimony was excluded by the court on the ground that such communication to him was privileged, under the following provision of the Code: "Sec. 4608. No practicing attorney, counselor, physician, or surgeon . . . shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice. . . . Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred." The contention of appellants is that plaintiff had waived his privilege with reference to communications made to Dr. Amos—First, by testifying with reference to the same matter on the same trial; second, by testifying as to the same matter at a former trial of this case; third, by calling Dr. Amos to testify as a witness with reference to the

same matter on a former trial of this case. Evidence of the testimony of plaintiff and of Dr. Amos on the former trial was introduced to show such waiver. With reference to the testimony of plaintiff on this trial, it is urged by appellee that the matter about which Dr. Amos was asked to testify was gone into by plaintiff only in answer to questions on cross-examination, and it is contended that this did not constitute a waiver. While, as to the testimony of plaintiff and Dr. Amos on the former trial, it is contended that nothing done on one trial will amount to a waiver of the objection to evidence as to privileged communications when they are attempted to be proved on another trial of the same case. The section of the Code above set out constitutes a partial statutory declaration of a rule of evidence which was recognized at common law with reference to privileged communications to attorneys, but in this respect it is only a partial declaration; for, with reference to attorneys, as well as physicians, it relates only to the testimony of the attorney or physician, whereas the common-law rule of evidence relating to communications to attorneys is broader, and excuses the client also from testifying as to such communications. It was not intended, however, by this partial statement to limit the common-law rule in this respect, for this court has held that the client is still entitled to claim the exemption. *Barker v. Kuhn*, 38 Iowa, 392. Further than this, the provision of the Code extends the privilege which at common law was recognized in regard to communications between client and attorney so as to cover communications between the patient and his physician; and we have no doubt that it was intended to extend to these communications the same complete protection, not only as to physicians, but also as to the patient, which by common law was recognized in regard to communications between client and attorney. We think that there is no question but that the patient is privileged from disclosing communications made to his physician, although the statute does not so expressly provide. With this construction of the statute in mind, we now proceed to determine whether in any of the three ways above specified the plaintiff in this case had waived the privilege of insisting that Dr. Amos should not testify in regard to the communications made to him in his professional capacity. It is proper to suggest further that the statute does not specify what shall constitute a waiver, leaving that to be determined by the general rules of evidence, which, without statutory authority, had previously been recognized as applicable to communications between client and attorney. It is well settled that the client or patient may waive his privilege, not merely by failing to make objection to the evidence of the attorney or physician when offered, but also by conduct from which a waiver may be imputed,—such as by himself testifying as to the subject-matter of such communications. *People v. Gallagher*, 75 Mich. 512, 42 N. W. 54 L. R. A.

1063; *State v. Tall*, 43 Minn. 273, 45 N. W. 449; *Hunt v. Blackburn*, 128 U. S. 464, 32 L. ed. 488, 9 Sup. Ct. Rep. 125; *McKinney v. Grand Street, P. P. & F. R. Co.* 104 N. Y. 352, 10 N. E. 544. But the testimony of the client or patient as to the communication which will constitute a waiver of the privilege so as to admit the attorney or physician to testify with reference thereto must be voluntarily given; for the privilege is that of the client or patient, and it exists in his favor until in some way abandoned. No doubt, under this privilege, the client or patient may refuse to answer on cross-examination when asked with reference to the privileged communication. *Barker v. Kuhn*, 38 Iowa, 392; *Bigler v. Reyher*, 43 Ind. 112; *Hemenway v. Smith*, 28 Vt. 701; *State v. White*, 19 Kan. 445, 27 Am. Rep. 137; *Duitenhofer v. State*, 34 Ohio St. 91, 32 Am. Rep. 362. But we are not willing to hold that the failure to insist on this privilege makes the testimony which he may give on cross-examination voluntary, in such sense as to constitute a waiver of his privilege with reference to the communication to his attorney or physician. In *McConnell v. Osage*, 80 Iowa, 293, 8 L. R. A. 778, 45 N. W. 550, this court said that even the voluntary act of the plaintiff in that case, as a witness, in testifying to her physical health at a particular time, would not constitute a waiver of objection to testimony by her physician as to communications made by her to him at that time showing that she was not in good health, and that the mere fact of the exclusion of the physician's testimony might result in putting the condition of her health at the time referred to in a false light before the jury would not be a sufficient reason for implying a waiver. And it was further said (and this is especially pertinent to our present inquiry) that it was improper to ask such witness on cross-examination whether she was willing that the physician might disclose any communications which she had made to him with reference to her health. Accordingly it was held that the propounding of such a question to the witness over the objection of her attorney, and to which her answer was, "No," constituted error; this language being used: "The statute gives the prohibition. It is a legal right, and a party should no more be required to state under oath that he did not want to surrender it, than any other legal right he possessed. We think a fair trial requires that such a matter should not even be referred to; that the jury should not be impressed with a belief that there is even reluctance to giving such assent. The subject-matter of such a waiver has no place for reference in the taking of testimony, except by the party permitted to make it." In the case before us it is evident that any objection of the witness on cross-examination to testify as to the communication might well have been prejudicial, and therefore that the answer of the witness with reference thereto cannot be treated as a waiver of the privilege, for it is essentially not voluntary. If counsel

saw fit on cross-examination to inquire into this matter, he must be bound by the answer, and cannot afterwards claim that the witness, by answering without objection, voluntarily waived the privilege. As to the testimony at the former trial, it seems to us that the waiver resulting therefrom should be confined to the trial in which the waiver is made. Our statute relates to the giving of testimony, not to the publication in general of the privileged matter, and it seems to us clear that any waiver resulting from the giving or introduction of testimony on a trial should be limited to that trial. *Briesenmeister v. Supreme Lodge, K. of P.* 81 Mich. 325, 45 N. W. 977; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 287, 44 Am. Rep. 372. In a later New York case a different conclusion was reached (*McKinney v. Grand Street, P. P. & F. R. Co.* 104 N. Y. 352, 10 N. E. 544); but we do not agree to the reasoning in that case, which would seem to lead to the result that, if the privileged communication is in any way made public by the patient, the privilege is waived for all time, whereas we understand it to be well settled that a communication to a third person by the patient or client will not be a waiver of the right to insist on the privilege when it is sought to have the disclosure made by the way of testimony in open court. Thus, it has been held that a waiver of the privilege as to one witness, by permitting him to testify as to the privileged matter, will not be a waiver of objection to the testimony of another witness as to the same matter. *Mellor v. Missouri P. R. Co.* 105 Mo. 455, 10 L. R. A. 36, 16 S. W. 849. See also *Dotton v. Albion*, 57 Mich. 575, 24 N. W. 786, cited in *McConnell v. Osage*, 80 Iowa, 293, 301, 8 L. R. A. 778, 45 N. W. 550.

3. Many other assignments of error are made and argued, some of them relating to the sustaining of objections to hypothetical questions propounded to witnesses called as experts, and others to instructions given; but a discussion of these assignments would unduly extend this opinion, without substantial benefit. We have carefully considered the objections made, and find them to be without merit.

Affirmed.

John OSBORNE, *Appt.*,

v.

B. R. VAN DYKE.

(.....Iowa.....)

One who beat a horse in violation of

NOTE.—For other cases in this series as to liability for unforeseen consequences of act, see *Doyle v. Chicago, St. P. & K. C. R. Co.* (Iowa) 4 L. R. A. 420; *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 18 L. R. A. 154; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* (Fla.) 17 L. R. A. 38; *New Orleans & N. E. R. Co. v. McEwen & Murray* (La.) 38 L. R. A. 134; *Lillibridge v. McCann* (Mich.) 41 L. R. A. 381; *Sullivan v. Dunham* (N. Y.) 47 L. R. A. 715; and *Cleghora v. Thompson* (Kan.) *post*,

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the statute for the prevention of cruelty to animals cannot escape liability for an injury caused by a blow falling on a bystander, on the ground that he used reasonable care to avoid the accident, which was caused by the shying of the horse and the slipping of his own foot, and that such result of his acts was not anticipated.

(April 12, 1901.)

APPEAL by plaintiff from a judgment of the District Court for Lucas County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Dungan & Bartholomew, for appellant:

Defendant in violating the statute is liable as for "culpable negligence" *per se*.

Gould v. Schermor, 101 Iowa, 582, 70 N. W. 697; *West v. Ward*, 77 Iowa, 323, 42 N. W. 309; *Liming v. Illinois C. R. Co.* 81 Iowa, 246, 47 N. W. 66; *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688.

The fact that the accident was so unusual and extraordinary that it could not reasonably have been expected to happen does not relieve the defendant.

Doyle v. Chicago, St. P. & K. C. R. Co. 77 Iowa, 607, 4 L. R. A. 420, 42 N. W. 555; *West v. Ward*, 77 Iowa, 323, 42 N. W. 309.

The intervening cause, to relieve the defendant from liability, must be wholly independent of the original cause of the injury.

16 Am. & Eng. Enc. Law, p. 445; Bishop, *Noncontract Law*, § 453; Wharton, *Neg.* §§ 114, 115; *Kennedy v. Way*, Brightly (Pa.) 186; 4 Wait, *Act. & Def.* p. 446; *Goldsey v. Pennsylvania R. Co.* 30 Pa. 242, 72 Am. Dec. 703.

Where there is danger, peril, or risk of a particular injury, which occurs, it is the natural, and probably result of the act.

West v. Ward, 77 Iowa, 323, 42 N. W. 309; *Doyle v. Chicago, St. P. & K. C. R. Co.* 77 Iowa, 610, 4 L. R. A. 420, 42 N. W. 555.

Everyone who does an unlawful or wrongful act is liable in damages to any person injured thereby, who is not himself guilty of contributory negligence.

Correll v. Burlington, C. R. & M. River R. Co. 38 Iowa, 120, 18 Am. Rep. 22; *Dodge v. Burlington, C. R. & M. River R. Co.* 34 Iowa, 276; *Messenger v. Pate*, 42 Iowa, 443.

Van Dyke's care, or want of care, not to hit plaintiff, will not affect his liability.

Amick v. O'Hara, 6 Blackf. 258; *Center v. Finney*, 17 Barb. 94, *Affirmed* in *Selden's Notes*, 44; *North v. Smith*, 10 C. B. N. S. 572; 4 Wait, *Act. & Def.* p. 666.

Messrs. Stuart & Stuart for appellee.

Waterman, J., delivered the opinion of the court:

Plaintiff was in the employ of defendant, and, among other duties, had the care of several horses. On the occasion in question, as plaintiff was leading into a shed with a halter one of the horses, defendant stopped him, and undertook to apply a wash

to a galled place on the animal's neck. The horse was nervous and restless, and would not stand, so a twitch was put on him, and plaintiff held this with the halter while the wash was applied. After the twitch was removed, defendant noticed another bruised spot on the animal's shoulder, and he attempted, without replacing the twitch, to wash this. The horse jumped aside, and struck defendant, throwing upon his clothes the medicine, which he had in a tin can in his hand. This angered defendant, who seized the twitch, the handle of which was a heavy stick with a nail in the end, and began violently and brutally beating the horse, which struggled to escape. Plaintiff tried, without avail, to induce defendant to desist. Finally, a blow aimed missed the horse because of a slip by defendant, and plaintiff was struck in the face, breaking the bones of his nose and otherwise injuring him. There was no evidence tending to show that the blow so struck was intentional. The court submitted the case to the jury on the theory of defendant's negligence, instructing them that defendant would not be liable if in beating the horse he exercised reasonable care to avoid striking plaintiff, and the blow which inflicted the injury was caused by an accidental slip for which defendant was not to blame; and the jury was further told, in effect, this would be so even if defendant, in beating the horse, was guilty of an unlawful act.

We think the instructions omit one essential fact, *viz.*: Was it negligence for defendant to strike the horse in the manner he did and under the circumstances existing at the time? If it was, he is liable for the natural and probable consequences of his act, even though the precise result which followed may not have been anticipated. *Doyle v. Chicago, St. P. & K. C. R. Co.* 77 Iowa, 607-610, 4 L. R. A. 420, 42 N. W. 555. An "accident" may be defined as an event happening unexpectedly and without fault. *Leame v. Bray*, 3 East, 593. Now, it cannot be said that defendant was without fault for the slip of the foot, which he urges in excuse, if it grew out of or resulted from his negligent act. There was evidence tending to show that defendant, in brutally beating the horse while plaintiff was holding it, did so for no other purpose than to vent his rage by inflicting physical pain on the object of his fury. The slip of the foot that caused the blow to go amiss cannot, if this state of facts is true, be said to have been without defendant's fault. He could not reasonably have supposed the horse would stand quietly and receive the punishment administered. If, then, he was negligent in striking the animal as he did, he cannot escape because some intervening cause, growing out of his wrong, aided in producing the result of which complaint is made. *Gould v. Schermer*, 101 Iowa, 583, 70 N. W. 497.

The case at bar is stronger in its facts than the one cited, for here there is evidence tending to show the claimed intervening cause was brought about by defend-

ant's wrongful act. But if it can be said the sixth instruction given by the court submitted to the jury the question of whether defendant was negligent as matter of fact in striking the horse, though we must say we are not inclined to give it that construction, there is still another point to be considered.

2. In the ninth paragraph of the court's charge, the jury were told: "It is not material or necessary for you to find whether or not the act of defendant in whipping or striking the horse was unlawful." It was claimed on behalf of appellant that, if defendant was engaged in the doing of an unlawful act which resulted in injury to plaintiff, such conduct would be negligence as matter of law. There was evidence going to show that defendant was guilty of a violation of § 4969 of the Code, which imposes a penalty for cruelty to animals. "The general rule of law, however, is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events." 1 Addison, Torts, 7. In *Messenger v. Pate*, 42 Iowa, 443, defendant was sued for an injury caused by the unboxed tumbling rod of a threshing machine. The statute made it a misdemeanor to operate a machine with such rods unboxed. This court announced the following rule of law in that case: "We concur in the general proposition that whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by such violation, is the subject of an action; and it is sufficient to allege the violation of the law as the basis of the right to recover, and as constituting the negligence complained of." So, likewise, it is held that, where one is unlawfully carrying a loaded revolver, he is liable for injuries done another by its discharge, although the person injured assented to the revolver being carried. *Evans v. Waite*, 83 Wis. 286, 53 N. W. 445. See also *Weick v. Lander*, 75 Ill. 93; *Salisbury v. Herchenroder*, 106 Mass. 459, 8 Am. Rep. 354; *Conn v. May*, 36 Iowa, 244. If the defendant was doing an unlawful act in beating the horse, he is liable for damages caused thereby, and the subsequent accidental slip would not shield him, for the reasons already stated. The well-known *Squib Case* is a leading authority illustrative of the principle that one who wrongfully sets in motion a force by which another is injured is liable, although an intervening agency, not in itself wrongful, aided in producing the result. *Scott v. Shepherd*, 2 W. Bl. 892, 1 Smith, Lead. Cas. 797. We do not regard the case of *Tingle v. Chicago, B. & Q. R. Co.* 60 Iowa, 333, 14 N. W. 320, cited by appellee, as in conflict with the views here expressed. In that case the unlawful act (operating a train on Sunday) was a condition, but not a cause, of the injury done.

For the reasons given, the case must go back for a new trial.

Reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Mrs. M. C. COBB, *Appt.*,
v.
J. P. OVERMAN.

(48 C. C. A. 223, 109 Fed. 65.)

Liability upon a penal bond conditioned for the payment of rents and annuities to another during life is within the provisions of § 63a of the bankruptcy act of 1898, allowing the proving against the bankrupt's estate of a fixed liability, evidenced by instrument in writing, absolutely owing at the time of filing the petition, whether then payable or not; but the claim proved must be limited to the penalty of the bond, where the computed value of the expectancy exceeds that amount.

(May 10, 1901.)

NOTE.—What constitutes a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition in bankruptcy.

I. Judgments.

- a. In general.
- b. For alimony.

II. Written instruments.

- a. In general.
- b. Bonds.
- c. Notes.
- d. Leases.

III. Conclusion.

As this provision of the present bankruptcy act, § 63a, subd. 1, as to the provability of debts which are a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against the bankrupt, whether then payable or not, is materially different from any provision contained in any former bankruptcy act, either in this country or in England, this note is confined to decisions arising under the present act.

I. Judgments.

a. In general.

As § 17a, subd. 2, of the bankruptcy act provides that a discharge in bankruptcy shall release a bankrupt from all of his "provable debts" except such as are judgments in actions for fraud or obtaining property by false pretenses or false representations, or for wilfully or maliciously injuring the person or property of another, it is evident that judgments of that nature were considered to be provable by the framers of the act.

Very few decisions have been rendered as to the provability of judgments of any kind except for alimony, as will be seen.

In *Re Alderson*, 98 Fed. 588, the district judge for West Virginia held that a judgment in favor of a state against a bankrupt, imposing a fine for unlawful retailing, was a provable debt, and was also released by the discharge of the bankrupt, and was not entitled to precedence in the distribution of his estate.

But in *Re Moore*, 111 Fed. 145, Evans, District Judge of Kentucky, who was a member of Congress at the time the bankruptcy act was passed, expressly refused to follow the preceding case, and held that a judgment for a fine in favor of a state in a criminal prosecution was not provable so as to be released by a discharge.

APPPEAL by claimant from a judgment of the District Court of the United States for the Eastern District of North Carolina rejecting a claim against the estate of G. W. Cobb, a bankrupt. *Reversed.*

The facts are stated in the opinion.

Argued before *Goff* and *Simonton*, Circuit Judges, and *Waddill*, District Judge.

Messrs. P. H. Williams and *E. F. Aydlett*, for appellant:

The claim of Mrs. M. C. Cobb is such an one that when the bankrupt is discharged in bankruptcy her debt is discharged, and for the debt to be discharged its full value must be ascertained.

Plaintiff has the right to have the contract valued, taking into consideration the expectancy of her life, for the \$25 per month

charge in bankruptcy, stating that while it might possibly appear to come within the letter of the statute he was persuaded that, as neither state nor national government is mentioned in the act in connection with the effect of a discharge, its obligation could not properly be held to embrace judgments imposed in executing the public criminal laws.

In *Re Baker*, 96 Fed. 954, the question at issue was whether or not a judgment for the support of a bastard child would be released by the discharge in bankruptcy of the putative father, and the court, while holding that a discharge would not operate as a release of the judgment, even if it were provable, states that it is not at all clear that it is provable.

And *Re Hubbard*, 98 Fed. 710, holds that a discharge in bankruptcy will not release the bankrupt from the obligation to obey an order of a state court for the payment of a certain amount weekly for the support of two minor children, and proceedings to compel the payment of weekly instalments subsequent to the filing of the petition will not be stayed. The district judge does not state in his opinion whether the reason for his holding is that it was not a judgment, but an order only, which was sought to be enforced, or whether the reason was that it was not a provable debt; but there seems to be nothing in § 17 which would justify a holding that the discharge did not operate as a release, other than that the debt was not provable.

Re Lipman, 94 Fed. 353, holds that a judgment which is barred by limitation at the time the petition in bankruptcy is filed is not a provable claim, even though it is inserted in the schedule by the bankrupt, as such insertion does not revive the claim.

b. For alimony.

Only one attempt to prove a judgment for alimony seems to have been made under the present law, the question as to provability arising in other cases in connection with the question whether or not the judgment has been or will be released by a discharge in bankruptcy, the only ground on which it seemingly can be held to be released, under § 17 of the bankruptcy act, being that it is a provable debt.

It seems now to be thoroughly decided that a judgment for alimony is not a provable debt so as to be released by a discharge in bankruptcy, as to instalments accruing either before or after the filing of the petition. In those states where such judgments are subject to modification by the court; and it seems very probable that

annuity, and of G. W. Cobb's life, for the rent of the bank building, and to prove the amount she would be entitled to, and to ascertain its present value.

Re Ella, 3 Am. Bankr. Rep. 564.

The value of an annuity bond is such a sum as will purchase a similar bond in a solvent company for the remainder of the life.

Atty. Gen. v. North America L. Ins. Co. 82 N. Y. 172; *Re Sinclair* [1897] 1 Ch. 921; 2 Am. & Eng. Enc. Law, 2d ed. p. 408; *Hawkins v. Blake*, 108 U. S. 422, 27 L. ed. 775, 2 Sup. Ct. Rep. 804.

Mr. G. W. Ward for appellee.

Waddill, District Judge, delivered the opinion of the court:

The question presented for the consideration of the court is the correctness of the

decision of the lower court in rejecting a claim of \$4,300.98, allowed by the referee in behalf of the appellant on a debt asserted by her against the bankrupt estate. The case is one of involuntary bankruptcy. The petition was filed on the 30th of November, 1898, and adjudication had on the 30th of December of the same year. The claim was based upon the following penal bond, *viz.*:

\$3,000.

Know all men by these presents, that I, George W. Cobb, principal, and M. B. Culpepper, surety, are held and firmly bound unto Mrs. Marie C. Cobb in the just and full sum of three thousand dollars (\$3,000), to the payment whereof, well and truly to be made to the said Mrs. Marie C. Cobb, her executors, administrators, and assigns, we

the ultimate decision will be that such a judgment is not provable so as to be released by a discharge in any state unless it has been rendered on an agreement of the parties.

Only four decisions have been rendered holding that such judgments are provable and released by a discharge. In *Re Challoner*, 98 Fed. 82, one of the district judges in Illinois held that alimony due under a decree of divorce prior to the adjudication in bankruptcy was a debt under the bankruptcy law according to the decisions of the Illinois court, such as would be released by a discharge in bankruptcy and consequently the wife would be restrained from bringing any proceedings in the state court pending the bankruptcy proceedings to enforce the decree for alimony. The judge stated that it was not necessary at the time to pass upon the status of any alimony which might become due after the adjudication, but restrained any proceedings in the state court as to alimony already accrued and that to accrue after the adjudication pending the bankruptcy proceedings. But in *Barclay v. Barclay*, 184 Ill. 375, 51 L. R. A. 351, 56 N. E. 636, and *Deen v. Bloomer*, 191 Ill. 416, 61 N. E. 131, 3 N. B. N. Rep. 1037, *infra*, the Illinois supreme court held that such decree for alimony was not provable, and would not be discharged.

In *Re Van Orden*, 96 Fed. 86, the district judge for New Jersey holds that a claim for monthly instalments of alimony as fixed by a decree of divorce is a provable debt, as the mere liability to support and maintain his wife, which existed before the decree of divorce, was thereby fixed and became a debt, and consequently a state court would be enjoined from prosecuting a suit for such alimony. But this decision seems to have been based largely on that of *Wetmore v. Wetmore*, 149 N. Y. 521, 33 L. R. A. 708, 44 N. E. 169, and it will be seen from the decisions below that in New York a decree for alimony is held not to be provable, or to be released by the discharge. And in *Barclay v. Barclay*, 184 Ill. 375, 51 L. R. A. 351, 56 N. E. 636, *infra*, the court states that they do not concur with the reasoning of the court in this case.

In *Re Houston*, 94 Fed. 119, *Evans*, District Judge for the district of Kentucky, who was a member of Congress at the time the bankruptcy act was passed, held that a judgment requiring the defendant in a divorce case to pay a fixed amount weekly to the plaintiff as alimony is, as to instalments due at the time of the adjudication, a provable debt against the bankrupt's estate, and consequently would be released by a discharge in bankruptcy; and said also that, while deciding only as to past-due in-
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stalments, he was strongly inclined to the opinion that the peculiar form of the judgment by which alimony was usually allowed might be properly classed among the unliquidated demands to be liquidated and made certain as to future instalments pursuant to the provisions of § 63 of the bankruptcy act. The real question at issue, however, in this case was whether the bankrupt could be adjudged in contempt by the state court for failure to pay alimony after the bankruptcy court had ordered a stay of proceedings, and the case was affirmed by the circuit court of appeals in *Wagner v. United States*, 43 C. C. A. 445, 104 Fed. 133, solely on the ground that the order of the bankruptcy court staying the proceeding was valid and within its jurisdiction, whether or not the claim for alimony was a provable debt, the court expressly stating that the question as to the provability of the decree for alimony was immaterial, and was not passed upon by it.

And in *Fite v. Fite*, 22 Ky. L. Rep. 1638, 61 S. W. 26, the Kentucky court of appeals, following *Re Houston*, 94 Fed. 119, *supra*, held that a claim for monthly instalments of alimony, whether accruing before or after the adjudication in bankruptcy, was provable as a fixed liability, and released by the discharge. The court says in this case that some of the state courts have reached a different conclusion, but that the law in some of the states in regard to alimony differs materially from the law in Kentucky, and that the court has nothing to do with the question of sentiment which might be supposed to enter into the matter, nor could the moral duty, if any, to pay the alimony, be considered in determining the law governing the case.

On the other hand, the United States Supreme Court in *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, *Reversing* 2 N. B. N. Rep. 517, holds that alimony, whether in arrears at the commencement of the bankruptcy proceedings or subsequently accruing, is not provable in bankruptcy or barred by the discharge. The court in this case said that permanent alimony was considered as a portion of the husband's estate to which the wife is equitably entitled, rather than as strictly a debt, and that alimony from time to time might be considered as a portion of the husband's current income, and the considerations affecting it might be better weighed by the court having jurisdiction of the relation of husband and wife than by a court of different jurisdiction, and that in the District of Columbia, whence the appeal was taken, an allowance of alimony was not in the nature of an absolute debt, and was not unconditional and unchangeable, but might

promise and bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 28th day of April, in the year 1897. The conditions of the above obligation is such that whereas, there has grown up a dispute between the said George W. Cobb, both in his fiduciary capacity as guardian of the children of Kenneth R. Cobb and as the manager of a certain sum of money, the property of Mrs. Marie C. Cobb, the total of which is, including the fiduciary claim, \$7,955.47, and which the said George W. Cobb claims to have paid in full, but which the said heirs at law and wards of the said George W. Cobb, the children of Kenneth R. Cobb, Sr., deceased, claim was not legally paid to them, but, if it was paid, was paid to their mother or others; and whereas, in consideration of the premises, and in order

to finally adjust and terminate and close the said fiduciary account, and also any claim for the said sum of \$7,955.47, the said Mrs. Marie C. Cobb, Kenneth R. Cobb, Jr., and Marie Celeste Cobb, his wife, Emma Heloise Anderson and James W. Anderson, her husband, Marie Celine Lewis and Arthur G. Lewis, her husband, and Lillian R. Cobb have this day signed, sealed, and delivered their receipt in full for the above-named sum, and have thereby fully released the said George W. Cobb, guardian, as to any claim they may have against him on account of his fiduciary capacity as such guardian, and have, as a further consideration, signed, sealed, and delivered unto the said George W. Cobb a deed of bargain and sale and quitclaim as to all of their right, title, and interest in and to a certain house and lot situated in the town of Elizabeth City, North

and is founded on public policy, and is for the good of society.

And Justice Brown, one of the district judges in New York, held that overdue weekly instalments of alimony adjudged to the divorced wife by the decree of divorce would not be released by the husband's discharge in bankruptcy, and consequently the wife would not be stayed, pending the bankruptcy proceedings, from pursuing in a state court proper proceedings to collect the same, except where a preference upon assets was sought. *Re Shepard*, 97 Fed. 187; *Re Anderson*, 97 Fed. 321.

And in *Turner v. Turner*, 198 Fed. 785, Baker, District Judge of the district of Indiana, holds that a gross sum awarded as alimony by the decree of divorce before the filing of the petition in bankruptcy is not a debt which is a fixed liability as evidenced by a judgment absolutely owing at the time of the filing of the petition, as alimony is not strictly a debt due the wife, but is rather a general duty to support, made specific by the decree of the court, and that the alimony is not awarded as a debt but for the enforcement of a duty growing out of the marital relations, which is not severed by the husband's misconduct. The court also asks: "If a discharge will not release the bankrupt husband from his liability to furnish his wife support, why should such discharge absolve him from the performance of this duty when, on account of the violation of his marriage contract, a court has decreed the amount of money that he should pay in satisfaction of this duty?"

And *Barclay v. Barclay*, 184 Ill. 375, 51 L. R. A. 351, 56 N. E. 636, holds that a decree for alimony is a penalty imposed for failure to perform a duty, and is always subject to modification of the court according to the varying circumstances of the parties, there being some circumstances which would even authorize a change in the amount for which the husband is in arrears, and that in consequence such a decree is not a provable debt, even as to amounts which have accrued at the time of the filing of the petition, so as to entitle the husband to a discharge in bankruptcy. *Boggs, J.*, stated that he concurred in the decision except so far as the opinion might be construed to hold that alimony which had accrued and become payable against the husband was not a provable claim.

And *Deen v. Bloomer*, 191 Ill. 416, 61 N. E. 121, 3 N. B. N. Rep. 1037, Reversing 93 Ill. App. 479, holds that a decree for alimony is not released by a discharge in bankruptcy, as it cannot be regarded as a debt owing from the husband to the wife, whether accruing before or after the bankruptcy proceeding, but that the duty which the law imposes on the husband and father to support the wife and children is a social obligation as well as a pecuniary liability, 54 L. R. A.

And in *Re Smith*, 3 Am. Bankr. Rep. 67, Hotchkiss, referee, holds that in New York alimony which had accrued before the adjudication in bankruptcy, whether temporary or permanent, is not provable, and therefore is not affected by the bankrupt's discharge, as it is not a debt because it is not assignable or suable or collectible except in certain specified ways, but is a natural duty reduced to dollars and cents, and is the obligation to support the wife which was taken on marriage and continuing through life which has been measured up and temporarily determined by a court, but which is absolutely inalienable and undischageable and, save in amount, beyond the control of the courts except with the consent or on default of the wife; and that the husband must, so long as he is able, stand between the state and the injured wife in order that she may not become a public charge.

And in *Re Nowell*, 99 Fed. 931, Lowell, District Judge, holds that in Massachusetts, where the decree for alimony is always open to modification on any change in the situation of the husband or wife, and where notice to the hus-

and Young v. Young, 35 Misc. 335, 71 N. Y. Supp. 944, following the decisions of Justice Brown above, holds that a discharge in bankruptcy does not affect the bankrupt's liability to pay alimony, whether accruing before or after the filing of the petition.

And *Malsner v. Malsner*, 62 App. Div. 286, 70 N. Y. Supp. 1107, holds that a discharge in bankruptcy does not release the bankrupt from liability to pay alimony which had accrued prior to the filing of the petition in bankruptcy, as a claim for alimony is not a debt which is a fixed liability, within § 63a, subd. 1, but that the decree is merely an admeasurement by the court of the material obligation of support, which obligation is thereby made a specific duty, the court having authority to provide in the decree for a modification of its terms if it chooses, and having power to compel obedience to its terms by other methods than those ordinarily resorted to to enforce a judgment.

And in *Re Nowell*, 99 Fed. 931, Lowell, District Judge, holds that in Massachusetts, where the decree for alimony is always open to modification on any change in the situation of the husband or wife, and where notice to the hus-

Carolina, and which was formerly the property of Mrs. Emma Cobb, deceased; and whereas, in consideration of the said quitclaim and the said deed, the said George W. Cobb covenanted on his part as follows: To rent the bank building now occupied by Guirkin & Company as bankers, situated in the town of Elizabeth City, North Carolina, and to pay a monthly rental for the same of \$12.50, payable monthly to Mrs. M. C. Cobb, who is authorized to receive and receipt for the same for the term of the natural life of the said Mrs. M. C. Cobb, to keep the said bank building in reasonable repair, subject to natural wear and tear, to pay the taxes and insurance on the said building and land, the said building to be insured in the sum of not less than \$500, and shall also pay to the said Mrs. M. C. Cobb during her natural life the sum of \$25.00 per month at the end

of each month, and shall pay off and satisfy the judgment obtained in favor of one Wheeler, and assigned to George W. Cobb, against the aforesaid Kenneth R. Cobb, deceased, and duly of record in the proper clerk's office in Pasquotank county: Now, if the said George W. Cobb shall well and truly perform each and every the covenants herein named, and in the manner named, this obligation to be null and void; otherwise, to be in full force and virtue.

G. W. Cobb. [Seal.]

M. B. Culpepper. [Seal.]

Witness: J. P. Overman.

Should Geo. W. Cobb die prior to Mrs. M. C. Cobb, in that event the rent of the bank building shall cease upon the death of said Cobb.

The referee, in his report, certifies the fol-

lowing: band is necessary where the wife seeks to collect arrears by legal process, and where the husband, may, without modification of the original decree, move that the amount to be collected be reduced because of a change in the circumstances of either party, and where the husband's executors may have the arrears due at the husband's death modified on motion, a claim for arrears due at the time of the husband's bankruptcy is not a fixed liability absolutely owing at the time of filing the petition, and that in consequence the claim therefor will not be released by a discharge in bankruptcy, and the wife will not be enjoined from prosecuting proper proceedings in a state court to collect the same. Justice Lowell also holds that a claim for future alimony is not a fixed liability absolutely owing, but is contingent on many circumstances, such as the life of the husband and wife, or a modification of the decree, and that such contingent claim would be impossible of valuation, even if proof of contingent liability were permitted by the act.

And in *Re Smith*, 3 Am. Bankr. Rep. 67, the referee also holds that liability for future alimony under a decree of separation is not a fixed liability evidenced by a judgment within § 63a, subd. 1, so as to be capable of liquidation under § 63b, as, under the New York Code, § 1771, the court has power at any time to annul, vary, or modify its former directions. He also holds that the same is true as to alimony which has accrued since the adjudication in bankruptcy and before the time the attempt to collect it is made.

And in *Re Lawrie*, 2 N. B. N. Rep. 77, the referee holds that a judgment for alimony is not a final division or distribution of the husband's estate, but under the Wisconsin statute is a judgment for alimony "out of" the husband's estate for the wife's support and maintenance, and is subject to revision and alteration from time to time, and therefore is not a fixed liability. Another reason given by the referee for holding that a judgment is not provable is that the bankrupt would by a contrary holding be allowed to place his wife on a par with other creditors, and thus enable her to participate in the distribution of the estate, a thing not allowed by law.

And *Sargent v. Sargent*, 3 N. B. N. Rep. 516, decided in the Ohio common pleas, holds that a decree for alimony in the ordinary form, requiring the husband to pay a specified amount monthly as alimony until a designated amount should be paid, is subject to modification by the court at any time before it is satisfied on any ground subsequently arising that requires or justifies such modification, and that in consequence

it is not provable as a fixed liability, and is not discharged by a judgment. But the court states that where the decree is of a kind or form which makes it absolute, as where it is an adoption by the court of an agreement between the parties, it is not the judgment of the court based on evidence, but simply an agreement of the parties carried into the decree, and cannot be modified by the court, and is accordingly a fixed liability.

And in *People ex rel. Buckel v. Grell*, 65 N. Y. Supp. 522, the court held that a decree for alimony is not a debt "founded on contract" within the meaning of the bankruptcy act, as there was a continual duty resting on the husband, arising out of the marital relation, to support his wife during her life, and therefore a decree for alimony was not affected by a discharge in bankruptcy. The court in this case did not discuss the question as to the provability of the decree as a fixed liability under § 63a, subd. 1.

Counsel fees.

Counsel fees *pendente lite* in a divorce suit are a part of the law's means to measure alimony, and an incident to a proper measure in money of the husband's duty, and therefore are not provable in bankruptcy, nor released by the discharge. *Re Smith*, 3 Am. Bankr. Rep. 67.

II. Written instruments.

a. In general.

In *Re Chambers*, 2 N. B. N. Rep. 864, the referee says that a "fixed liability" is a liability which is settled and determined, as opposed to an unsettled, undetermined, and uncertain liability, and that "absolutely owing" would mean unconditionally, wholly owing, as opposed to a liability which depends upon the fulfillment of some condition, or the doing of some act, or happening of some event, before it attaches.

In *Re McCauley*, 2 N. B. N. Rep. 1085, the referee holds that an open account due from the bankrupt is a fixed liability absolutely owing at the time of filing the petition, within § 63a, subd. 1.

An agreement by the holder, as trustee, of the naked legal title to land owned by a bankrupt corporation to mortgage such land as security for the debt of a third person does not constitute a fixed liability against the bankrupt, as such trustee has no authority to bind the corporation as an accommodation surety by the mortgage of its property. *Re Columbia Real Estate Co.* 8 N. B. N. Rep. 157.

Where a mortgage provides for the payment

lowing facts in connection with the debt: That G. W. Cobb, the bankrupt, failed in October, 1898; that since the 1st of October, 1899, nothing has been paid on the said bond; that M. B. Culpepper, the surety on the bond, is insolvent; that the contract is for value; and that there is due on the bond \$518.75, being arrearages from the time of discontinuance of payment to February 1, 1900, less \$85.25, paid on account of rent. The referee further found that the age of Mrs. Cobb, the appellant, was fifty years, and that of G. W. Cobb fifty-six years; that Mrs. Cobb's expectancy was twenty and nine tenths years and G. W. Cobb's expectancy was sixteen and seven tenths years; and that, pursuant to § 1352 of the Code of North Carolina, Mrs. Cobb was entitled to prove her claim for \$2,780.23, being the amount allowed as the value of her contract under the

agreement to pay her \$25 per month during her lifetime, and the sum of \$1,200 for rent of the building during the lifetime of G. W. Cobb,—making a total sum of \$3,980.23,—which two sums were allowed by the referee, together with the arrearages of \$518.75, due as aforesaid on the bond, aggregating \$4,300.98. The learned judge of the lower court excluded the claim as an entirety, holding that under the present bankruptcy act (§ 63a) a liability only existed for the amount of arrearages due on the bond at the time of the filing of the petition in bankruptcy, and that no claim could be asserted, either for the instalments falling due after the filing of the petition to the date of the referee's report, or for any commuted value of the payments thereafter to become due thereunder, such claims not being debts ab-

of specified attorneys' fees if the holder of the mortgage elects or it should become necessary to foreclose by suit or proceedings in court, and the mortgagor becomes bankrupt, and the creditor proves his claim as a secured debt, and the mortgaged property is sold by the trustee in bankruptcy at private sale under order of the court out of the proceeds of which the debt is paid, the mortgages cannot prove and recover the attorneys' fee, as the foreclosure on which the liability to pay the same depended did not take place. *Re Roche*, 42 C. C. A. 115, 101 Fed. 956

b. Bonds.

COBB V. OVERMANN holds that the liability of the principal obligor to the obligee on a penal bond in a certain amount conditioned for the payment of specified monthly rentals and annuities during the lifetime of the obligee is a fixed liability absolutely owing, as the penalty of the bond with the instalments thereon became absolutely owing at the time of its execution, and future instalments to become due thereon after the filing of the petition are covered by the provision "whether then payable or not." But where the value of such demand as ascertained from the life tables exceeds the penalty of the bond, only the debt for the penalty is provable.

But *Goding v. Rosenthal* (Mass.) 61 N. E. 222, holds that the liability of the principal to reimburse the surety, although evidenced by an instrument in writing and in one sense a fixed liability, is contingent upon the happening of a breach of the bond and a payment by the surety, and does not constitute a provable debt against the principal where no payment by the surety or breach of the bond occurs until several months after the filing of the petition, as merely contingent claims are not provable.

The liability of a defendant in replevin on a bond with sureties, given by him for the purpose of reclaiming the goods replevied, is so contingent that it is not a provable debt under the present bankruptcy act, and his discharge in bankruptcy pending the replevin suit does not, therefore, release him from such liability. *Clemmons v. Brinn*, 72 N. Y. Supp. 1066.

c. Notes.

The liability of the bankrupt as indorser of a note which is not due at the time of the filing of the petition in bankruptcy is not a fixed liability absolutely owing, within § 63a, subd. 1, of the bankruptcy act, although it is held to be a provable debt under other provisions of the act.

54 L. R. A.

Thus, in *Re Gerson*, 47 C. C. A. 49, 107 Fed. 897, affirming 105 Fed. 891, the circuit court of appeals of the third circuit holds that the liability of a bankrupt indorser of commercial paper, whose liability did not become absolute until after the filing of the petition in bankruptcy, is provable as an "express contract, under § 63a, subd. 4." The court states that the contract created by such an indorsement is not governed by subd. 1, relating to fixed liability, but says that instruments like surety bonds under which the liability is contingent on future defaults and where the amount of the liability is wholly uncertain, depending on the nature of the default, are fairly referable to such subd. 1. The court also states that such subd. 1 does not qualify, and is not to be carried down and read into, subd. 4, but that they are distinct and independent clauses. In the court below (105 Fed. 891) the decision was to the same effect, that the claim was not provable as a fixed liability under subd. 1, but that, even before demand and notice of default, there was a contingent liability on the part of the indorser which would be fairly within the words "demand or claim" as used in § 1, defining "debt," and could be proved under § 63a, subd. 4, after the liability became absolute.

And *Re Schaefer*, 104 Fed. 973, holds that a note to a third person payable to the bankrupt and indorsed by him, which does not appear to have been given for accommodation, and which had not matured at the filing of the petition in bankruptcy, but had matured before the adjudication, is not a provable debt, under § 63a, subd. 1, the court stating that such clause made no provision for liabilities that were contingent only, and that an indorser's liability before the maturity of the note and the taking of proper steps to charge him with notice of nonpayment was contingent only. At a later date, as shown by a note at the close of the opinion, the previous order was remanded, and the referee directed to allow the claim, nothing being said as to the reason for the change; but from the decision of the same judge in *Re Gerson*, 105 Fed. 891, *supra*, it appears that the reason was that he considered the claim to be provable as an "express contract" under subd. 4, still holding that it was not a fixed liability provable under subd. 1.

And in *Re Marks*, 6 Am. Bankr. Rep. 641, the referee held that the liability of the bankrupt firm as indorsers on notes discounted for them by a bank, and which became due after the filing of the petition in bankruptcy, continued contingent, notwithstanding the execution of an agreement in the firm name a few days before the bankruptcy and after the execution by the

olutely owing at the time of the filing of the petition in bankruptcy.

Section 63a (1) of the bankruptcy act is as follows: "A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest." [30 Stat. at L. 563, chap. 541.]

The present bankruptcy act, unlike the one of 1841, does not provide specifically for the payment of annuities, or, like the act of 1867, in terms for the payment of contingent debts and liabilities generally contracted by the bankrupt; and hence the question to be determined is whether the language above quoted is sufficiently broad to include a

liability of the character here presented. The debt asserted by the appellant was for the penalty of the bond, \$3,000, claiming the same to be due, and that no part thereof had been paid. The statute of North Carolina (Code 1883, vol. 1, § 1352) provides a method for computing the value of an expectancy, and under such statute the referee correctly calculated the value of future instalments to become due under said penal bond. The section of the bankruptcy act in question seems sufficiently broad to cover the claim. The debts referred to, which may be proved, are "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition, whether then payable or not." We have here an instrument in writing creating a fixed liability, the maximum of which, so far as the right to recover on the

firm of an assignment for creditors by which the firm assumed liability as makers of such notes, which agreement was delivered to one of the directors of the bank, but was not signed or assented to by it; and also held that their liability as indorsers was not provable as a fixed liability absolutely owing at the time of the bankruptcy, the expression "absolutely owing" having apparently been inserted solely to exclude contingent claims. He also held in the first part of the opinion that the claim was not provable under subd. 4, but in the latter part of the opinion states that in deference to the decision of the circuit court of appeals in *Re Gerson*, 47 C. C. A. 49, 107 Fed. 897, *supra*, which was announced after the first part of the opinion was written, he allowed the claim of the bank to be proved after deducting all payments by the makers up to the time of making the allowance, refusing the claim of the bank that no deductions should be made unless they so reduced the amount due on any particular note that it would be less than the dividend allowed.

And in *Re Chambers*, 2 N. B. N. Rep. 864, the referee held that a claim by a bank against a bankrupt on a note indorsed by him, which the bank had discounted for him, and which was not due at the time of filing the petition, but which had become due and had been protested before the filing of proof of claim, does not constitute a fixed liability absolutely owing, as the liability of an indorser before maturity is contingent on the maker not paying the note on demand and notice of nonpayment being given at maturity. The referee also upholds his decision under the provision of the bankruptcy act of 1867, relating to indorsers, which provides that if the bankrupt shall be bound as indorser upon any note, and his liability shall not have become "absolute" until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become "fixed" and before the final dividend shall have been declared, stating that the use of the terms "absolute" and "fixed" in such section in connection with the liability of an indorser conclusively showed that the framers of that act did not regard the liability of an indorser before the maturity of the note as "absolute" and "fixed," and that the language of such act must have been in the minds of the framers of the present act, who undoubtedly gave to the terms "fixed" and "absolutely owing" the same meaning which had been attached to them in the previous statute.

In *Re Dunnigan*, 2 N. B. N. Rep. 755, the referee holds that where one of three joint makers of a note was adjudicated a bankrupt before the 64 L. R. A.

maturity of the note, and one of the other makers, who is conceded to be an accommodation party to the note, paid it in full at its maturity, the latter cannot prove against the bankrupt a claim for his proportionate share of the amount so paid as a fixed liability absolutely owing, as at the time of the adjudication the claim was but a contingent liability or mere possibility of a debt depending upon his being compelled to pay and actually paying the note in whole or in part.

And *Lamolle County Nat. Bank v. Stevens*, 107 Fed. 245, holds that a note executed by a bankrupt firm for a firm debt does not become a separate debt of one of the partners as between him and the firm because he was an indorser of the note and his liability as indorser has not been fixed, and that even if such liability had been fixed it would still be apparently a firm debt.

The liability of the bankrupt as guarantor of the payment at maturity, or any time thereafter, of a note given by the purchaser of a wagon sold by the bankrupt as agent for the claimant, which note was not due at the time of filing the petition, is not a fixed liability within such § 63a, subd. 1. *Re McCauley*, 2 N. B. N. Rep. 1085.

Smith v. Wheeler, 55 App. Div. 170, 66 N. Y. Supp. 780, holds that the bankrupt maker of a note to the payee who is compelled to pay it after the bankruptcy may prove the same under § 574, nothing being said as to a fixed liability within § 63a, subd. 1.

Notes executed by the bankrupt, and not due at the filing of the petition, are a fixed liability within such subd. 1. *Re McCauley*, 2 N. B. N. Rep. 1085.

As to notes given for rent which had not accrued at the time of the filing of the petition, see *Atkins v. Wilcox*, 53 L. R. A. 118, 44 C. C. A. 626, 105 Fed. 595, *infra*, II. d.

d. Leases.

According to almost all the decisions rendered, only a few cases in Pennsylvania holding the contrary, rent which had not accrued at the time of the adjudication in bankruptcy is not provable as a fixed liability or otherwise.

Thus, in *Re Collignon*, 4 Am. Bankr. Rep. 250, the referee said that as to a claim for rent to accrue subsequent to the bankruptcy the law has been well settled, and seems to be, that instalments of rent accruing after the time of the bankruptcy are neither provable debts against the estate nor affected by the discharge.

And in *Reed v. Phinney*, 2 N. B. N. Rep. 1000, the referee said that from the decisions "a

particular obligation, is \$3,000. The language, "absolutely owing at the time of the filing of the petition," is clear. The penalty of the bond, with the instalments to become due thereon, became absolutely owing at the time of the execution of the instrument, and the language of the act, "whether then payable or not," clearly covers the future instalments to become due thereunder.

In *Riggin v. Magwire*, 15 Wall. 549, 552, 21 L. ed. 232, Mr. Justice Bradley, in passing upon the question of a contingent liability under the bankruptcy act of 1841, said: "But the better opinion is that, as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the act of 1841. . . .

claims for rent it seemed to be the settled rule that rent which had accrued at the date of filing the petition might be proved as a debt against the estate, and held that only those instalments which had become due and payable before the bankruptcy were provable, no matter how large a portion of the instalment period had passed at that time.

And in *Re Shilladay*, 1 N. B. N. 475, 80 Pittab. L. J. N. S. 54, the referee allowed claims for rent due and owing at the time of filing the petition and adjudication in bankruptcy giving a priority to such claims, but disallowed a claim for instalments falling due after the adjudication, on the ground that it was not a provable claim against the estate.

And *Bray v. Cobb*, 100 Fed. 270, holds that a landlord is not entitled to prove a claim for rent against a bankrupt after such bankrupt ceases to use the building, as the contractual relations are terminated by the bankruptcy, and the court says that if the trustee elects to reject the lease, and surrenders the premises, neither the trustee nor the bankrupt's estate is liable for rent after the election of the trustee and the property ceases to be used for the administration of the estate. This decision was reversed by the circuit court of appeals in *COBB V. OVERMAN* (*supra*, II. b), on the ground that the claim for rent was absolutely owing under an agreement therefor contained in a penal bond, nothing being said therein as to liability on the lease itself.

In *Re Arnstein*, 101 Fed. 706, the referee, whose decision was affirmed by the district judge, holds that under a lease having several years to run at the time of the filing of the petition only the rent which had accrued before such filing constitutes a fixed liability then absolutely owing, as future rent, as such, is an incident to, and grows out of the use and occupancy of, the premises, and is the consideration therefor, and cannot therefore be a fixed liability then absolutely owing, or a "debt" of any kind, as the word is used in the bankruptcy statute, but is only an unmatured obligation to pay in the future a consideration for future enjoyment and occupancy, and therefore cannot be a present debt, demand, or claim at all within such provision.

And *Re Mahler*, 105 Fed. 428, Affirming 2 N. B. N. Rep. 70, holds that rent to accrue monthly under a lease after the adjudication in bankruptcy of the tenant on his own petition is not provable against his estate as a fixed liability absolutely owing at the time of the filing of the petition as before the day on which rent is covenanted to be paid it is in no sense a debt, being neither *debitum* nor *solvendum*, as it never be-

In 1843 Martin Thomas was still living, and there was no certainty that his wife would ever survive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated or reduced to present or probable value? If an action at law had been brought on the covenant at that time, nominal damages at most, if any damages at all, could have been recovered. It did not come within the category of annuities and debts payable in the future, which are absolute, existing claims. If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principles of life annuities."

It will be observed that the learned justice treats annuities and debts payable in the future as absolute, existing claims, and fur-

comes payable if the tenant is evicted before that day, or if he quits or assigns his term with the landlord's consent. The court also holds that it is not an unliquidated claim capable of liquidation and valuation which may be proved and allowed after its amount has been ascertained, as the present bankruptcy act does not expressly authorize the proof of contingent claims as the preceding bankruptcy acts did, and such a claim would not be provable even under those acts, as its very existence depends upon a contingency. The court expressly states in this case that he does not decide whether the bankrupt will remain liable under his covenants notwithstanding the discharge, but the referee stated that his liability under such covenants was not released.

And *Re Jefferson*, 93 Fed. 948, holds that a claim for rent under a written lease providing for payment in monthly instalments accruing after adjudication in bankruptcy of the tenant is not a provable debt so as to entitle the landlord to a priority of payment out of the estate under a state statute giving the landlord a lien on the tenant's property on the premises to secure the payment of one year's rent due or to become due, as the lease and the relation of landlord and tenant were absolutely terminated by the adjudication, as well as all other contracts of the bankrupt and his right to occupy the premises as well; and that, in consequence, the future rent is not a fixed liability, and that no rent accrued after such adjudication. The district judge states that in reaching his conclusion he has paid little attention to a forfeiture clause in the lease, as he should have reached the same conclusion if there had been no such clause, and if the Kentucky statute had not also contained a similar provision. In *Re Ellis*, 98 Fed. 967, *infra*, Lowell, J., criticizes the holding, in this case, that the lease is absolutely terminated by the adjudication, and says that, notwithstanding the refusal of the trustee in bankruptcy to take the lease, the bankrupt would remain tenant as before, citing as illustration a lease for several hundred years on which the rent had all been paid in advance except one dollar a year, and which it would accordingly be to the trustee's interest to retain. In *Atkins v. Wilcox*, 53 L. R. A. 118, 44 C. C. A. 626, 105 Fed. 595, *infra*, the circuit court of appeals stated that while Justice Lowell's example was in form a leasehold it was in fact the purchase of a freehold for a present consideration paid at the beginning of the term, the subsequent burden being so inconsiderable that it might well be disregarded.

And in *Re Frankel*, 2 N. B. N. Rep. 840, the referee, whose opinion is affirmed by the district

ther holds that the value of that class of debts can be calculated upon the principle of life annuities.

In *Wolf v. Stie*, 99 U. S. 1, 25 L. ed. 309, Mr. Chief Justice Waite, in discussing the question of the liability arising under a replevin bond in an attachment proceeding to answer the judgment of the court for the value of the goods replevied, and whether such liability constituted a contingent debt provable in bankruptcy, under the act of 1867, said, at pages 7 and 8, 99 U. S., and page 113, 25 L. ed.: "The debt thus created was provable under the bankrupt act. It was payable upon the happening of an event which might never occur, and was, therefore, contingent. The bond was in full force when the petition in bankruptcy was filed. The sum to be paid was certain in amount. Whether the event would ever occur which would require the payment is uncertain; but, if it did occur, the amount to be paid was fixed."

We have not been referred to any author-

ity bearing directly on this subject under the present bankruptcy act, and have found none ourselves, though the case of *Re Lipke*, 3 Am. Bankr. Rep. 569, 98 Fed. 970, incidentally touches thereon, but the conclusions we have reached herein are amply supported by reason and authority. *Scovill v. Thayer*, 105 U. S. 143, 156, 26 L. ed. 968, 974; *Glenn v. Abell*, 39 Fed. 10; *Re Alexander*, 1 Low, Dec. 470, Fed. Cas. No. 161; *Re King*, 1 N. Y. Legal Obs. 276, Fed. Cas. No. 7,785; *Re Mcad*, 19 Nat. Bankr. Reg. 81, Fed. Cas. No. 9,365; *Sigsby v. Willis*, 3 Ben. 371, Fed. Cas. No. 12,849; *Hare & W. notes to Aurioi v. Mills*, 1 Smith, Lead. Cas. pt. 2, pp. 1245-1251. The case of *Glenn v. Abell*, 39 Fed. 10, is a decision by Judge Simonton, of this circuit, involving the liability of a subscriber to corporate stock for his unpaid subscription, and in which such debt was held to be provable under the bankruptcy act of 1867. The learned judge said: "The liability to pay was fixed; the time—the precise moment when to pay—may have been

judge, holds that rent to accrue in the future under a lease for a term of years having more than two years to run at the time of the adjudication in bankruptcy does not constitute a fixed liability absolutely owing, as, although the contractual obligations under the lease are not absolved by the adjudication as held in *Re Jefferson*, 93 Fed. 948, *supra*, but only the payment released by the discharge, the claim, in order to be provable, must have accrued at the time of filing the petition, and rent to accrue in the future, if a debt, is one depending on contingencies which cannot be valued; and that there is no provision under the present bankruptcy act for contingent claims of any kind.

And *Atkins v. Wilcox*, 53 L. R. A. 118, 44 C. C. A. 626, 105 Fed. 595, holds that notes for unaccrued rent are not provable as a fixed liability absolutely owing at the filing of the petition, where the lease provides that if the premises shall be destroyed by fire, or if the lessee shall be deprived of their use by some unforeseen event not due to his fault or negligence, he shall be entitled to credit for the unexpired portion of the term, and that a corresponding portion of the rent notes shall be canceled, and that the lessor may cancel the lease on violation of any of its terms by the lessee without putting the latter in default, and that the lessee shall not sublet the premises without the lessor's consent.

And in *Re Collignon*, 4 Am. Bankr. Rep. 250, the referee holds that where the lease authorizes the landlord to relet the premises as the tenant's agent on their becoming vacant for any cause, and hold the tenant for any balance remaining after applying the avails of the new lease, and the tenant becomes bankrupt before the end of the term, and the landlord subsequently relets the premises for a less amount, she cannot prove against the estate for the deficiency, under § 63 of the bankruptcy act, on the ground that her debt has thereby become liquidated, as the line of cleavage is established at the time of the filing of the petition, or at the slightly later time of the adjudication, at which time the rights of creditors become fixed. He also states that the deficiency is a new debt for which the landlord can doubtless hold the lessee, but which should not be recognized to the detriment of other creditors.

And where a lease for a term of years at a specified yearly rental provides for payment in "equal monthly instalments," and receivers for 54 L. R. A.

the lessee are appointed by the state court who take possession of the premises on December 19, none of the December rent having been paid, and retain such possession paying the rent in full for the time they are in such possession until January 21, when receivers in bankruptcy take possession and hold until February 21, paying the rent in full for such time, the landlord is only entitled to prove for the rent from December 1 to December 19, and not for the rent from February 21 to the end of the month. *Re Frankel*, 2 N. B. N. Rep. 840.

And where the bankrupt is the lessee of premises under a lease authorizing the lessors to re-enter on the lessee being declared bankrupt, and by which the lessee covenants in case of the termination of the lease in that manner to "Indemnify the lessors . . . against all loss of rent . . . which they may incur by reason of such termination during the residue of" the term, and the lessors re-enter on the occurring of the bankruptcy, they cannot prove a claim against the estate for the difference between the present letting value for the remainder of the term and the rent fixed by the lease, as the covenant of indemnity would only be broken after the actual loss of rent, and then only to the extent that the rent had actually been lost. *Re Ellis*, 98 Fed. 967. The district judge also stated that at the time of the adjudication the claim was contingent upon the termination of the lease by the lessor for breach of the covenant and a subsequent loss of rent by the lessor, and that such claim was not provable as a fixed debt under § 63a, subd. 1, of any other provision of the present bankruptcy act.

And in *Re Cronson*, 1 N. B. N. 474, the lease, which was for five years, provided for a specified yearly rental payable monthly on the first day of each month, and provided that on failure to make any payments when due the rent for the entire term should become due. The May rent was not paid, and on May 19th a petition in voluntary bankruptcy was filed and the petitioner adjudicated a bankrupt. On June 6th a receiver was appointed, who retained the premises till July 3d. The claim was made that the rent for the entire future term was provable, and was also a preferred claim under the Pennsylvania statute. The referee, however, only allowed the rent from May 1st to June 6th to be proved, which was allowed as a preferred claim, and also allowed the regular rental for the month the receiver had possession, stating

uncertain. The subscription was an absolute promise, *debitum in presenti*; a part, possibly, *solvendum in futuro*."

We are confirmed in the conclusions reached by reference to other sections of the present bankruptcy act. Section 16 provides that, "the liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

Paragraph i of § 57 provides that, "whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor."

It would thus appear that to sustain appellee's contention in this cause would bring about this condition: that the appellant would be denied the right to assert a claim due herself, though the insolvent surety would be expressly authorized by law to

make proof of a claim for the amount due her in her name for his own benefit. Such an interpretation would not be in consonance with the reason and spirit of the law, and bring about a result that could never have been contemplated by its authors. The bond in this case is a fixed obligation, its amount definite and certain, and the same was in full force and effect at the date of the filing of the petition in bankruptcy, though the liability thereunder is payable in the future, and in stated sums. The demand is clearly one the value of which can be ascertained, and hence provable under the bankruptcy act; and, the value thereof, as thus fixed, being in excess of the penalty thereof, the debt for penalty only is provable, and should have been allowed by the referee, instead of the sum reported by him.

The decision of the lower court will be reversed, and the cause remanded thereto to be proceeded with in accordance with the views herein expressed.

Reversed.

that the rent so fixed by the lease was reasonable.

Where the lease contains a covenant by the lessee not to assign the same voluntarily or involuntarily, by judicial proceedings or otherwise, without the lessor's consent under "penalty" of instant forfeiture of the lease and of a specified sum as "additional rent," and the lessee becomes bankrupt, the amount so specified is not provable, as it is for a penalty, and not for liquidated damages, and was not due or owing at the time of the filing of the petition. *Re Rhoads*, 2 N. B. N. Rep. 179. The referee also states that the remedies of the landlord on such covenant are not affected by the bankruptcy proceedings.

But in *Re Gerson*, 2 Am. Bankr. Rep. 170, 8 Pa. Dist. R. 277, the bankrupt held under lessees who were to pay \$4,200 per annum, payable \$350 monthly in advance. At the time of the filing of the petition in bankruptcy on November 25th the November rent was not paid. The trustee occupied the premises during December, allowing the full rent fixed by the lease therefor, and the adjudication was made on January 8d, following. Distress for the November rent was made November 28th, and for the December rent on December 2d, and it was ordered that the sale of the property distrained should be made by the receiver in bankruptcy subject to the landlord's lien whose claim was to be proved as a preferred one. The Pennsylvania statute gives a lien on the property on the premises for one year's rent, and provides that rent for not more than one year shall be first paid out of the proceeds of an execution sale. The referee stated that there was no dispute as to the amount of the claim for rent, and allowed to the landlord out of the proceeds of the sale \$1,315.68 in addition to the \$350 allowed for the receiver's use and occupation of the premises for the month of December. It is difficult to say just what the referee intended to hold, but it would seem from some of the cases cited that if the rent for an entire year had been claimed, whether accruing before or after the bankruptcy, such claim would have been allowed as a preferred claim.

And in *Re Goldstein*, 2 Am. Bankr. Rep. 603, the lease, which had several years to run, contained an agreement by the lessee that if he should become bankrupt during the term the whole rent for the unexpired term should at

once become due and collectible. The referee held that such provision was not illegal or against public policy, and that, as under the law of Pennsylvania where the bankruptcy occurred the landlord had a lien for a year's rent, he was entitled to priority for a full year's rent, although only a small amount had accrued before the bankruptcy, and said that the whole amount for the unexpired term became due on the date of the adjudication although the priority was limited to one year. In allowing the claim the referee fixed it at one year's rent, saying nothing as to the landlord's rights to the rent for subsequent years.

According to all the cases discussing the question the landlord is entitled to be paid as part of the expenses the rent for the time the receiver or trustee in bankruptcy remains in possession of the premises, and so far as appears the rent has been allowed at the rate fixed by the lease. This, of course, is not proved as a fixed liability within § 63a, subd. 1.

Agreements as to condition of premises at the end of the term.

Where a lease contains a covenant by the lessee to keep the improvements on the premises in good repair and "at the end of the term" surrender the premises in the same condition as when received, and the lessee becomes bankrupt before the end of the term, leaving the premises in bad condition, a claim for the amount necessary to put them in repair is not provable, as it is not absolutely due and owing at the time of the filing of the petition, within § 63a, subd. 1, and therefore cannot be liquidated under § 63b, which refers only to claims coming within § 63a. *Re Frankel*, 2 N. B. N. Rep. 840.

And where by a lease of realty the tenant is permitted to make certain alterations, he agreeing to restore the premises to their former condition at the expiration of the lease, and he becomes bankrupt before such expiration, and the landlord enters and leases the premises to the trustee, in bankruptcy, receiving compensation from the estate for the time they are occupied by the trustee, the claim for failure to restore the premises to their former condition is not provable, as there was no obligation to restore until the expiration of the term fixed by the lease,

and there was therefore no breach of the agreement. *Re Arnstein*, 101 Fed. 706. Nothing is said directly in this case as to the question whether such liability is fixed and absolutely owing at the time of filing the petition, within § 68a, subd. 1.

III. Conclusion.

If the liability is contingent on the happening of some event which has not yet occurred at the time of the bankruptcy, or if the amount

for which the bankrupt is liable is subject to change in any manner, it is not a fixed liability absolutely owing within the provision of the bankruptcy law in question. Thus, a liability of an indorser on a note which is not due at the time of the bankruptcy, or on a decree for alimony which is subject to modification at any time, is not provable, nor is the liability, if there is any, as to which the decisions are in conflict, for rent to accrue after the bankruptcy, although the liability for rent already accrued seems to be unquestioned. J. H. H.

IDAHO SUPREME COURT.

Frank M. POWELL, *Appt.*,

v.

Hester M. SPACKMAN, *Respt.*

(.....Idaho.....)

- *1. A constitutional provision which provides that, "for the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while kept at any almshouse or other asylum at public expense," preserves the voting status of the inmates of a soldiers' home at the time of their entry thereto, and such inmates cannot acquire, by reason of their presence in such soldiers' home, and while kept at public expense, the right to vote in the county and precinct in which such institution is located.
2. Where the language of a constitutional provision is plain and free from ambiguity, the ordinary signification of the words employed, as used in common parlance, must be considered, and the intent of the provision gathered from the words themselves, giving to them their usual meaning and signification.

(*Sullivan, J., dissents.*)

(June 6, 1901.)

A PPEAL by contestant from a judgment of the District Court for Ada County in favor of defendant in a proceeding to contest defendant's claimed election to the office of county superintendent of public instruction. *Reversed.*

The facts are stated in the opinions.

Messrs. Henry Z. Johnson, John J. Blake, and Hawley & Puckett, for appellant.

Inmates of the soldiers' home were not entitled to vote in the precinct where the home was located.

Silvey v. Lindsay, 107 N. Y. 55, 13 N. E. 444; *Laurence v. Leidigh*, 58 Kan. 594, 50 Pac. 600; *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 838; *Registration in Erie*, 8 Pa. Dist. R. 14.

*Headnotes by QUARLES, Ch. J.

NOTE.—As to residence of elector in soldiers' home. see *Wolcott v. Holcomb* (Mich.) 23 L. R. A. 215, and *note*.

As to residence for voting purposes of student in theological seminary who has renounced all other homes, see *Re Barry* (N. Y.) 52 L. R. A. 881.

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The facts to establish legal residence for voting purposes by one while kept at any home or asylum at the public expense must be acts wholly independent and outside of his presence in the institution, and should be very clear and convincing.

Re Goodman, 146 N. Y. 284, 40 N. E. 769; *Re Garvey*, 147 N. Y. 117, 41 N. E. 439.

Messrs. Wyman & Wyman, for respondent:

The general common-law rule disqualifies those who are indigent or under the domination of others.

1 Bl. Com. § 171, subsec. 1.

No one becomes a voter merely "by reason of his presence or absence" at a particular place, independent of any such constitutional provision.

People ex rel. Budd v. Holden, 28 Cal. 124; *Devlin v. Anderson*, 38 Cal. 92; *Putnam v. Johnson*, 10 Mass. 488; *Biddle v. Wing*, Clarke & H. Elec. Cas. 504; 10 Am. & Eng. Enc. Law, p. 604; *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700; *Shaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 434; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216, 5 N. W. 119; *Paine, Elections*, § 69; *Dennis v. State*, 17 Fla. 389; *Opinion of the Justices*, 5 Met. 587.

One does not lose his residence by reason of his absence while in the service of the state, and it is competent for the party to prove his intention in respect to it.

State ex rel. Hannon v. Griezard, 89 N. C. 116.

So no prohibition is necessary, or was intended, by § 5 of our Constitution. It is a question of fact, and the intention is evidence of the fact. Mere actual residence, however prolonged, will not constitute legal residence unless accompanied with the intention of making the place a home.

Paine, Elections, § 47; *McCrary, Elections*, 4th ed. § 97; *Story, Conf. L.* p. 44, § 46, subsecs. 7, 8, 13; *Darragh v. Bird*, 3 Or. 229; 10 Am. & Eng. Enc. Law, 2d ed. pp. 598, 599.

Section 5 of the Constitution, therefore, merely furnishes a rule of evidence by which the prima facie right of inmates of the home to vote in and claim as their legal residence the precinct where the home is situated, "by reason of their presence" there, is taken away, but they must prove their right by other evidence.

Fry's Election Case, 71 Pa. 302, 10 Am. Rep. 608; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216, 5 N. W. 119; *Lankford v. Gebhart*, 130 Mo. 633, 32 S. W. 1127.

All of the acts which are necessary to make a residence or domicile there are affirmatively proved by abandoning the former home without intention to return, and taking up a residence in the home with the intention of permanently residing there.

Story, Conf. L. 6th ed. § 46, p. 44; *Darrah v. Bird*, 3 Or. 229; *Wood v. Fitzgerald*, 3 Or. 568; *People ex rel. Budd v. Holden*, 28 Cal. 124; *Devlin v. Anderson*, 38 Cal. 92; 10 Am. & Eng. Enc. Law, 2d ed. p. 935c; *McCrary, Elections*, 4th ed. § 466a; *Re Green*, 5 Fed. 145.

The Constitution adopted by the state of Idaho in 1890 is taken from the Constitution of California, and the decisions of that court as to what those provisions of the Constitution meant were adopted with those provisions.

Flood v. McClure (Idaho) 32 Pac. 255; *Brown v. Bryan* (Idaho) 51 Pac. 1001; *Sutherland, Stat. Constr.* § 256, p. 337.

The case of *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, sustains our view of the law of this case.

People v. Cady, 143 N. Y. 100, 25 L. R. A. 399, 37 N. E. 673; *Re Goodman*, 146 N. Y. 284, 40 N. E. 769; *Re Garvey*, 147 N. Y. 117, 41 N. E. 439; *Re Batterman*, 14 Misc. 213, 35 N. Y. Supp. 593; *Re Griffiths*, 16 Misc. 128, 38 N. Y. Supp. 953; *People ex rel. McShane v. Hagen*, 48 App. Div. 203, 62 N. Y. Supp. 816.

This question was again determined in our favor by the supreme court of California in the case of *Stewart v. Kyser*, 105 Cal. 459, 39 Pac. 19.

Quarles, Ch. J., delivered the opinion of the court:

This action was commenced by the appellant, who is an elector of Ada county, to contest the election of the respondent, Hester M. Spackman, to the office of county superintendent of public instruction of said county, and who received a certificate of election to said office; whereas it is claimed by appellant that Miss Helen Coston was elected to said office, and should have received certificate of election thereto. A stipulation of facts was filed, and the case decided upon the same by the lower court. It is agreed in the stipulation that 40 inmates of the soldiers' home, situated in Soldiers' Home precinct, in said county, voted for Miss Spackman, including which 40 votes the vote of Miss Spackman was 2,299, and that of Miss Coston 2,290. It is also stipulated that these 40 inmates never resided in said county except in said soldiers' home; the eighth paragraph of the stipulation being in words and figures as follows: "That at least 40 of the said persons above referred to, and whose names are set forth in plaintiff's complaint, will testify that they abandoned their former residences and places of abode with no inten-

tion of returning thereto, and took up their residence in said soldiers' home in said Soldiers' Home precinct, Ada county, Idaho, and thereafter resided and continued to reside therein with the intention of permanently remaining and residing there; and that each of said persons were, at the time of said election, and for six months prior thereto had been, residing at and as inmates of the soldiers' home in said Ada county, state of Idaho; and that at all times during their residence there the said soldiers' home was established under the laws of the state of Idaho, and maintained at the public expense. That all of said persons above referred to were duly and regularly admitted to said soldiers' home under the terms and provisions of the act entitled 'An Act to Establish a Soldiers' Home,' passed at the second and fifth sessions of the legislature of the state of Idaho, and approved March 2, 1893 [Sess. Laws 1893, p. 91], and February 9, 1899 [Sess. Laws 1899, p. 190], respectively, and hereinbefore referred to; and during all the time of their residence in said Ada county they were maintained in the said soldiers' home at the public expense."

Judgment was given in favor of Miss Spackman, the respondent, from which judgment this appeal was taken.

This cause is to be determined upon a construction of article 6 of our Constitution, especially § 5 of said article, which is as follows: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of this state, or of the United States, nor while engaged in the navigation of the waters of this state or of the United States, nor while a student of any institution of learning, nor while kept at any almshouse or other asylum at public expense." Section 2 of said article of the Constitution, as amended, provides that, "except as in this article otherwise provided every male [and female citizen of the United States], twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he offers to vote thirty days next preceding the day of election, if registered as provided by law, is a qualified voter." Section 3 of said article provides that parties who are insane, under guardianship, idiotic, convicted of any of certain crimes, and not restored to citizenship, or who, at the time of the election, are confined in any public prison, etc., shall not vote. Section 4 of said article is as follows: "The legislature may prescribe qualifications, limitations, and conditions for the right of suffrage additional to those prescribed in this article, but shall never annul any of the provisions in this article contained." The election statutes of this state cannot affect the question presented here, as none of the constitutional provisions can be repealed by legislative enactment. It will thus be seen that the qualifications of an elector are prescribed by the Constitution; that the legislature is restricted from annulling any of the qualifica-

tions prescribed, but expressly authorized to prescribe additional "qualifications, limitations, and conditions for the right of suffrage." One of the indispensable elements of the right to vote in this state is residence,—“six months in the state, and thirty days in the county, next preceding the election,”—and so says the Constitution. Can this residence be acquired by a person who is an inmate of an almshouse or of an asylum kept at public expense, while residing in such almshouse or asylum? The answer to this must be found in a construction of the language used in § 5, art. 6, of the Constitution, quoted above. This section must be considered in connection with the other provisions of the Constitution, and the whole must be construed so as to give force and effect to all of the provisions of that instrument, without destroying or nullifying any of them. The meaning and intent of the provision in question, taking the instrument as a whole, must be determined. In doing this we must give to the language used that effect which was most probably intended. We must consider the words used in their ordinary and usual signification.

It will be seen that the specific inquiry here is whether a resident of some county other than Ada county can take up his abode in the soldiers' home, in Soldiers' Home precinct, in Ada county, intending to make that his home permanently, and with the intention of abandoning his former residence, and by continuous presence in said soldiers' home for thirty days (he having been in the state six months prior thereto), acquire the right to vote in said precinct. The stipulation of facts in this case shows that the votes in question were cast by inmates of the soldiers' home, who, "during all the time of their residence in Ada county, . . . were maintained in the said soldiers' home at the public expense." With all due deference to the inmates of said soldiers' home, there can be no question but what it is an "asylum," maintained "at the public expense." Now, in the purview of the constitutional provision under consideration, what does the language used mean: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while kept at any almshouse or other asylum at the public expense?" In interpreting this language we should have no serious trouble, as all the words used are simple, and have a well-defined signification as used in common parlance. If any one word in this section is liable to raise any doubt whatever of the meaning of the provision, or the effect that it was intended that the provision should have, it is the word "deemed," in the phrase "no person shall be deemed to have gained or lost a residence by reason of his presence or absence." etc. The word "deemed" is the past participle of the transitive verb "deem," which is defined by Webster as follows: "To account; to esteem; to think; to judge; to hold in opinion; to regard." And it is defined by the same lexicographer, when used as an in-

transitive verb, as follows: "To be of opinion; to think; to estimate." Giving this word its ordinary signification as generally used, it would read in the provision in question thus: "No person shall be accounted, or no person shall be esteemed, or no person shall be thought to be, or no person shall be judged to be, or no person shall be held in opinion to be, or no person shall be regarded to have gained or lost a residence by reason of his presence or absence at an asylum kept at the public expense, for the purpose of voting. The right of the 40 inmates of the soldiers' home mentioned in the pleadings and stipulation of facts depends, so far as the qualification of residence is concerned, to vote in said Ada county, upon their presence in said soldiers' home. They did reside in other counties. All of their residence in Ada county has consisted of the time spent by them in the soldiers' home; and, if they have resided in Ada county the requisite thirty days required by the Constitution in order to entitle them to vote in the latter county, it must be "by reason of their presence" in the soldiers' home. Now, if the court is prohibited from "accounting" them residents of the county of Ada, for voting purposes, "by reason of their presence" at said home, how can we account them residents of said county? How can we "esteem" them residents of said county? How can we "think" them residents of said county? How can we "judge" them to be residents of said county? How can we "hold in opinion" that they are residents of said county? How can we "regard" them as residents of said county? To do so it must be "by reason of their presence" at the soldiers' home, and while kept at public expense, in plain violation of the Constitution. This cannot be done without violating the Constitution itself. The language used cannot be regarded in any other light than that the framers of the Constitution intended that the inmates of such an institution, whose residence in a county depended upon their "presence" in or at such institution, should not vote in such county; and, further, that by reason of their absence from the county of their residence they should not lose their right to vote in the latter county.

In the case of *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, the court of appeals of New York construed a similar provision. The plaintiff in that case had been an inmate of the soldiers' home at Bath six years, and made oath as follows: "I reside in the town of Bath for the reason that I was admitted an inmate of the New York Soldiers' and Sailors' Home, in this town, by the authorities thereof, in the year 1880, and have remained such inmate from that time to the present, with the intention at all times of making my residence in said institution, so long as I shall be permitted to remain such inmate. . . . In becoming an inmate of said institution, I intended to change my residence from the city of New York to the fifth election district of said town of Bath." The plaintiff there, so far

as intent is concerned, abandoned his residence in the city of New York, and changed it to the town of Bath. Yet the New York court held that his narrative of his intention was only a conclusion from the facts stated. The court said, *inter alia*: "His relations were not with the village, but with the institution, which was situated within its borders. . . . It follows that he has not lost the right to vote in the place of his legal residence, New York, for the provision of the Constitution in question also declares that he shall not lose his residence by reason of such 'presence' in the 'institution.' As to that city, he is to be regarded as temporarily absent, and his residence as a citizen still therein. We have no doubt that the institution in question is within the purview of the constitutional provision (art. 2, § 3) above referred to. It is an asylum supported at the public expense, and its members are within the mischief against which that provision is aimed,—the participation of an unconcerned body of men in the control, through the ballot box, of municipal affairs in whose further conduct they have no interest, and from the mismanagement of which by the officers their ballots might elect they sustain no injury. But the question in each case is still, as it was before the adoption of the Constitution, one of domicile or residence, to be decided upon all the circumstances of the case. The provision (art. 2, § 3) disqualifies no one; confers no right upon anyone. It simply [note the language] eliminates from those circumstances the fact of the presence in the institution named or included within its terms. It settles the law as to the effect of such presence, and as to which there had before been a difference of opinion, and declares that it does not constitute a test of a right to vote, and is not to be so regarded. The person offering to vote must find the requisite qualifications elsewhere." The able and ingenious counsel for respondent argues that the decision in *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, does not support the contention of appellant; that the facts are different; that in that case the plaintiff's abode in the soldiers' and sailors' home was only temporary, transient, and not intended to be permanent; hence the decision there is not applicable here. However strenuous the effort to distinguish between that case and the case at bar may be, it must fail, as there is no distinction, except in theory, between that case and the one at bar. It is true that *Silvey* said that he entered the home at Bath "with the intention" of making it his "residence" so long as he should "be permitted to remain such inmate," while the stipulation here says that the 40 inmates whose votes are questioned entered the home "with the intention of permanently remaining there," and that they had "abandoned their former residences and places of abode with no intention of returning thereto, and took up their residence in said soldiers' home." Yet it is apparent that the plaintiff in the *Silvey Case* and the 40 inmates here each entered the home with the

same intent, to wit, with the intent to reside in said home, and make it their permanent abode, so long as they could do so, or were permitted to do so. As a matter of course, all such institutions have their rules and regulations, and inmates may be discharged for violations of same; and then the continuance of the institution itself is somewhat problematical, depending, as it does, upon popular sentiment,—an element that is always charged with more or less uncertainty. But the New York court expressly says in the *Silvey Case* that the presence of the inmate in the home does not constitute a test of a right to vote, and is not to be so regarded, and that "the person offering to vote must find the requisite qualifications elsewhere." Now, suppose we do, as the New York court in *Silvey v. Lindsay* said must be done, eliminate the presence of these inmates from the soldiers' home, and upon what possible hypothesis can it be held that they are entitled to vote in the precinct in which the home is situated? They came from their former homes, in other counties, to the soldiers' home, and remained in the home until the election at which it is claimed that they voted wrongfully. If they have resided in Ada county the requisite time (thirty days) to entitle them to vote at said election, it is solely by reason of their presence in the home. This presence, as was said in *Silvey v. Lindsay*, and as the constitutional provision under consideration clearly intends, is to be eliminated,—not regarded,—and their qualifications must be sought elsewhere. Now, the constitutional provision under consideration does not prohibit inmates of the home, or other asylums kept at public expense, from changing their places of residence. They may do so. But, for the purpose of voting, they shall not be deemed to have gained or lost a residence by reason of their presence in the institution, while kept at public expense. Now, having lived in other counties of the state, and having come into Ada county to reside at the home, to be there kept at public expense, and residing nowhere else in the county, how can we, for the purpose of voting, regard them as "having gained a residence" in the county by reason of their presence at the home? The Constitution does not disfranchise anyone. It simply declares what persons, by reason of age, citizenship, and residence, may vote. In the provision under consideration no one is disqualified from voting. It is declared, however, in that provision, where the parties therein named shall vote. When it declares that no one, by reason of presence or absence in certain service, or at certain institutions, shall be regarded or deemed to have gained or lost a residence for the "purpose of voting," it is only meant that whoever enters such service or such institution, if he votes while in such service or institution, must do so at the place where he was entitled to vote at the time he entered such service or institution. Any other interpretation of the language of the Constitution would do violence to the words used, and

would palpably defeat the meaning and intent of the provision under consideration. The rule of liberal construction—such as will give effect to the object of a statute or constitutional provision—applies in this state. This rule has been properly adopted. Yet, claiming to apply this rule, an interpretation or construction is asked in this case which does not effect the object sought to be accomplished, but defeats the same. That object, as was said in the *Silvey Case*, was to prevent the mischief resulting from "the participation of an unconcerned body of men in the control, through the ballot box, of municipal affairs in whose further conduct they have no interest, and from the mismanagement of which by the officers their ballots might elect they sustain no injury." The construction that we are asked to give this constitutional provision is not a construction, but destruction. It does not carry out the object of the constitutional provision; it does not give force and effect to it; it destroys the provision by defeating and thwarting its object and intent.

The respondent interprets the decision in *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, cited *supra*, as holding that one can, if he so intends, by mere residence in an institution like the soldiers' home, and while kept at public expense, gain a residence for the purpose of voting, notwithstanding the constitutional provision under consideration; and cites the decision in the following cases as sustaining this interpretation, to wit: *People v. Cady*, 143 N. Y. 100, 25 L. R. A. 399, 37 N. E. 673; *Re Goodman*, 146 N. Y. 284, 40 N. E. 769; *Re Garvey*, 147 N. Y. 117, 41 N. E. 439; *Re Batterman*, 14 Misc. 213, 35 N. Y. Supp. 593; *Re Griffiths*, 16 Misc. 128, 38 N. Y. Supp. 953; *People ex rel. McShane v. Hagen*, 48 App. Div. 203, 62 N. Y. Supp. 816. A study of these decisions is instructive, as well as interesting. In *People v. Cady* the defendant was convicted of illegal registration. The facts were that he had been an inmate of the Tombs prison for about seven years, serving under commitments for sixty days each, for vagrancy, and which he himself procured. He testified that he had made his home at said prison, and intended it as his permanent home. The court held that, for voting purposes, the prison could not be the home of anyone confined there; that it is not a place of residence, and not maintained for that purpose. The court affirmed the judgment of conviction. In the *Goodman Case* one Henry W. Bainton, who was a student at the Union Theological Seminary, in the twenty-fifth election district of the twenty-first assembly district of the city of New York, registered in said district. Goodman moved to strike Bainton's name from the registry list on the ground that he was not a resident of said district. In opposition to the motion, Bainton deposed that he went to the seminary for the purpose of obtaining a residence and domicile, that he had no intention of changing his residence, and that he claimed no residence elsewhere. Under the constitutional provi-

sion of New York, from which the one here under consideration seems to have been copied, the court held that, for voting purposes, Bainton could not lose his residence by removing to the seminary, "nor gain a new residence in the seminary district by his presence in it as a student." The court said in that case, *inter alia*, that "usually—perhaps always—the voting residence remains unchanged until a new residence is actually acquired; but there can be no such acquisition merely by an abode as a student in an institution of learning. Something else beyond that fact, and wholly independent of it, must occur to effect the change. The intention to change is not alone sufficient. It must exist, but must concur with, and be manifested by, resultant acts, which are independent of the presence as a student in the new locality." In the *Garvey Case* the court, in concluding, said: "We have to say in conclusion that, unless the rule laid down in the *Goodman Case* and followed in the case at bar, is rigidly enforced, the constitutional provision now construed will be nullified. It may be urged that the enforcement of this rule will render it well-nigh impossible for a student to establish a residence in a seminary of learning, but the very obvious answer is that the letter and spirit of the Constitution contemplate such a result. The sojourn of the student is assumed to be temporary, and the law preserves to him his former residence, notwithstanding his absence therefrom." So said the court of appeals of New York. The *Cases of Batterman*, 14 Misc. 213, 35 N. Y. Supp. 593, and of *Griffiths*, 16 Misc. 128, 38 N. Y. Supp. 953, are not analogous to the case at bar. The question in those cases was whether a similar provision was retrospective, or prospective only, and the court held that it was prospective only. Those decisions, if rendered by a court of last resort, could have no application to the case at bar. In *People ex rel. McShane v. Hagen* the question arose whether an inmate of a hospital, who performed certain labor there, was "kept at the public expense." The court, *inter alia*, said: "The question then, is, Was the relator 'kept' (that is, 'supported,' *Silvey v. Lindsay*, 107 N. Y. 60, 13 N. E. 446) in the hospital? If so, he neither gained nor lost a residence by reason of his presence there while being so kept or supported. . . . But, if he was simply an inmate of the hospital under a bare license,—that is, with mere permission to use it as an asylum,—then, clearly, he could not gain a residence there while enjoying the maintenance which it afforded him. . . . It was, in part, at least, to prevent such institutions from being utilized for political purposes, that this provision of the Constitution was adopted. That provision would be practically nullified were the courts to favor mere devices like the present, whereby it is sought to turn these penniless and homeless inmates into contract employees and genuine residents. Efforts of a similar character in other directions have been numerous, but they have uniformly failed.

Silvey v. Lindsay, 107 N. Y. 60, 13 N. E. 446; *People v. Cady*, 143 N. Y. 100, 25 L. R. A. 399, 37 N. E. 673; *Re Goodman*, 146 N. Y. 284, 40 N. E. 769; *Re Garvey*, 147 N. Y. 117, 41 N. E. 439." The New York cases lay down with certainty the rule that under this constitutional provision the presence of the inmate of the soldiers' home therein must be eliminated—disregarded—in determining whether he is entitled to vote in the election district or precinct where the home is situated. Eliminating the presence of the 40 inmates of the soldiers' home whose votes are here in question, it is palpable that they were not entitled to vote in the Soldiers' Home precinct in Ada county at the election in November, 1900, for the reason that they had not resided in Ada county the thirty days preceding the election, as is required by § 2, art. 6, of the Constitution.

Michigan has, and had prior to the adoption of our Constitution, the same provision under consideration here, which the supreme court of that state said was copied from the Constitution of New York. See *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837. In that case the Michigan court followed and approved the decision in *Silvey v. Lindsay*. After quoting from Webster to show the meaning of the term "asylum,"—"an institution for the protection or relief of the unfortunate,"—and demonstrating that a soldiers' home, like the one in question here, is an asylum, the Michigan court says: "It follows that one's entry and residence in such an institution partake of the same character as the institution itself, and are likewise eleemosynary in character. One entering them cannot, under the Constitution, gain or lose his residence. Inmates of the home enter it for one purpose only, and the Constitution solemnly and clearly declares that their status as to residence when they enter must control, while they remain there. When Mr. Carpenter entered the home, he was a legal resident of the township of Woodstock. He entered the home upon his own application, solely as a beneficiary, and a resident of that township, to accept a well-bestowed and deserving charity. He did not, by this act, lose his residence there, and his intent is wholly immaterial. To permit his intent to control would result in the practical annulment of this provision of the Constitution. The mischief intended to be avoided is as apparent in this case as in any. The inmates of the home own no property, pay no local taxes, do not work in or for the benefit of the municipality, and have no pecuniary interest in its local affairs. In fact, they have no connection with, and stand in no relation to, the local municipal government. They occupy state property, and are exclusively under the control and management of the state." The court, in *Wolcott v. Holcomb*, clearly suggests the reasons for incorporating this provision in the Constitution, and points out some of the evils that would result from adopting the construction which respondent insists should be

adopted. The court in that case also shows conclusively that the interpretation of the decision in *Silvey v. Lindsay* asked by respondent here is not the correct one, and should not be adopted.

Kansas has the same constitutional provision that is being considered here, and its supreme court has given to it the same construction that the New York court of appeals and the Michigan supreme court gave to the same provision in the cases above cited and quoted from. The Kansas supreme court in *Lawrence v. Leidigh*, 58 Kan. 594, 50 Pac. 600, has construed this identical constitutional provision, and held that under it an inmate of a soldiers' home cannot, by presence in such home, acquire the right to vote in the voting district where the home is situated. The opinion in this case is very instructive, and clearly shows that such a home is an asylum (in the language of the court, "place of retreat or shelter"); that the thirty days' residence next preceding the election in the county where the person offers to vote is not acquired by presence in such an institution; and that the inmates of such institutions are entitled to vote at the place of their residence at the time they leave the same to enter the institution, which residence, for voting purposes, cannot be gained or lost by presence in such institution, whatever the intent of the inmate as to future residence or abandonment of the old residence may be. This case is on all fours with the case at bar. In the stipulation of facts—like the one at bar—it was agreed that "these inmates abandoned their former places of abode with no intention of returning thereto, and took up their residence at the soldiers' home with the intention of permanently remaining there; such of them as had families removing them and their household goods and other personal belongings." We quote from the opinion in the Kansas case, which, so far as the stipulation of facts is concerned, goes to the full extent of the stipulation of facts in this case, and further, too, making even a stronger case for the inmates than the case at bar. The court then discusses and considers the different decisions showing that the New York and Michigan courts took the same view of the proper construction of the provision under consideration as did the Kansas court, saying: "The decisions upon the precise question are few in number. But three have been called to our attention. Those of *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837, and *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, are to the same effect as the one we make. That of *Stewart v. Kyser*, 105 Cal. 450, 39 Pac. 19, is in opposition. It also appears, by records of the United States district court for this district, which have been called to our attention, that in an unreported case, entitled *United States v. Rowdebush*, being an indictment for illegally voting at an election for representative in Congress, a decision similar to that of the supreme court of California was made upon an agreed statement of facts; but we are

constrained by what we regard as the true interpretation of the Constitution, derived out of the settled and authoritative meaning of the words used, to follow the New York and Michigan decisions, and to hold that, notwithstanding the abandonment by the veterans in question of their former places of abode and their settlement at the soldiers' home with the fixed intention of remaining there, they cannot acquire a residence at such home for voting purposes."

In *Stewart v. Kyser*, 105 Cal. 459, 39 Pac. 19, the supreme court of California has given this constitutional provision a different construction, without giving any good reason for so doing. Counsel for respondent argues that we copied or borrowed this provision from California, and are therefore bound by the construction placed upon the same by the supreme court of California, and quotes authority to the effect that when we adopt a statute or constitutional provision from a sister state that we adopt the construction of the same placed thereon by such state. This rule is correct so far as constructions placed upon the statute or constitutional provision before its adoption are concerned, but not as to those subsequently made. The California case cited *supra* was decided some five years after we adopted our Constitution. More than that, it is apparent to one who will give the necessary study and investigation to the subject, that this state, California, Michigan, and Kansas all adopted the constitutional provision under consideration from the state of New York, and for that reason should follow the construction placed upon the same in *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, and other cases decided later by the court of appeals of that state. The decision in *Silvey v. Lindsay* was made in 1887, three years before we adopted the provision under consideration.—an additional reason why we should follow the construction given in the decision in that case. But the rule of construction invoked by counsel for respondent was not obeyed, but violated, by the supreme court of California, in *Stewart v. Kyser*, 105 Cal. 459, 39 Pac. 19. Yet we are asked to follow the decision in the latter case. We should not do so, especially as it would, as held by the New York, Michigan, and Kansas cases cited, "nullify" the constitutional provision under consideration.

A labored effort has been made on behalf of the respondent to distinguish the case at bar from the cases of *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444; *Laurence v. Leidigh*, 58 Kan. 594, 50 Pac. 600, and *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837, by showing that inmates in the New York, Michigan, and Kansas soldiers' homes must, under the provisions of the laws creating them, be indigent, while the inmates of the soldiers' home here need not be, and are not indigents. But this makes no difference whatever, as the framers of the Constitution did not limit the provisions of the section to indigents, but intended it to apply to all inmates of every

asylum—place of shelter, refuge, or retreat—kept at public expense, whether such inmates be indigent or not. The language used must be taken in its natural import, given its usual signification as used in common parlance, and the intent gathered from the language used, it being plain and free from ambiguity, and, thus considered, it is susceptible of no other construction or interpretation, otherwise the framers of the Constitution would not have said "while kept at any almshouse or other asylum at public expense." In some of the decisions reviewed here, courts have spoken of various reasons for adopting the constitutional provision which we are considering; but it is not necessary so to do. The language of the provision being plain, and free from ambiguity, courts, in applying it, have no need to look beyond the provision itself to ascertain the reason for its adoption. It is not the province of the court to set at naught the provisions of a constitution made and adopted by the people,—the source of all power in a republic,—forsooth in the opinion of the court no good reason existed for adopting the provisions. Courts do not make constitutions. They have no right to unmake them, either in whole or in part. It is the duty of the court to apply and give force to all provisions in the Constitution, whether they are, in the opinion of the court, wise or otherwise. See *Cohn v. Kingsley* (Idaho) 38 L. R. A. 74, 49 Pac. 985. The construction asked in this case would largely nullify the provisions of § 5, art. 6. of our Constitution, if it did not unmake that section. This the court has no power to do; and should not, by palpable usurpation of power, overthrow the will of the people as expressed in the Constitution.

We are cited to a number of authorities showing the rule as to residence and qualifications of voters at common law, but they have no application here. Those authorities are somewhat conflicting, and under them the right of the inmates of the soldiers' home, whose votes are here questioned, might be doubted. But, as was said by the court in *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, the constitutional provision which we are considering was adopted to settle the law as to the effect of the presence of the inmates at the home upon their right to vote, "and as to which there had before been a difference of opinion, and declares that it does not constitute a test of a right to vote, and is not to be so regarded." The object of citing these common-law authorities is to induce this court to hold that the provision in question has no force or effect, and that the right to vote of the inmates is to be determined without reference to this provision; its words, meaning, and intent to the contrary, notwithstanding. A careful reading of the decisions in *Darragh v. Bird*, 3 Or. 229, and *Wood v. Fitzgerald*, 3 Or. 568, shows that these cases are not identical with the case at bar. The provisions there construed are somewhat analogous to the one under consideration here, and the Oregon court followed the decision in

People ex rel. Budd v. Holden, 28 Cal. 123. In the latter case the supreme court of California held that a soldier serving in the United States army could, notwithstanding a similar constitutional provision, obtain, for voting purposes, a residence in California while serving in said army, notwithstanding that the court there said "that, in determining the fact of residence, presence or absence in the service of the United States shall not be taken into account; or, in other words, neither presence nor absence in the service of the United States is a condition upon which the fact of residence can be affirmed or denied." Is this not saying, in effect, what the New York court of appeals said in *Silvey v. Lindsay*, that "the presence" of the inmate in the home must be "eliminated" in determining the residence of the inmate for voting purposes? Under the language above quoted from *People v. Holden*, to the effect that presence in the service of the United States cannot be taken into "account" in determining the residence of the one offering to vote, and that the right can neither be "affirmed or denied" upon presence in such service, the right is solely dependent upon the intention of the voter. This conclusion is absurd, and not sustained by authority. It is difficult to see how the California and Oregon courts reached the conclusion announced in these cases. We are told that residence in the county is an essential requisite to vote; that presence in the soldiers' home is not to be considered in determining this residence. This creates a residence without presence in the county,—by mere intention,—a thing which the constitutional provision under consideration was intended to prevent.

Respondent cites Paine, Elections, §§ 47, 69-71, but these sections have no bearing upon the question under consideration. This treatise was written in 1887, and, of course, does not and could not, consider the decisions in *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837, or *Lawrence v. Leidigh*, 58 Kan. 594, 50 Pac. 600; and nothing in this treatise has any special bearing upon the question as to what is the proper construction to give § 5, art. 6, of our Constitution. And what we have said as to Paine, Elections, is also true of McCrary, Elections, 3d ed., published in 1887, and written before the decision was handed down in *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444.

There can be no doubt that the constitutional provision under consideration was borrowed by the framers of our Constitution from New York, and the framers of our Constitution are presumed to have known of the construction placed upon that provision by the New York court of last resort when they adopted it. That construction gives force and effect to the language of the provision, and has due regard for the common meaning of the words employed, while the construction demanded by respondent, and which California has given to it, 54 L. R. A.

emasculates the provision, and leaves it impotent, without life or vitality.

Under the construction here given to § 5, art. 6, of our state Constitution, the conclusion is unavoidable that the 40 inmates of the soldiers' home mentioned in the aforesaid stipulation of facts were not voters in the Soldiers' Home precinct, were not entitled to vote for the respondent for the office of county superintendent of public instruction for Ada county, and that said 40 votes were wrongfully credited to and counted for the respondent. Deducting these 40 votes from the 2,299 votes credited to respondent, leaves her with 2,259,—less than a majority as between her and her competitor, Miss Helen Coston. Miss Coston received 31 legal votes more than the respondent received, and was entitled to a certificate of election, and the judgment demanded in the prayer of plaintiff's complaint should have been made and duly entered in behalf of the plaintiff.

The judgment is reversed, and the cause remanded to the district court, with instructions to render and enter judgment in favor of appellant in conformity to the prayer of his complaint. Cost of appeal awarded to the appellant.

Stockalager, J., concurring:

My associates in this case have each prepared lengthy opinions; the Chief Justice agreeing with the contention of appellant, Justice Sullivan with the contention of respondent. They have discussed the authorities cited at length, and from them drawn their conclusions. I have carefully examined all the authorities cited by counsel for the respective parties to this action. It is admitted that the only question before the court is whether the occupants of the soldiers' home in Soldiers' Home precinct are entitled to vote, and were so entitled to vote at the last general election in said precinct in this, Ada county. Many authorities have been cited by both appellant and respondent, but, after investigating all of them, I only find four bearing directly on the case at bar. Those are the New York, Michigan, and Kansas cases, cited by appellant, and the California case cited by respondent. The three former cases deal with Constitutions almost identical with ours, and all construe them in harmony with appellant's contention; while the California case construes a Constitution using almost, if not exactly, the same language of the three former Constitutions referred to, and construes theirs in harmony with the contention of respondent. It will be observed that the California court cites no authority, and bases its conclusion on its own construction of its Constitution. Two Oregon cases are cited by respondent, but I cannot construe them as contended for by respondent. The New York, Michigan, and Kansas cases are discussed at length by the writers; the New York case being the first, which is cited and approved by the Michigan court. Then follows the Kansas case, decided in 1896, which quotes largely and approvingly the New York and Michigan cases. It is earnestly

and ably urged by counsel for respondent that the New York case does not conflict with the contention of respondent in this case, but he admits the Michigan and Kansas cases do. A careful review of the facts in all three cases, coupled with the construction of their Constitutions, will disclose that the decisions are directly in conflict with the contention of respondent. As I view it, to hold with the contention of respondent would be directly in opposition to these three courts, and holding with California, that practically stands alone in its construction of a Constitution similar to all of them. I concur with the conclusions reached by Chief Justice Quarles.

Sullivan, J., dissenting:

I am unable to concur in the conclusion reached by the majority of the court. Counsel for appellant contend that under the provisions of § 5 of article 6 of the Constitution of this state the inmates of said soldiers' home are prohibited from gaining a residence therein for voting purposes, which section is set forth at length in the opinion of my associates. For an intelligent understanding of this case, reference must be had to the law establishing said soldiers' home (Sess. Laws 1899, p. 190). The 1st section of said act is as follows: "That there shall be established in this state an institution under the name of the Soldiers' Home, which institution shall be a home for honorably discharged Union soldiers, sailors, and marines, who served in the Union armies during the war of the Rebellion, and also for the members of the State National Guard disabled while in the line of duty, and veterans of the Mexican war: provided that before any person is admitted to said home, he shall have been a bona fide resident of this state not less than four months prior to making application for admission thereto." The 2d section makes an appropriation of \$25,000 to carry out the provisions of said act. Section 3 sets apart 25,000 acres of state land for the maintenance of said home. Said act provides for the admission to said home of all honorably discharged Union soldiers, sailors, and marines who served in the Union armies during the war of the Rebellion, and also for the members of the State National Guard disabled while in the line of duty, and veterans of the Mexican war, provided they have been bona fide residents of this state not less than four months prior to making application for admission thereto. Thus each and every of the persons therein named must be admitted to said home on application, whether he be indigent and unable to support himself or not. The 25,000 acres of land set apart by the 3d section of said act for the maintenance of said home and the repayment to the state of the \$25,000 appropriated by the 2d section, if sold at the minimum price authorized by law for its sale, would produce \$250,000. It no doubt will bring sufficient to repay the \$25,000 and interest to the state, and leave a permanent fund for the support of said home of \$225,000 L. R. A.

000, which, if put at 6 per cent interest, will bring \$13,500 per annum for the support of said home, which is much more than is required at the present time, as shown by the last report of the superintendent thereof. The general government also appropriates \$100 per annum for the support of each inmate of said home. It is also shown by the report above mentioned that the total expense or cost for the support of each inmate for the year 1900 was about \$135. I make this statement to show that the continuance of said home is not problematical or uncertain, but to show that said home is as permanent as are the homes of most of the voters in this state; and also to show that said home was not intended as a temporary home or residence for its inmates, but as a permanent one. All who come within the provisions of said act must be admitted to said home on proper application, whether they be indigent or not, and may remain there as long as they live. It is optional with them, and is not left with the board of trustees to turn them out at its will, as it is under the laws of other states governing homes established in those states for "indigent and pauper" soldiers and sailors. For a right decision of this case the character of this home must be kept in mind. The inmates are not there for temporary purposes, subject to the will of others, but may remain there permanently, if they desire to do so, and conduct themselves as gentlemen. It is conceded that the sole question presented for decision in this case involves the right of the inmates of the soldiers' home to gain a residence therein for voting purposes. It is contended by counsel for appellant that such inmates are absolutely prohibited from gaining such residence by the provisions of said § 5, art. 6, Idaho Const. In support of that contention they cite *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444; *Lawrence v. Leidigh*, 58 Kan. 594, 50 Pac. 600; *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837; *Registration in Erie*, 8 Pa. Dist. R. 14. The first three cases cited arose under provisions of the Constitutions of three respective states similar to the provisions of said § 5 of our Constitution, except, however, that the section in those state Constitutions contained the clause, to wit, "nor while confined in any public prison." Section 3 of said article 6 of our Constitution prohibits certain persons from voting, and includes those "confined in prison on conviction of a criminal offense." The laws establishing the soldiers' homes in New York, Michigan, and Kansas are quite different from that establishing the soldiers' home in Idaho. They provide only for the admission of disabled indigent and pauper soldiers and sailors,—those who are dependent upon charity for their support; and they must be discharged or turned out as soon as they become self-supporting. Inmates of those homes were admitted for temporary purposes only, and could not acquire a permanent domicile or residence therein. In *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, the court said: "The intending voter was in

Bath [the town where said home was situated] as a mere inmate of the institution, and for a temporary purpose;" and held that he was not a legal voter, and says: "But the question in each case is still, as it was before the adoption of the Constitution, one of domicile or residence, to be decided upon all the circumstances of the case." Why did that court there say that each case must be decided upon all of the circumstances of the case, if it intended to hold that the one fact that being an inmate of such institution prohibited such inmate from gaining a voting residence? The case of *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837, quotes largely from the opinion in *Silvey v. Lindsay*. The law that established the soldiers' home of Michigan and the rules and regulations adopted for its government show that it was a poor house for pauper soldiers and sailors, and the decision in that case clearly indicates that the court so held. It is stated on page 367, 97 Mich., page 218, 23 L. R. A. and page 839, 56 N. W., as follows: "If the construction [of the provision of the Constitution under consideration] contended for by the relator be correct, it follows that all of the inmates of county almshouses and of prisons and jails are electors, at their option, in the townships and cities where those institutions are located." The matter stated in that quotation from the Michigan case no doubt had a controlling influence in the decision of it. And it is stated at page 364, 97 Mich., page 217, 23 L. R. A., and page 838, 56 N. W., as follows: "The mischief intended to be avoided is as apparent in this case as in any. The inmates of the home own no property, pay no local taxes, do not work in or for the benefit of the municipality, and have no pecuniary interest in its local affairs. In fact, they have no connection with it, and stand in no relation to the local municipal government." Thus it is shown that that case is very different from the one at bar. The inmates of the Idaho Soldiers' Home may, and, so far as the record shows, do, own property, pay local taxes, do work in and for the benefit of the municipality, and have pecuniary interests in its local affairs. The Constitution of Michigan has no prohibited classes as we have in said § 3, art. 6, of our Constitution. That fact, no doubt, had its influence on the mind of the supreme court in the rendition of said opinion, or at least on the minds of the majority of the court, as that opinion was by a divided court (three to two), as Chief Justice Hooker wrote a dissenting opinion, in which Mr. Justice Long concurred. In reply to that statement in the opinion of the majority of said court wherein it is suggested that the inmates of said home own no property, pay no taxes, and do no work for the benefit of the municipality, the chief justice, in his dissenting opinion, very cogently remarks that "it never has been a requisite to electoral rights that the citizen should pay taxes, do work for the benefit of the municipality, or evince interest in municipal affairs; nor does the right depend

upon a wise or even honest exercise of the privilege of the ballot;" that "this proposition is so important a part of the foundation of our institutions that it should not be eliminated or weakened by any unnecessary construction of a Constitution based upon civil liberty and political equality;" and that "the true construction of this section should be just what its language imports,—i. e., that being kept in an almshouse, or attendance at college, or employment in the service of the United States, or the navigation of the lakes or high seas, does not work a change of residence against the intention or desire of the individual." If it be a necessary qualification to vote that one owns property, pays taxes, and does work for the benefit of the municipality, no doubt thousands in this state would be disqualified from voting. If that was a reason for adopting said constitutional provision, it ought to apply to all alike, and not alone to the student, soldier, and old veteran.

What we have said in regard to the case of *Wolcott v. Holcomb* substantially applies to the case of *Lawrence v. Leidigh*, 58 Kan. 594, 50 Pac. 600, and the court apparently rests its opinion upon the New York and Michigan cases, *supra*, and the further fact that the law establishing the soldiers' home in Kansas provided in direct terms that inmates of said homes could not acquire a legal residence while inmates of said home. In *Warren v. Board of Registration*, 72 Mich. 398, 2 L. R. A. 203, 40 N. W. 553, Justice Campbell, after quoting § 5 of article 7 of the Constitution of that state, which is the same, so far as the question under consideration is concerned, as said § 5, art. 6, of the Idaho Constitution, says, "These provisions do not prevent such persons from becoming residents if such is their purpose, and if they are able to choose." One class of persons named in said section of the Michigan Constitution was those confined in public prisons. They were not "able to choose." That court held that all of the classes named in said section that were able to choose were not prohibited by the provisions of said section from becoming residents for voting purposes.

The case of *Stewart v. Kyser*, 105 Cal. 459, 30 Pac. 19, is a soldiers' home case, is directly in point, and sustains the contention of respondent. In that case a number of the inmates of the veterans' home, and inmates of the county infirmary, and certain students of Napa College voted at an election held in the precincts of the county in which those institutions are situated. The appellant contended that such inmates and students had not been residents of the county and precincts in which they respectively voted during the period of thirty days immediately prior to said election, and for that reason were not qualified electors. The testimony of one of the inmates of the veterans' home is quoted in said opinion, and it is stated in the opinion that the evidence of said witness upon the issue as to the qualifications of said witness is substantially a fair sample of that applicable to

each of the other inmates of the veterans' home, the infirmary, and the college, whose votes were adjudged to have been legal. Said evidence is as follows: Killalee came to the county and to the precinct and entered the home as an inmate on November 14, 1891. For some time prior to this date he was living on the charity of relatives and friends in the city and county of San Francisco, where he was an elector. He made and subscribed the usual application, and obtained a permit to enter the home. He says that: "The reason I went there was because I was in indigent circumstances. Circumstances compelled me to go, and I would not have gone there had it not been for those circumstances. I had no desire to become a resident of the veterans' home or the precinct other than as induced by my indigent circumstances. Since I have been there, I have been maintained and supported by the home. At the time I went there I did not have any fixed intention with respect to the length of time I should stay there. It was my intention to stop there as long as I lived. I have no other interests in the precinct except my relations with the home. I went there with the expectation of living and dying there,—making it my permanent home the balance of my life. I have no relatives or property interest in the veterans' home precinct. I have no other home. At the time I went there, it was my intention to make the home my permanent home. I make it as a home to live and die—as a refuge." The question presented in that case was whether or not said witness "Killalee was a legal resident of the veterans' home precinct, and entitled to vote at the last general election." It was conceded in that case, as in the case at bar, that said witness had all of the requisite qualifications of an elector, except that of residence; and it was contended there, as here, that said witness could not gain a residence for the purpose of voting at the soldiers' home while there as a beneficiary at public expense, for the reason that the gaining of such is prohibited by the 4th section of the 2d article of the Constitution of that state, which is as follows: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student at any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison." In reference to that section of the California Constitution that court said: "As construed by our supreme court in the case of *People ex rel. Budd v. Holden*, 28 Cal. 137, this section does not have the effect claimed for it by counsel for appellant. In that case the qualification of soldiers to vote while employed in the service of the United States was questioned, and it was decided that their presence in Mendocino county while thus employed in the service of the

United States did not 'preclude them from acquiring a residence in Mendocino, if disposed to do so.' The court further said: 'That it was their intention to acquire a domicile in Mendocino county sufficiently appears from the evidence. Such being the case, there is nothing in the constitutional provision in question (which is merely declaratory of the common law) which stands in the way of their doing so.' After quoting the above from the decision of *People ex rel. Budd v. Holden*, the court says: "Thus their residence for the purpose of voting in Mendocino county was made to depend upon the proof of their intention to make that county their place of residence while there present in the service of the United States, there being no question that they had all other requisite qualifications of electors;" and holds that said decision is clearly in point for respondents. The provisions of the California Constitution under which said case arose are identical with our own upon the point under consideration, and the court in that opinion construed said provisions, and gave them the effect intended, to wit, they were adopted for the benefit of, and to enlarge and protect the rights of, those classes, and were not intended to deprive them of a privilege so common in this country. To the same effect is *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700. That case involved the right of a student attending college to vote. The court said: "Taking the view of the testimony most favorable to the appellant, the utmost that can be said of it is that the voters entered the state university at Bloomington without, at the time of entering, having formed a definite intention of making that place their residence, but that they did subsequently determine that it should be their residence. This gave them the right to vote, because there is no evidence that this was not their intention, formed and acted upon in good faith. We think it clear that, if they had gone to Bloomington with the intention of remaining simply as students, and there was no change of intention, they would not have acquired a residence." Several authorities are then cited, and the opinion proceeds: "Where, however, the intention is formed to make the college town the place of residence, and that place is selected as the domicile, then the person who does this in good faith becomes a qualified voter." Apply the correct and reasonable rule there laid down to the case at bar, and the plain intention of the provisions of said § 5 of our Constitution is effected and accomplished, and no one disfranchised by a court-made constitutional provision. In the case at bar it is agreed that each of the persons whose vote is questioned would testify "that they abandoned their former residences and places of abode with no intention of returning thereto, and took up their residence in said Soldiers' Home precinct, Ada county, Idaho, and thereafter resided and continued to reside therein with the intention of permanently remaining and residing there." Thus it is shown that said persons aban-

doned their former residence and place of abode without any "intention of returning there, and took up their residence in said Soldiers' Home precinct with the intention of permanently remaining and residing in said precinct;" not to be turned out as soon as their physical or financial condition permitted, as the laws of the states of Michigan and Kansas required to be done in those states. The good faith and intention of said persons is not questioned, but it is contended that they cannot gain a residence in said precinct while an inmate of said home. Apply to the above facts—which clearly show intention—the reasonable rule laid down in the Indiana case above cited, and the brave old veterans, whose heroism and self-sacrifice assisted in preserving the unity of the nation, will not be disfranchised by court-made constitutional provisions.

In *Shaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 434, which is a college student case, the court, in passing upon the meaning of the word "residence," as used in the Constitution of Maryland, says: "It does not mean, as we have said, one's permanent place of abode, where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one's residence for a temporary purpose; . . . but means, as we understand it, one's actual home in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time;" and holds under the facts of that case, the defendant had a right to vote. In *Vanderpool v. O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216, 5 N. W. 119,—a college student case,—it is held that, to constitute a residence within the meaning of the article of the Constitution prescribing qualifications of voters, the fact of residence and the intent to remain must concur. Both of which concur in the case at bar. In § 69, Paine, Elections, referring to college students, the author says: "The question of residence is to be determined by all the circumstances of each case. Among such circumstances, the intent of the party, the existence or absence of other ties or interests elsewhere, the dwelling place of the parents, or, in the case of an orphan, just of age, of near friends, with whom he had been accustomed to make his home in his minority, would, of course, be of the highest importance." And in § 70 it is said: "Under a Constitution declaring that 'the residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town in which such seminary is situated,' while such residence will not entitle him to the right, it will not prevent its acquisition." So in the case at bar, under the provisions of said § 5 of our Constitution, which is that, for the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while residing at the soldiers' home, the mere fact of such residence will not, of itself, entitle him to the right to vote. Such residence, however, will not prevent the acquisition of such right. In *McCrary, Elections*, 3d ed. 54 L. R. A.

§ 66, it is stated as follows: "It will be found, from an examination of the authorities, and from a full consideration of the subject, that the question whether or not a student at college is a bona fide resident of the place where the college is located must in each case depend upon the facts. . . . In a word, it is necessary, from a survey of all the facts, to determine whether while at college he is at home, his residence, or temporarily absent from it." It was laid down in *Putnam v. Johnson*, 10 Mass. 488, in 1813, that the question of residence was one of act and intention as applied to college students, and is still so held by the decided weight of authority; and college students, under § 5 of our Constitution, are placed in the same category with inmates of our soldiers' home. And said section leaves it with that class of persons to retain the former home as a voting place, or permits them to adopt their present home for that purpose. To the same effect is the *Opinion of the Justices*, 5 Met. 587. In *Re Green*, 5 Fed. 145, it is held under the provisions in the Constitution of the state of New York, in order to prove a residence in an election district something more must be shown than the fact of having lived in marine barracks located within the limits of such district in the capacity of a marine. Many of the cases hold that something more must be shown than mere residence at such home; but none of the cases cited, as I read them, hold that residence at such a home is a prohibition against the inmate gaining a voting residence while residing there, except *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837, and *Lawrence v. Leidigh*, 58 Kan. 594, 50 Pac. 600.

It is said in *Silvey v. Lindsay*: "But the question in each case is still, as it was before the adoption of the Constitution, one of domicile or residence, to be decided upon all the circumstances of the case." The common-law rule disqualified those who were indigent or under the dominion of others, which rule embraces many of those disqualified under § 3, art. 6, of our state Constitution. 1 Bl. Com. Cooley's ed. *171. Under the common-law rule no one became an elector merely by reason of his presence or absence at a certain place. It required something besides mere presence. It required other circumstances; it required intent; it required good faith. The residence must not be for temporary purposes. It must be one's actual home in the sense that he has no other home; no place to return to when away, but that one; abandonment of former home. Those are some of the facts to be shown to prove intent and good faith in establishing a residence, all of which are shown by the record in this case. The question of residence, as applied to electors, is one of act and intent, as laid down by a long line of decisions of courts and law writers; and that rule has not been changed by the provisions of said § 5 of our Constitution. In the case of *People v. Cady*, 143 N. Y. 100, 25 L. R. A. 399, 37 N. E. 673, the question was presented whether a prisoner im-

prisoned in the Tombs city prison could gain a residence therein for voting purposes. The court held that he could not; that the Tombs was not a place of residence; it was not constructed or maintained for that purpose. The court says: "The domicile or home requisite as a qualification for voting purposes means a residence which the voter voluntarily chooses and has a right to take as such, and which he is at liberty to leave, as interest or caprice may dictate, but without any present intention to change it."

It has been suggested that the 5th section of article 6 of the Constitution of Idaho was adopted from the Constitution of New York, and that in adopting that provision we adopted the construction placed upon it in *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444, by the court of last resort of that state. I have followed that rule as I read that decision, but, if I have not construed it according to its true intent and meaning, I would say, as this court has heretofore said, that the rule referred to is a general rule, but, where such decision places a construction thereon that is clearly erroneous, iniquitous, and unjust, this court is not bound by said rule, and ought not to be bound by such construction. Had the framers of our Constitution intended, by the provisions of said § 5, to prohibit inmates admitted from other counties from voting in the county where the home is located, why did not they use plain and simple language to that effect? I have no doubt that they would have done so had they intended to prohibit such persons from voting. The language used in said § 5 is too plain to be misunderstood, and, to construe it to prohibit such inmates as the 40 referred to in this case from voting, the prohibition must be read into it, for it is not there as the section now stands. It was said by the supreme court of Oregon, in the case of *Darragh v. Bird*, 3 Or. 239, after quoting § 4, art. 2, of the Constitution of Oregon, which is as follows: "For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States or of this state," and § 5 of the same article: "The question of residence being one of act and intention, the framers of the Constitution left the matter entirely to the discretion of the parties themselves." If the contention of appellants is right, the 5th section of the Constitution of Oregon was a work of supererogation, as it positively prohibits soldiers quartered in that state from voting there; and § 4 of said article, so far as the pretended prohibition is concerned, contains the exact words of § 5 of the Idaho Constitution. The people, by adopting that provision of the Constitution, left the question of residence, where it was before, entirely to the discretion of the parties themselves,—that question being one of act and intention; and said, "We will neither enlarge nor restrict the right of persons in this respect, but leave it with them to elect as to where they will claim their residence." The words, "for the purpose of voting," etc.,

clearly indicate that the matter was left with the elector himself to select the place of his residence. The section of our Constitution under consideration prohibits anyone from questioning the right of the persons therein named from voting at the place from whence they were admitted to such home, but it does not prohibit them from changing their residence therefrom for voting purposes. The Constitution of Idaho prescribes the qualifications of an elector, and authorizes the legislature to prescribe other qualifications if it desires to do so. And the language of *Wolcott v. Holcomb*, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837, is quoted with approval as a reason for the adoption of said § 5 of article 6 of our Constitution, to wit, that the inmates do not own property, do not pay taxes, and do not work for the benefit of the municipality. We would suggest that, had the framers of the Constitution desired to prohibit the classes of persons named in said section from acquiring a residence, why was not plain and simple language to that effect used? It is not the province of this court to make any additional qualifications to those provided by the Constitution and legislative enactment. The right of suffrage is considered a sacred privilege, and it was plainly the intention of the framers of our Constitution to extend that right to all persons except those excluded therefrom by its strict terms. And, if this court has due regard for the rights of the citizen, it will not disfranchise him, or so construe the Constitution as to effect his disfranchisement, unless by its strict terms it is clearly required.

Where a constitutional provision is susceptible of two constructions, that construction should be adopted which will protect and save the right of suffrage to the citizen; and the decided weight of authority sustains the construction herein placed upon said constitutional provision. As our government is based upon civil liberty and political equality, and the right of suffrage being one of its foundation stones, no person should be disfranchised by construction of the provisions of our Constitution, which provisions may reasonably be construed in favor of suffrage. Are those old veterans an undesirable and ignorant class in whose hand the ballot ought not to be placed? We think not. But my brothers say their construction of said section of our Constitution does not disfranchise them. I admit that it does not in terms, but in effect it does; for, by reason of wounds received in battle, disease, and old age, many of them are unable to return to the counties from whence they entered said home to vote, and they are as effectually disfranchised as though it were held that they could not vote at all. It was held in the California, Oregon, Iowa, and other cases above cited, under constitutional provisions the same as our own, that, the question of residence being one of act and intention, the framers of our Constitution left the matter entirely to the discretion of the parties themselves.

That provision of our Constitution is merely declaratory of the common law, and does not stand in the way of an inmate of said home acquiring therein a residence for voting purposes. It was made to protect his right to vote, and not to disfranchise him, and it ought to be so construed. While residing at the soldiers' home, those old veterans are not temporarily absent from home. They are at home. They are there to remain, with the right to remain permanently. They have abandoned the place from whence they came without any intention of returning, and have established their permanent residence at said home in good faith. They had a right to do those things. They

had a right to choose, and did those acts voluntarily. They may remain there till death, or leave that home whenever they choose to do so. They are not under the dominion of others, as persons who are in prison or in almshouses subject to the absolute will of others, as was the condition of those persons referred to in the New York, Michigan, and Kansas cases above cited. The residence of the old veterans at said home is their permanent place of abode, as permanent as the residence of thousands of the voters in this state, and is a sufficient residence on which to base the qualifications to vote. The judgment of the court below ought to be affirmed.

INDIANA SUPREME COURT.

John BOOHER, Appt.,
v.

STATE of Indiana.

(156 Ind. 435.)

Upon trial of an indictment for conspiring to commit murder, the fact of defendant's intoxication at the alleged time of the commission of the offense may be considered by the jury as bearing upon the existence of the felonious intent necessary to render him guilty.

(April 16, 1901.)

APPEAL by defendant from a judgment of the Circuit Court for Kosciusko County convicting him of conspiracy to murder. *Reversed.*

The facts are stated in the opinion.

Messrs. Arthur F. Biggs and Levi R. Stoekey, for appellant:

The jury had no right to wholly disregard and cast aside all evidence of the defendant's condition as to being intoxicated on the evening that the alleged offense was committed, but they might consider his voluntary intoxication in determining the grade of the crime of which he was guilty, if they should find him guilty.

1 Wharton, *Crim. Law*, 8th ed. §§ 51-55; 1 Bishop, *Crim. Law*, § 404; Kerr, *Homicide*, § 209; *Cline v. State*, 43 Ohio St. 332, 1 N. E. 22; *Com. v. Hagenlock*, 140 Mass. 125, 3 N. E. 36; *Crosby v. People*, 137 Ill. 325, 27 N. E. 49; *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809; *Asman v. State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123.

Messrs. Cassius C. Hadley and Merrill Moores, with **Mr. William L. Taylor**, Attorney General, for appellee:

Voluntary intoxication was no excuse for crime; voluntary intoxication was of itself a crime, and a man could not plead in excuse of one crime the fact that he had committed another.

Harris v. United States, 8 App. D. C. 20,

NOTE.—As to what intoxication will excuse crime, see **Harris v. United States** (D. C.) 36 L. R. A. 465, and note.

54 L. R. A.

36 L. R. A. 465; *United States v. Cornell*, 2 Mason, 91, Fed. Cas. No. 14,868; *Com. v. Hawkins*, 3 Gray, 463; *State v. Morgan*, 40 S. C. 345, 18 S. E. 937; *Beasley v. State*, 50 Ala. 149; *Meroer v. State*, 17 Ga. 146; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Flanigan v. People*, 86 N. Y. 554, 40 Am. Rep. 556; *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 263; *Cluck v. State*, 40 Ind. 263; *Bailey v. State*, 26 Ind. 422; *Shannahan v. Com.* 8 Bush, 464, 8 Am. Rep. 465; *Sanders v. State*, 94 Ind. 147; *Smurr v. State*, 88 Ind. 504; *Colee v. State*, 75 Ind. 511; *Fisher v. State*, 64 Ind. 435; *Bradley v. State*, 31 Ind. 492.

Mr. H. W. Graham also for appellee.

Jordan, J., delivered the opinion of the court:

The information upon which appellant was tried and convicted contained three counts. By the first and second appellant is charged, together with two other parties (Stanton Galbreath and Emory Bennett) with having committed an assault and battery upon William Rafter, with the felonious intent to commit murder in the first degree. The third count charges him and four other persons, namely, Galbreath, Bennett, Waggoner, and Dudley, with unlawfully, knowingly, and feloniously conspiring, uniting, and confederating together and agreeing with each other for the object and purpose and with the unlawful and felonious intent to unlawfully, feloniously, wilfully, purposely, and with premeditated malice, kill and murder said Rafter, etc. The first and second counts of the information are based on Burns's Rev. Stat. 1894, § 2260 (Horner's Rev. Stat. § 1909), which reads as follows: "Whoever perpetrates an assault or an assault and battery upon any human being, with intent to commit a felony, shall, upon conviction thereof, be imprisoned in the state prison not more than fourteen years nor less than two years, and be fined not exceeding \$2,000." The third count is based on Burns's Rev. Stat. 1894, § 2260 (Horner's Rev. Stat. § 2139), which provides as follows: "Any person or persons who shall

unite or combine with any other person or persons for the purpose of committing a felony, or any person or persons who shall knowingly unite with any other person or persons, or body or association or combination of persons, whose object is the commission of a felony or felonies, shall, upon conviction thereof, be fined in any sum not more than \$5,000 nor less than \$25, and imprisoned in the state prison not more than fourteen years nor less than two years." Upon appellant's motion he was tried separately and the case against him was submitted to a jury for trial upon the several counts contained in the information, and a verdict was returned finding appellant guilty of the conspiracy as charged in the third count of the information; and over his motion for a new trial, he was sentenced by the court, upon the verdict of the jury, to be imprisoned in the state's prison for an indeterminate period of not less than two years nor more than fourteen years. From this judgment he appeals, and under his assignment of errors his counsel contend that the trial court erred in giving certain instructions to the jury, and that the verdict is not sustained by the evidence.

The following may be said to be an epitome of the evidence: On the night of March 10, 1900, appellant, John Booher, Stanton Galbreath, Emory Bennett, Ray Wagoner, Lorenzo Dudley, and William Rafter, the prosecuting witness, together with others, were in Hammer's saloon, in the town of Pierceton, Kosciusko county, Indiana. There is no evidence to show that the meeting of these parties was agreed to by any of them, but it appears that they came together casually at the saloon in question. Rafter, it seems, had been at Warsaw during the day, and had been drinking prior to his coming to Hammer's saloon. A short time after he came into the saloon a controversy seems to have arisen between him and Ray Wagoner in regard to a former difficulty or fight which occurred between Rafter and another party. Rafter claimed that he was drunk at the time that he had the fight with the party mentioned, and that for that reason his adversary had succeeded in getting the best of him. Wagoner offered to bet him money that what he asserted was not true. The controversy between these parties became so heated that the bartender directed Rafter to leave the saloon. He seems to have complied with this direction, and went out of the saloon by the front door, but went around and stood at a side door which led into the saloon. Wagoner, upon learning that Rafter was standing at the side door, went to this door and accused the latter of eavedropping, and some further controversy was indulged in between the two parties in respect to the matter which previously had occasioned the quarrel between them in the saloon. After this last controversy, Rafter left, and went to where his horse was tied, a block or more distant from the saloon. He mounted his horse, and apparently started in the direction of his home; but after riding around town for a short time he

went to a livery stable, where he procured a piece of cloth and wrapped or tied it around a stone, and then went to a pool room adjoining Hammer's saloon. Appellant, Galbreath, and Wagoner, and other persons, as it appears, were in the pool room when Rafter entered, and they all remained there while Rafter played two games of pool. No words appear to have passed between Rafter and the other parties, and no demonstration of any kind took place. Rafter and the keeper of the pool room, during the time the former was playing, had some words in regard to the payment for the use of the pool table. It being then time for the pool room to close, all of the parties went out on to the street, Rafter and Wagoner going down the middle of the street; and the other parties, who composed the crowd in the pool room, seem to have followed along the sidewalk after Rafter and Wagoner. In regard to the question as to whether Wagoner followed after Rafter down the street, or walked by his side, the evidence is conflicting. Rafter, after arriving at the place where his horse was hitched to a rack, jumped down from the sidewalk into a gutter. Wagoner then said to Rafter, "You get on your horse quick, and get out of town." Upon the trial Rafter testified that after Wagoner had directed him to get on his horse and leave town, as above stated, Wagoner struck at him, and that he in return knocked Wagoner down with the stone which he had tied in the rag as heretofore mentioned. Wagoner testified, upon the other hand, that Rafter struck the first blow and knocked him down, and that he struck or stabbed Rafter in self-defense. After Wagoner had been knocked down by Rafter, the latter states that he heard him say to the persons who were following him: "Come on. We'll catch him and kill him." Thereupon Rafter started and ran, followed by Wagoner and several other persons; and while he was running Wagoner stabbed him several times in the back with a knife, and while running he was knocked down by someone, whose name the evidence does not disclose. After Rafter was knocked down, the evidence shows that appellant got on top of him, and that Rafter threw him off and got up. When Rafter rose up, he states that he saw Galbreath standing over him, or near him, with a club drawn. The wounds which Rafter received at the hands of Wagoner were severe, but not dangerous. There is also evidence to show that after the first quarrel in the saloon between Rafter and Wagoner, appellant said to the latter: "Why didn't you hit him? I would have stood by you if you had." There is evidence which apparently shows that Wagoner and Rafter were both willing to have trouble with each other, and that neither was trying to avoid it. There is no evidence showing any enmity or ill feeling between Rafter and any of the parties prior to the meeting at Hammer's saloon. Evidence was introduced in behalf of appellant which discloses that he had been freely drinking intoxicating liquors prior to and after the time that Rafter came into the

saloon on the night in question. Some witnesses testified that he was very drunk on the occasion, and that they saw him previous to the time that Rafter came into the saloon, and that he was so drunk that he was leaning over, with his head resting upon, a table in Hammer's saloon. Other witnesses testified that appellant previous to this assault upon Rafter was so drunk that he staggered. Another testified that immediately after the assault upon Rafter he assisted appellant to get home, and that he was so drunk that he fell down on the way home.

The court, on its own motion, gave to the jury, upon the question of appellant's intoxication, the following instruction, which was the only one given upon that feature of the case: "Voluntary intoxication will not excuse crime. If the defendant, Booher, was drunk, it was his own fault, and he cannot claim any immunity by reason of his intoxication. It was his duty to keep sober, and if he voluntarily permitted himself to become intoxicated, and while so intoxicated he committed the crime charged, in any form, he is guilty, and should be punished precisely the same as though he had been sober. It is not the law that a man may voluntarily become intoxicated and commit crime, and escape punishment by reason of such intoxication; but, upon the other hand, it is the law that he cannot use his own voluntary intoxication to escape the consequences of his acts while so intoxicated." Counsel for appellant contend that the court in giving this charge clearly erred to the prejudice of the accused. They concede that voluntary intoxication is no excuse for the commission of a crime, but nevertheless they insist that it may be considered where the essence of the crime depends upon the intent with which the act is done, or where an essential element of the crime consists in doing an unlawful act with deliberation and premeditated purpose. Under such circumstances, it is insisted that the mental condition of the accused, whether occasioned by voluntary intoxication or otherwise, is an important factor to be considered by the court or jury trying the case. The contention of appellant's counsel upon the question involved is supported by the decision of this court in *Assman v. State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123. The defendant in that case was charged with murder in the first degree. The lower court refused to charge the jury that voluntary intoxication upon the part of the defendant might be considered to reduce the offense from the highest to the lower grade of murder. In that appeal this court, by Mitchell, Ch. J., after reviewing many authorities in respect to the effect of voluntary intoxication on the part of a person accused of a criminal offense, said: "As a matter of course, the rule is universal that voluntary intoxication is no excuse for crime, nor does it in any degree mitigate or palliate an offense actually committed. To hold otherwise would unbridle crime and subvert public order. On the contrary, where there is reason to believe that one has conceived the

design to commit a crime, and, while harboring the unlawful purpose, voluntarily become intoxicated, in order to blunt his moral sensibilities and nerve himself up to the execution of his preconceived design, the offense is thereby greatly aggravated. *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799. Where, however, the essence of a crime depends upon the intent with which an act was done, or where an essential ingredient of the crime consists in the doing of an unlawful act with a deliberate and premeditated purpose, the mental condition of the accused, whether that condition be occasioned by voluntary intoxication or otherwise, is an important factor to be considered. [Citing authorities.] Thus, in *Oline v. State*, 43 Ohio St. 332, 1 N. E. 22, the learned judge delivering the judgment of the court said: 'Where a person, having a desire to do another an unlawful injury, drinks intoxicating liquors to nerve himself to the commission of the crime, intoxication is held, and properly, to aggravate the offense; but at present the rule that intoxication aggravates crime is confined to cases of that class. . . . But in many cases evidence of intoxication is admissible with a view to the question whether a crime has been committed, or, where a crime consisting of degrees has been committed, such evidence may be important in determining the degree.' In *Smurr v. State*, 88 Ind. 504, the offense charged was murder in the first degree. An instruction which advised the jury that "voluntary intoxication is no excuse for crime, as long as the offender is capable of conceiving an intelligent design," was approved as a correct expression of the law. In the case of *Crosby v. People*, 137 Ill. 325, 27 N. E. 49, the defendant was indicted for an assault with intent to murder. The question arose in regard to his intoxication at the time of the alleged assault. The trial court, in its charge to the jurors, instructed them, in effect, that voluntary drunkenness was no excuse for the commission of any crime or misdemeanor, and that this ruling applied although the intoxication was so extreme as to make the accused unconscious of what he was doing. On appeal the supreme court held that the instruction, as applied to that case, was erroneous. After citing authorities to show that, under the rule asserted at common law, voluntary drunkenness was no excuse or extenuation for crime committed under its influence, and that the same rule prevailed under the statutes of Illinois, it said: "It will be observed that all the cases hold, as our statute provides, that drunkenness is not an excuse for crime; and yet the uniform holding is that where a particular intent is charged, and such intent forms the gist of the offense, as contradistinguished from the intent necessarily entering into every crime,—as where one crime is thereby aggravated into a higher crime, or a misdemeanor enlarged into a felony,—any cause which deprives the defendant of the mental capacity to form such an intent will be a defense to the graver crime. . . . Drunkenness was, therefore,

at common law, as under our own statute, no excuse for crime, but, where the nature and essence of the offense is by law made to depend upon the state and condition of the mind of the accused at the time and with reference to the acts done and committed, drunkenness, as a fact affecting the control of the mind, is proper for the consideration of the jury; for if the act must be committed with a specific intent, to constitute the crime charged, and the defendant is incapable of forming any intent whatever, the offense has not been committed. The drunkenness is no excuse for any act done or committed. The defendant may be punished for the consummated offense, whatever it may be; and the want of mind operates, not by way of excuse for crime committed, but renders the accused incapable of committing the graver offense." In *State v. Garvey*, 11 Minn. 154, Gil. 95, the defendant was indicted for an assault with an intent to do great bodily harm, under a statute which provided that "if any person being armed with a dangerous weapon shall assault another with intent to do great bodily harm, he shall be punished," etc. The intoxication of the accused was involved, and the supreme court, in reviewing the ruling of the lower court upon that feature of the case, said: "It does not appear that Garvey became intoxicated with a view to the commission of the crime, or that before his intoxication he had any intention of committing such crime. The existence or nonexistence of the malicious and felonious intent charged was the principal question to be passed upon by the jury. If Garvey was so drunk as 'not to know what he was doing,' then he had no intention; he was incapable of forming any intention; and any evidence showing this fact should have been admitted by the court." In *Mooney v. State*, 33 Ala. 419, the charge was assault with intent to commit murder. The court, in that appeal, after holding that the specific intent to commit murder as charged was an essential ingredient of the crime, and that such intent must be proved as charged, said: "Drunkenness certainly does not excuse or palliate any offense. But it may produce a state of mind in which the accused would be totally incapable of entertaining or forming the positive and particular intent requisite to make out the offense. In such a case the accused is entitled to an acquittal of the felony, not because of his drunkenness, but because he was in a state of mind, resulting from drunkenness, which affords a negation of one of the facts necessary to his conviction,"—citing the following authorities: Am. Crim. Law, § 41; Wharton, Homicide, 368; *Pigman v. State*, 14 Ohio. 555, 45 Am. Dec. 558; *Swan v. State*, 4 Humph. 136; *Pirtle v. State*, 9 Humph. 663; *Pennsylvania v. McFall*, Addison (Pa.) 255; *United States v. Roudenbush*, Baldw. 514, Fed. Cas. No. 16,198; *Haile v. State*, 11 Humph. 154. In *Whitten v. State*, 115 Ala. 72, 22 So. 483, the defendant was indicted and convicted for an assault with intent to forcibly ravish. The trial court refused to charge that

if the jury had a reasonable doubt, arising out of the evidence, as to whether the accused was sufficiently sober to form the specific intent to ravish, then the jury could not find him guilty of an assault with such an intent. The court in that appeal, upon the question, said: "We are of opinion the charge should have been given. In order to convict under the statute for an assault with intent to ravish, it is necessary to satisfy the jury beyond a reasonable doubt that the defendant entertained the specific intent charged, and made the assault to accomplish the specific purpose. Mere drunkenness does not excuse or palliate an offense, but it may produce a state of mind which incapacitates the party from forming or entertaining a specific intent. If the mental condition is such that a specific intent cannot be formed, whether this condition is caused by drunkenness or otherwise, a party cannot be said to have committed an offense, a necessary element of which is that it be done with a specific intent. . . . The condition of the defendant's mind, arising from his voluntary drunkenness, was no excuse for the assault,—an offense included in that charged. It can only be considered upon the question of his guilt of the statutory offense for which he was indicted, to wit, an assault with intent to forcibly ravish, which involves the condition of the defendant's mind." In *Chrisman v. State*, 54 Ark. 288, 15 S. W. 891, the defendant was also convicted of an assault with intent to murder. The court in that appeal, upon the question of the intoxication, said: "But, as the cause must be remanded, we think it proper to say that although voluntary drunkenness cannot, as the jury were told by the court, excuse the commission of a criminal act, yet, where a person is accused of a crime such as can be committed only by doing a particular thing with a specific intent, it may be shown that at the time of doing the thing charged the accused was so drunk that he could not have entertained the intent necessary to constitute the offense." In *Reagan v. State*, 28 Tex. App. 227, 12 S. W. 601, the accused was charged with having perpetrated an assault with intent to commit rape. It was held in that appeal that evidence which tended to show that when the accused made the attempt he was excessively drunk fairly raised the question of his mental capacity to conceive the criminal intent, and demanded of the trial court a charge to the effect that, in determining whether he had the specific intent to rape at the time he made the attempt, the jury should take into consideration the evidence of his drunkenness, and his consequent mental capacity to form such intent. The court, in conclusion, said: "Appellant is not to be held responsible for the intent if he was too drunk for a conscious exercise of the will to the particular end, or, in other words, too drunk to entertain the intent, and did not entertain it in fact. If he did in fact entertain it, though but for the intoxication he would not have done so, he is responsible for the intent as well as for the acts." In *Roberts v. People*,

19 Mich. 401, the defendant was charged with an assault with intent to commit murder. The trial court instructed the jury to the effect that his voluntary intoxication at the time of the assault would not excuse him. The supreme court, in that appeal, in reviewing the rulings of the lower court, said: "In determining the question whether the assault was committed with the intent charged, it was therefore material to inquire whether the defendant's mental faculties were so far overcome by the effect of intoxication as to render him incapable of entertaining the intent. . . . But he is not to be held responsible for the intent if he was too drunk for a conscious exercise of the will to the particular end, or, in other words, too drunk to entertain the intent, and did not entertain it in fact. If he did entertain it in fact, though but for the intoxication he would not have done so, he is responsible for the intent as well as the acts." In *Warner v. State*, 56 N. J. L. 686, 29 Atl. 505, the defendant was convicted in the lower court of murder in the first degree. Upon appeal, in considering the question of intent or design to kill involved under the evidence in that case, the court said: "Design to kill was a fact. A reasonable doubt of the existence of that fact might spring out of the drunkenness of defendant, or out of any other circumstance or combination of drunkenness with other circumstances. . . . The general proposition is that drunkenness is no excuse for crime. The reasoning upon which, in those states in which murder is distinguished by degrees, drunkenness is permitted to modify the degree of the crime, rests upon one requirement essential to constitute murder in the first degree. This requirement is the existence of actual, specific malice,—of an actual intent to take life. Without this there is no crime in that degree. Any condition of fact, whether drunkenness or other circumstance, which shows the nonexistence of this kind of actual malice, is relevant, not as an excuse for crime, but as showing that no statutory crime at all of the degree named was committed. . . . The exceptional immunity extended to the drunkard is limited to those instances where the crime involves a specific, actual intent. When the degree of intoxication is such as to render the person incapable of entertaining such intent, it is an effective defense. If it falls short of this, it is worthless." In § 413, 1 Bishop. New Crim. Law, the author says: "An indictable attempt is committed only when the intent is specific, namely, to do the particular thing which constitutes the substantive crime. If, therefore, one is too drunk to entertain such specific intent, he cannot become guilty of the offense of attempt, however culpable, in a general way, he may be for his drunkenness."

Other authorities of like import might be cited in support of the doctrine for which appellant contends. Those mentioned will suffice to disclose for what purpose the intoxication of the defendant on trial upon the criminal charge which involves a spe-

cific, actual intent may be admitted in evidence and considered in his behalf. The intoxication of an accused person, under such cases, is not admissible upon the ground that it of itself excuses or palliates the crime, but is admitted and considered only for the purpose of ascertaining the condition of the mind of the accused in order to determine whether he was incapable of entertaining the specific intent charged, where such intent, under the law, is an essential ingredient of the particular crime alleged to have been committed; hence, where a homicide has been charged to have been committed with premeditated or deliberate intent, the drunkenness of the defendant may be considered as tending to show, under all the circumstances in the case, that the less, and not the greater, homicide was committed. In all criminal cases where the intent of the accused is an essential element, such intent becomes a question of fact to be determined by the jury or court trying the case upon a consideration of all the evidence. In fact, the rule seems to be universally asserted by the authorities that in all prosecutions for an assault with intent to kill the intoxication of the defendant is admissible in evidence, and should be considered by the jury or court trying the case in determining whether he actually entertained the specific intent essential to the crime charged. In addition to the authorities heretofore cited, see 17 Am. & Eng. Enc. Law, 2d ed. p. 411. It does not follow, by any means, in any criminal case in which the intoxication of the accused person may be considered in evidence, from the fact that at the time he committed the alleged crime he was intoxicated that he was thereby rendered incapable of entertaining the specific felonious or criminal intent with which he is charged. He may have been grossly intoxicated, and yet capable of forming the intent to kill and murder, or to commit any other offense in which an intent is an essential element. The correct rule or test in such cases, and the one generally asserted by the authorities, is that the drunkenness of the defendant, in order to rebut such criminal intent, must be of such a degree as to deprive him of the power to deliberate or form the necessary design or guilty intent; otherwise, it is not available. Or, in other words, as affirmed in *Aszman v. State*, 123 Ind. 357, 8 L. R. A. 33, 24 N. E. 123, mere intoxication of the accused, in the absence of such mental incapacity resulting therefrom as will render a person incapable of thinking deliberately and meditating rationally in forming the guilty design or intent, cannot be regarded as sufficient. There must be, as a result of such intoxication, the absence of that self-determining power which in a sane mind makes it conscious of the real nature of its own purpose, and capable of resisting wrong impulses. Of course, all reasonable doubts arising upon such question or issue must be solved in favor of the accused party. Neither is the drunkenness of the defendant available if the criminal design or intent with which he is charged was formed or enter-

tained before he became intoxicated, during the state of which he carried the intent so formed into effect. It may be further said, in reference to the question of the intoxication of persons accused of the commission of crime, that the law has due regard for the safety of society; and, as such safety to a great extent depends upon the due administration of our criminal laws, hence voluntary intoxication of one at the time he is charged to have violated such laws ought to be most cautiously considered by the jury before arriving at a conclusion that his intoxication rendered him mentally incapable of committing the alleged crime. The specific intent of the appellant in the case at bar to commit the murder as charged under either count of the information was, under the statutes upon which these counts were respectively based, an essential element or ingredient of the offense, and the existence or nonexistence of such felonious intent was one of the principal questions to be decided by the jury. In fact, in entering into or forming a conspiracy, under the statute, there must be a concert of will between and among the conspirators, as well as the intention or purpose to commit the particular felony. Under either the first or second count of the information, in the event the evidence justified, appellant might have been convicted of the assault and battery with intent to commit murder in either the first or second degree, or voluntary manslaughter. *State v. Throckmorton*, 53 Ind. 354; *Jarrell v. State*, 58 Ind. 293; *Behymer v. State*, 95 Ind. 140. It was also within the province of the jury, upon either the first or second count, if warranted by the evidence, to have acquitted appellant of the felonious intent, and convicted him of assault and battery only. *Gillespie v. State*, 9 Ind. 380; *Behymer v. State*, 95 Ind. 140; *State v. Hattabough*, 66 Ind. 223; *Burns's Rev. Stat.* 1894, § 1904.

Applying the principle so fully and generally supported by the authorities to which we have referred, it becomes manifest that the intoxication of appellant, which was admitted in evidence, ought to have been considered by the jury for the purpose of rebutting the felonious intent to kill and murder the prosecuting witness, with which, as charged under the first and second counts, he committed the assault and battery, and with which, under the third count, he entered into the conspiracy in question. By the instruction in dispute the trial court, in effect, at least, virtually withdrew or excluded from the jury the consideration of the intoxication of appellant for any purpose. We must assume that the evidence in respect to his intoxication was admitted for the only purpose for which it was legitimately admissible. It could neither be received nor considered for the purpose of excusing or palliating the crime alleged to have been committed, and, under the circumstances, the charge which the court gave upon that question may be said to have been wholly inapplicable to the evidence, and must at least have tended to mislead the 54 L. R. A.

jury. It was, of course, proper for the court to have advised the jury in respect to the abstract proposition that appellant's drunkenness was no excuse or palliation for the crime charged; but the instruction went beyond this, and advised them that if appellant was intoxicated when he committed the crime charged, "in any form," he was guilty, and should be punished, etc. The guilt of appellant in respect to the particular crime imputed to him was the essential question propounded to the jury, to be decided upon the consideration of all the evidence in the case; and his intoxication was a matter for the jury to consider in determining the question of the existence of the felonious intent,—an essential element of the crime of which he was accused. As to whether his intoxication was in such a degree as to render him mentally incapable of forming or entertaining the design or intent to commit the felony charged was, as previously stated, solely a question of fact to be determined from all the evidence in the case.

It follows that the court erred in giving the instruction in controversy, for which error the judgment is reversed, and the cause remanded to the lower court, with instructions to grant appellant a new trial. The clerk will issue the proper warrant to the warden of the state prison for the return of the prisoner to the custody of the sheriff of Kosciusko county.

City of SOUTH BEND *et al.*, Appts.,
v.

Bennie TURNER, by Next Friend.

(156 Ind. 418.)

1. One of two defendants cannot assign errors upon a general exception by both to the overruling by the court of demurrers to the complaint, filed, one by both defendants demurring generally to each paragraph of the complaint, and others by the complaining defendant attacking specified paragraphs of it.
2. Although the statute allows complaint for the first time in the appellate court, in case of absence from the complaint of averments essential to the cause of action, or the presence of some averment which absolutely destroys the right to recover, yet mere uncertainty or inadequacy of averment, which might have been amended or cured, will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection.
3. A municipality constructing a

NOTE.—For another case in this series as to liability of municipal corporation for injuries received by person who falls into sewer in process of construction, see *Chope v. Eureka* (Cal.) 4 L. R. A. 325, and note as to liability for injuries in general caused by negligence.

As to liability of city for negligent construction of sewer generally, see *Uppington v. New York* (N. Y.) 53 L. R. A. 550, and footnote thereto.

For exception to rule that a master is not liable for the acts of an independent contractor, see *Peerless Mfg. Co. v. Bagley* (Mich.) 53 L. R. A. 285, and footnote.

sewer in a public street is not relieved from liability for injuries to persons using the street by the fact that it was in the exclusive possession of the contractor, if it had notice, or might have had notice by the exercise of proper oversight, that its licensee had acted in a negligent manner and left the street in an unsafe and dangerous condition.

4. A municipal corporation which, in constructing a sewer in a public street, leaves a manhole uncovered for several weeks, and near it a pile of sand, with knowledge that children are accustomed to play in the sand, will be liable for injuries to a child of tender years who, while at play in the sand, falls into the manhole and is injured.
5. To overthrow a general verdict by answers to special interrogatories they must be of such a nature as to exclude the possible existence of other controlling facts provable under the issue relating to the same subject.
6. For the purpose of overthrowing a general verdict in favor of a child who, while playing on a sand pile in a public street, fell into an open manhole and was injured, the court will not assume, from the fact that he was six and a half years old, that he was so advanced in knowledge as to be able to know when he was in a place where he ought not to be, and to appreciate the evidences and presence of danger.
7. It is reversible error to refuse defendant in an action by a child for personal injuries an order for a physical examination of plaintiff by physicians to be appointed by the court, where defendant has no other method of determining the extent of the injury, and the examination may be made without pain or danger to the plaintiff.

(April 16, 1901.)

APPEAL by defendant City from a judgment of the Circuit Court for Marshall County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. T. E. Howard and Joseph G. Orr, with Mr. O. M. Cunningham, for appellants:

The city of South Bend was not itself engaged in building this sewer, and cannot, therefore, be primarily chargeable with negligence, should any be shown, in its construction.

Warsaw v. Dunlap, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568.

The amended complaint, by its particular allegations, shows that there was no negligence on the part of the contractors; and, in the next place, even if this complaint should be held sufficient to show negligence on the part of the contractors, and, at the same time, freedom from contributory negligence on the part of appellee, still it must be very plain that it shows no negligence on the part of the city of South Bend.

Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304; *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432; *Berg v. Parsons*, 156 N. Y. 109, 41 L. R. A. 391, 50 N. E. 957.

The owner of premises is under no legal duty to keep them free from pitfalls or ob-

structions, for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission.

Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L. R. A. 531, 40 Atl. 682; *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123.

The construction company, prior to the accident, repeatedly warned and turned boys and others away from the place in question. This was all that the company or its agents could do, and all that they were required by law to do. They were not called upon to keep such visitors away by main force.

Appellee was quite as capable of taking care of himself in the dangerous places where he persisted in going as were any of the other visitors to the sewer.

Wendell v. New York C. & H. R. R. Co. 91 N. Y. 420; *Collins v. South Boston R. Co.* 142 Mass. 301, 56 Am. Rep. 675, 7 N. E. 856; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013; *Ivens v. Cincinnati, W. & M. R. Co.* 103 Ind. 27, 2 N. E. 134; *Cleveland, C. C. & St. L. R. Co. v. Stephenson*, 139 Ind. 641, 37 N. E. 720.

There is no middle ground between negligence and wilfulness.

Pennsylvania Co. v. Meyers, 136 Ind. 258, 36 N. E. 32.

Appellee is chargeable with negligence which brought about his own injury. The court not only had the right to order a physical examination, but, under the circumstances as they appeared to the court at the time of the submission of this motion, the court's refusal to grant it in the furtherance of justice was error.

Alabama G. S. R. Co. v. Hill, 90 Ala. 71, 9 L. R. A. 442, 8 So. 90; *McGuff v. State*, 88 Ala. 147, 7 So. 35; *King v. State*, 100 Ala. 85, 14 So. 878; *Sibbey v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 3 L. R. A. 808, 9 S. E. 602; *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091; *Schraeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 378; *Barker v. Perry*, 67 Iowa, 147, 25 N. W. 100; *Hall v. Manson*, 99 Iowa, 698, 34 L. R. A. 207, 68 N. W. 922; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 460, 44 Am. Rep. 659; *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641, 54 N. W. 757; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; *Shepard v. Missouri P. R. Co.* 85 Mo. 629, 55 Am. Rep. 390; *Sidekum v. Wabash, St. L. & P. R. Co.* 93 Mo. 400, 4 S. W. 701; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, 8 S. W. 350; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Miami & M. Turnp. Co. v. Bailly*, 37 Ohio St. 104; *International & G. N. R. Co. v. Underwood*, 64 Tex. 463; *Missouri P. R. Co. v. Johnson*, 72

Tex. 95, 10 S. W. 325; *White v. Milwaukee City R. Co.* 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; *O'Brien v. La Crosse*, 99 Wis. 421, 40 L. R. A. 831, 75 N. W. 81; *Bryant v. Stilwell*, 24 Pa. 317; *Hess v. Lake Shore & M. S. R. Co.* 7 Pa. Co. Ct. 565; *Langworthy v. Green Twp.* 95 Mich. 93, 54 N. W. 697; *Strudgeon v. Sand-Beach*, 107 Mich. 496, 65 N. W. 616; *Ohadron v. Glover*, 43 Neb. 732, 62 N. W. 62; *McQuigan v. Delaware, L. & W. R. Co.* 129 N. Y. 50, 14 L. R. A. 466, 29 N. E. 235; *Lyon v. Manhattan R. Co.* 142 N. Y. 298, 25 L. R. A. 402, 37 N. E. 113.

Messrs. F. J. L. Meyer and Charles P. Drummond for appellee.

Hadley, J., delivered the opinion of the court:

Suit by appellee to recover damages for personal injuries. The facts set forth in the complaint are substantially as follows: On the 8th day of April, 1894, the defendants, being, respectively, a municipal and a private corporation, were engaged in the construction of a trunk sewer for the defendant city through one of its public streets, declining northward, and terminating in St. Joseph river. That at a point near its terminus the defendants constructed a manhole, circular in form, and 2½ feet in diameter, near the center of a public street crossing, thus constituting a means of communication with said sewer from the surface of the street to the bottom of said sewer, a distance of 29 feet. That said manhole was carelessly and negligently permitted by the defendants to be open and uncovered on said day, and was and had been carelessly and negligently permitted by the defendants to be and remain open and uncovered continuously prior thereto for many days and weeks, without any signal or warning of any kind, and without any protection to persons lawfully upon the street. That said sewer, from its mouth or terminus to the manhole, and for some distance beyond, had been in part completed, and large piles of sand had been piled upon the street where the sewer was completed, near the manhole, by the defendants, and had been by them carelessly and negligently permitted to remain there, and were calculated to, and did, attract children for the purpose of engaging in play in the sand. That the children in the neighborhood were accustomed, with the knowledge of the defendants, to play in the street with said sand piles. That the plaintiff on said day, being six and one-half years of age, was so engaged at play with said sand piles, and at the time did not know of the open condition of the manhole, and while so engaged in play, and while in the exercise of due care and caution, did, by reason of the negligence of the defendants as aforesaid, fall into said open manhole, and was precipitated to the bottom of the sewer, without fault, and without any warning by the defendants of the danger existing by reason of the open manhole, and whereby he was greatly injured.

The complaint is in four paragraphs. The first was withdrawn. The second and third

are, in substance, the same. The fourth charges that the manhole at the time of the accident was, and had been for many days and weeks, negligently suffered by the defendants to be and remain insufficiently covered, etc. The joint demurrer of the defendants and the separate demurrer of the defendant city to each paragraph of the complaint were overruled, and a joint exception to both rulings reserved. Upon issues joined, the jury returned a general verdict for appellee, and answers to divers interrogatories. The city alone appeals, and assigns for error (1) the insufficiency of the facts stated to constitute a cause of action against it; (2) the action of the court in overruling its demurrer to each paragraph of the complaint; (3) in overruling its separate motion for judgment in its favor on the answers to interrogatories; and (4) in the overruling of its separate motion for a new trial.

No question upon the complaint is properly presented by the demurrers. The record shows that "the defendants demur to each paragraph of the complaint," etc. Then follow three separate papers, being the separate demurrers of the defendant city to each the second, third, and fourth paragraphs of the complaint, and the record then proceeds: "Which demurrers the court overruled, to which ruling of the court defendants except." Exceptions taken thus in gross reserve no question, and the assignment of error predicated thereon by one of the exceptors is futile. *Johnson v. McCulloch*, 89 Ind. 270, 273; *Western U. Teleg. Co. v. Trissal*, 98 Ind. 566, 570; *Walter v. Walter*, 117 Ind. 247, 249, 20 N. E. 148; *Elliott*, App. Proc. § 788.

Appellant, however, makes an independent assignment of error that the complaint does not state facts sufficient to constitute a cause of action against it. The total absence from the complaint of any averment of some fact or facts essential to the existence of the cause of action, or the presence of some averment that absolutely destroys the plaintiff's right of recovery, may be for the first time raised in this court by an independent assignment of errors, under Rev. Stat. 1891, § 346, Burns's Rev. Stat. 1894, § 346, Horner's Rev. Stat. 1897, § 543; but mere uncertainty or inadequacy of averment, such as might have been amended and cured upon motion seasonably made, will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection, and who brings his complaint for the first time after the cause of action has been strengthened by the verdict of a jury and the presumptions indulged in favor of the decisions of the trial court upon the motions for judgment and for a new trial. *Shoemaker v. Williamson*, 156 Ind. 384, 59 N. E. 1051, and authorities cited; *Kinney v. Dodge*, 101 Ind. 573; *Smith v. Smith*, 106 Ind. 43, 45, 5 N. E. 411. This assignment of error challenges the complaint as an entirety, and if any paragraph thereof is sufficient the assignment must fail. *Buchanan v. Lee*, 69 Ind. 117; *Carese*

v. *Foster*, 62 Ind. 145; *Miller v. Billingsly*, 41 Ind. 489, 492. The complaint avers that the defendants were constructing the sewer; that they had constructed the manhole; that the defendants negligently permitted the manhole to be and remain open and uncovered on the day of the plaintiff's injury, and to so be and remain open and uncovered continuously for several weeks prior thereto, and negligently permitted a large sand pile, which defendants had produced, to be and remain on said day, and for several weeks prior thereto, near the manhole, and at a point on said sewer where the same was completed, with the knowledge that the children in the neighborhood, including the plaintiff, were accustomed to play in said sand pile. There is no suggestion in the complaint that the defendant construction company was an independent contractor, nor that it had the exclusive possession of the street; nor does it appear, from anything averred, except for the presence of the sand pile, that the public was prevented or in any way denied the usual right of play or travel in the street. Even assuming, as appellee argues, that the facts pleaded show that the street was so obstructed by the construction of the sewer as to be inconsistent with public use, and that the construction company was necessarily in the exclusive possession of the street, the city would not thereby be relieved of liability, when it is shown that it had notice, or might have had notice by the exercise of proper oversight, that its licensee had acted in a negligent manner, and left its streets in an unsafe and dangerous condition. *Stalder v. Huntington*, 153 Ind. 354, 362, 55 N. E. 88; *Senhenn v. Evansville*, 140 Ind. 675, 40 N. E. 69; *Indianapolis v. Doherty*, 71 Ind. 5; *Elliott, Roads & Streets*, 2d ed. § 634. We are unable to see why the complaint is not sufficient against the city if tested by demurrer, and it is clearly so when questioned for the first time in this court.

With respect to the motion for judgment on the answers to interrogatories notwithstanding the general verdict, the rule is that all reasonable presumptions must be indulged against the special answers and in support of the general verdict, and if the general verdict, thus aided, is not in irreconcilable conflict with the answers, it must stand. *Louisville, N. A. & C. R. Co. v. Creek*, 130 Ind. 139, 142, 14 L. R. A. 733, 29 N. E. 481; *British American Assur. Co. v. Wilson*, 132 Ind. 278, 283, 31 N. E. 938; *Louisville, N. A. & C. R. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235. The reason of the rule is that the jury is required to pronounce upon all the issuable facts proved in the case, while the court, in testing the force of isolated facts disclosed by answers to interrogatories, does not know and cannot know what other facts touching the same matters were rightfully before the jury to justify their verdict. Therefore, in conceding to the jury the presumption of right judgment, to overthrow its general verdict the special facts returned must be of such a nature as to exclude the possible ex-

istence of other controlling facts, provable under the issues, relating to the same subject. The answers show that the construction company had exclusive possession of the street at the manhole for the purpose of building the sewer, that said company frequently warned boys away from playing in the sand pile near the open manhole, that the plaintiff knew that the manhole was uncovered, and that he was six and one-half years of age; and from the answers it is contended that it affirmatively appears that the plaintiff was guilty of contributory negligence, and the city free from liability. If there were no other answers supportive of the general verdict, we could not approve the contention. We could not assume that a boy six and one-half years of age was so advanced in knowledge as to be able to know when he was in a place where he ought not to be, and to appreciate the evidences and presence of danger (*Cleveland, C. & St. L. R. Co. v. Klee*, 154 Ind. 430, 56 N. E. 234); nor would the isolated fact that the construction company had the exclusive possession of the street for the purpose of building the sewer prevail, as a defense for the city, against the presumptions that would arise under the averments of the complaint that both the construction company and city carelessly permitted the manhole to remain open and uncovered near a sand pile that they knew was attractive to children, and to which they knew children were attracted for play, continuously for many weeks. But by other answers it was found that the plaintiff at the time of the accident did not have intelligence enough to know the danger of the open manhole, nor was it shown that he was ever warned of the danger by anyone. It is further shown that the manhole had been completed for four weeks; that it was within 4 feet of a sand pile 7 feet high, and had been left continuously for two weeks uncovered, with the knowledge of both the city and the construction company, and with their further knowledge that the sand was attractive to the children of the neighborhood, and that they were attracted to it for the purpose of play; that there were no guards or barricades about the manhole, nor on the street or sidewalks, and the street from the manhole to the mouth of the sewer was for two weeks prior to the accident traveled by hundreds of people; that the sewer was completed from its mouth to the manhole and for 300 feet beyond at the time of the accident, except the leveling of the street grade. The motion for judgment upon the answers to interrogatories was properly overruled.

The first ground urged for a new trial is the refusal of the court, upon appellant's motion, to order a physical examination of the plaintiff. Before the commencement of the trial, appellant filed and presented its verified motion that the court select some competent, responsible, and unbiased physician and surgeon of the county to examine the head, leg, and eye of the plaintiff before the beginning of the trial, for the purpose of discovering and giving testimony as to the

true character and extent of his injuries, and their probable effect, as to permanency, upon his mind and person; that the plaintiff is a child nine years of age, and was but seven years of age when he received the alleged injuries, and the defendant has had no opportunity and has been wholly unable to inform itself upon the subject of said injuries; that the plaintiff asserts in his complaint that his skull was cracked, his eyes injured, his leg broken, his nervous system impaired, and that his said injuries are great and permanent; that the plaintiff will produce as a witness in his own behalf the physician who attended him in his illness, and the defendant is totally unable to produce any witness who has examined the plaintiff, and who can state from medical knowledge the nature and extent of his injuries, and the probability or improbability of their permanency; that the plaintiff's father be permitted to be present at such examination; that such examination will be able to determine the true nature and extent and probable effect of such injuries, and may be made without pain, humiliation, or danger to the plaintiff. The overruling of this motion presents a question of some difficulty, and upon which the courts of the country are not entirely agreed. It is one, too, that has but recently engaged the attention of the courts of last resort. The fundamental principle, however, is an ancient doctrine of the common law, limited, it is true, to a few classes of cases (among them, mayhem and divorce cases, wherein impotency was charged); but as the sources of evidence have been extended, to parties and in many other ways, its application has been expanded to meet new conditions. The doctrine rests upon the principle that justice is the object of judicial investigation, and that courts charged with its administration, as a necessary means of attaining that end, have inherent power to require the production of the most infallible evidence. That its application to personal injury cases is a modern practice does not disprove its common-law origin. As was well said by Justice Brewer in his dissenting opinion in *Union P. R. Co. v. Botsford*, 141 U. S. 258, 35 L. ed. 740, 11 Sup. Ct. Rep. 1003: "The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages in early days was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and the common-law courts to compel a personal examination was in many cases often exercised and unchallenged. Indeed, wherever the interests of justice seem to require such an examination, it was ordered." Beginning with the case of *Lloyd v. Hannibal & St. J. E. Co.* (decided in 1873) 53 Mo. 509, there 54 L. R. A.

have followed many adjudications upon the power of the trial court to order a physical examination of the plaintiff in suits for personal injuries upon the request of the defendant. In this first case the power, upon slight consideration, was denied. In 1877, in the well-considered case of *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375, the power was affirmed. Following this lead, the states of Alabama, Arkansas, Georgia, Kansas, Kentucky, Michigan, Missouri, Minnesota, Nebraska, Pennsylvania, Ohio, Texas, and Wisconsin have reasserted the rule as announced in the Iowa case. *Alabama G. S. R. Co. v. Hill* (1890) 90 Ala. 71, 9 L. R. A. 442, 8 So. 90; *King v. State* (1893) 100 Ala. 85, 14 So. 878; *Sibley v. Smith* (1885) 46 Ark. 275, 55 Am. Rep. 584; *St. Louis S. W. R. Co. v. Dobbins* (1895) 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Richmond & D. R. Co. v. Childress* (1889) 82 Ga. 719, 3 L. R. A. 808, 9 S. E. 602; *Hall v. Manson* (1896) 99 Iowa, 698, 34 L. R. A. 267, 68 N. W. 922; *Atchison, T. & S. F. R. Co. v. Thul* (1893) 29 Kan. 460; *Belt Electric Line Co. v. Allen* (1898) 102 Ky. 531, 44 S. W. 89; *Graves v. Battle Creek* (1893) 95 Mich. 266, 19 L. R. A. 641, 54 N. W. 757; *Shepard v. Missouri P. R. Co.* (1885) 85 Mo. 629, 55 Am. Rep. 390; *Sidecum v. Wabash, St. L. & P. R. Co.* (1887) 93 Mo. 400, 4 S. W. 701; *Owens v. Kansas City, St. J. & C. B. R. Co.* (1888) 95 Mo. 169, 8 S. W. 350; *Hatfield v. St. Paul & D. R. Co.* (1885) 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; *Stuart v. Havens* (1885) 17 Neb. 211, 22 N. W. 419; *Hess v. Lake Shore & M. S. K. Co.* (1890) 7 Pa. Co. Ct. 565; *Miami & M. Turnp. Co. v. Baily* (1881) 37 Ohio St. 104; *Chicago, R. I. & P. R. Co. v. Langston* (1898) 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610; *White v. Milwaukee City R. Co.* (1884) 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; *O'Brien v. La Crosse* (1898) 99 Wis. 421, 40 L. R. A. 831, 75 N. W. 81. These cases assert the doctrine that courts are instituted by the state to administer impartial justice to contending parties. In such contests, it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its orders all persons and things that will afford the most reliable evidence. In quasi recognition of this power it is the law of this state, and other states, so far as we have observed, that the court may permit the plaintiff, in both civil and criminal cases, to exhibit to the jury such weapons, implements, clothing, and wounds upon his person, or upon the person of the prosecuting witness, as are asserted to be the means or effects of the violence complained of. *Indiana Car Co. v. Parker*, 100 Ind. 181, 199; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Hess v. Lourey*, 122 Ind. 232, 7 L. R. A. 90, 23 N. E. 166; *Citizens' Street R. Co. v. Wil-*

Loeb, 134 Ind. 563, 33 N. E. 627; *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95. Such things, when a part of the *res gestæ*, serve a most useful purpose in assisting the jury to a proper application of the testimony. They are unerring exponents of the truth of the particular fact, and it may not be controverted that when the nature, extent, and effect of a palpable injury is in dispute, not involving scientific questions, the jury may arrive at a more accurate knowledge of the truth by the aid of their own senses than by a verbal description of the observations of others. This being well known to the plaintiff, he is certain to avail himself of this advantage in the trial when the truth will be beneficial to him; and, if impartial justice is to be administered, we see no way of its attainment in all cases if an important source of evidence is open to one and closed to the other. That the question embraces the exercise of scientific knowledge makes no difference. Physicians and surgeons, however honest and learned, are fallible, and, equally with other honest and honorable persons, subject to the unconscious influence of friendships and personal interest; the latter, in surgery cases, involving not only professional reputation, but pecuniary liability. Besides, surgeons of equal learning and honesty may not diagnose an injury in the same way. They may not be equally strong in perception, or equally accurate in observation or in measurements, and thus form different judgments of the existing conditions, which of necessity must constitute the basis of their scientific opinions; and it may be readily seen that if a defendant must make his defense against the expert opinions of the plaintiff's chosen surgeons, without an opportunity of testing the verity of the basis for such opinions, he may be placed at a disastrous disadvantage, such as the law cannot and does not sanction.

The cases above cited as affirming the existence of the power establish the following propositions: (1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed or fully elucidated by such an examination, and such an examination may be made without danger to the plaintiff's life or health or the infliction of serious pain; (5) that the refusal of the motion when the circumstances appearing in the record present a reasonably clear case for the examination, under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a

judgment for the plaintiff; (6) that such order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding. The discretion lodged in the trial court, as fairly deducible from the decisions, is a sound discretion, based solely upon legal considerations. When serious and permanent injuries are claimed by the plaintiff, and he or she has submitted to examination by a chosen physician or surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent, and effect of the injury are to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify a denial of the motion. When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff, on the one hand, and probable injustice to the defendant, on the other, the law will not hesitate; the court, in making such orders, with respect to time, place, and persons, in every case, having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit.

So far as our researches have revealed, the Federal Supreme Court, Justices Brewer and Brown dissenting, now stand alone in denial of the power. *Union P. R. Co. v. Botsford*, 141 U. S. 250, 15 L. ed. 734, 11 Sup. Ct. Rep. 1000. The decisions of New York were confused, and the rule both affirmed and denied in inferior courts, until established by legislative enactment in 1893. Laws 1893, chap. 721; Code Civ. Proc. § 873. The power was first denied in the state of Missouri in *Loyd's Case*, 53 Mo. 509, in 1873, but affirmed in the same court in *Shepard's Case*, 85 Mo. 629, 55 Am. Rep. 390, in 1885, and affirmance has been adhered to in many subsequent cases. In Illinois the supreme court, in 1882, in *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588, disposed of the question in a single line, as follows, "The court had no power to make or enforce such an order," and in subsequent decisions, while not expressly overruling the *Parker Case*, recognized the existence of the power when properly and timely invoked. See *Chicago & E. I. R. Co. v. Holland* (1887) 122 Ill. 461, 13 N. E. 145; *St. Louis Bridge Co. v. Miller* (1891) 136 Ill. 465, 28 N. E. 1091. The decisions in Indiana, in the words of the majority opinion of the Federal Supreme Court in the *Botsford Case*, 141 U. S. 250, 15 L. ed. 734, 11 Sup. Ct. Rep. 1000, "are conflicting and indecisive." In the first appearance of the question before this court in any form, in 1885, in *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 416, 417, 3 N. E. 389, 4 N. E. 908, in ruling upon the competency of evidence touching the details of a physical examination of the plaintiff under an order of court, made upon the defendant's motion, the right of the trial court to make the order is not questioned. *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664, was an action for slander for charging the plaintiff with lewdness. The court refused to order the plaintiff to submit her person to examination by medical experts. The question related to a collateral matter, and not to the

subject-matter of the suit,—to a source of evidence not shown to be reliable or useful to the defendant in his answer of justification,—and should not be accepted as an authority in a suit by a plaintiff to recover damages for a particular injury to his person. The question came before the court in *Hess v. Lowrey*, 122 Ind. 225, 7 L. R. A. 90, 23 N. E. 156, and the request for an examination denied because untimely made. The court, by Mitchell, J., said: "It is undoubtedly true that the court may, in its discretion, in a proper case, if application is seasonably made, require the plaintiff to submit his person to a reasonable examination by competent physicians and surgeons, when necessary to ascertain the nature, extent, and permanency of injuries." The case of *Terre Haute & I. R. Co. v. Bruner*, 128 Ind. 542, 26 N. E. 178, presenting a like question, was ruled by *Hess v. Lowrey*, 122 Ind. 225, 7 L. R. A. 90, 23 N. E. 156. In *Pennsylvania Co. v. Newmeyer*, 129 Ind. 409, 28 N. E. 860, the question we have here came before the court for decision, and it was there held that the power of the court to order an examination did not exist; the court regarding what was said in *Hess v. Lowrey* as *obiter*. Upon further, and perhaps fuller, consideration of the question, we are satisfied that the decision in the *Newmeyer Case* upon this point is refuted by the great weight of authority, and it is therefore disapproved. It is insisted that the question should be ruled by the decision of the Federal Supreme Court, but adopted as our own language, used by Montgomery, J., in *Graves*

v. Battle Creek, 95 Mich. 266, 19 L. R. A. 641, 54 N. W. 757, with respect to the Botsford decision: "This decision is entitled to very great weight, but, in view of the manifest justice of a requirement that the plaintiff in case of personal injury shall produce the best evidence attainable, we think this case should not be permitted to stem the otherwise almost unbroken current of authority upon the subject." In the case at bar the motion of the defendant was timely. The injuries were alleged to be serious and permanent, as affecting both the body and mind of the plaintiff. The plaintiff would produce in his own behalf his attending physician. The defendant had no opportunity to inspect the injuries, or in any way inform itself as to their nature, extent, and effect, and was wholly unable to contest, if it should be contested, the testimony of the plaintiff's expert witness. An examination by skilled and unbiased physicians would enable them to determine the nature and extent of the injuries, and, at least in a degree, to determine their effect and permanency, and could be made without danger or pain to the plaintiff. The application was made before the trial began, more than two years after the infliction of the injuries, and clearly presents a case where the trial court should have exercised its discretion in favor of the motion. For error of the court in overruling the motion, the appeal must be sustained.

Judgment reversed, with instructions to grant appellant's motion for a new trial.

KANSAS SUPREME COURT.

D. CLEGHORN *et al.*, *Plffs. in Err.*,
v.

Josephine THOMPSON *et al.*

(.....Kan.....)

- *1. Negligence, to be actionable, must result in damage to someone, which result, in the absence of wantonness or *malice animi*, might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act.
2. The allegation of negligence is not sustained by evidence of acts resulting in damage to another, which result is not the reasonable and ordinary outcome of such acts, and which would not have been foreseen or anticipated by the exercise of ordinary prudence and foresight under all the circumstances of the case.

(April 6, 1901.)

*Headnotes by CUNNINGHAM, J.

NOTE.—For the principle with respect to the possibility of foreseeing the result, as a criterion of liability for alleged negligence, see also *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. (Fla.)* 17 L. R. A. 33, and *New Orleans & N. E. R. Co. v. McEwen & Murray (La.)* 38 L. R. A. 134.
54 L. R. A.

ERROR to the District Court for Rice County to review a judgment in favor of plaintiffs in an action brought to recover damages for the alleged negligent killing of plaintiffs' intestate. *Reversed*.

The facts are stated in the opinion.

Messrs. Frigg & Williams for plaintiffs in error.

Messrs. T. F. Foley and Samuel Jones for defendants in error.

Cunningham, J., delivered the opinion of the court:

A firm composed of M. E. Richardson and Samuel Haston was engaged in the butcher business in the city of Sterling, and in connection therewith had a slaughterhouse and stock yards on a tract of land a short distance from that town. They had in their employ one D. Cleghorn, who was in charge of the slaughterhouse and stock yards. Dogs had upon various occasions been about

For a case in which a person, while on a highway, was killed by a missile thrown by the explosion of a blast, and in which the person firing the blast was held liable as a trespasser without regard to the question of negligence, see *Sullivan v. Dunham (N. Y.)* 47 L. R. A. 715.

the slaughterhouse and yards, causing annoyance and trouble; and Cleghorn had been instructed that, if the dogs returned, to kill them. A Colts rifle, carrying a No. 32 cartridge, was in use at the slaughterhouse. On the east of the tract of land on which the slaughterhouse was located, and about 70 to 80 rods therefrom, was a public highway, running north and south, which was traveled generally by people going to and coming from Sterling. To the east and northeast of the slaughterhouse and pens the land rose gradually to the road spoken of. From the slaughterhouse and pens a portion of this north and south road was visible, and a portion was not. On the morning of the 31st of January, 1898, about 9 o'clock, Cleghorn noticed the dogs about the yards. He procured the rifle and discharged it at the dogs, which were then about 75 yards to the northeast of where he was standing. The distance to the highway from the same point, and in the direction in which he shot, was between 70 and 80 rods. The land between where the dogs then were and the highway was higher than it was where they were, and so much so that it is spoken of as an "embankment." It was of a sandy character. At this time one Joseph Thompson, who was the husband of one of the defendants in error, and the father of the others, was passing along the north and south road, and was then at a point east, or possibly to the southeast, of where Cleghorn stood. Whether he was in a position that he might have been seen by Cleghorn does not appear. The ball which was discharged by Cleghorn at the dogs was deflected at quite an angle, and, passing through the intervening space, struck Mr. Thompson and killed him. This action was brought by these defendants in error against Cleghorn, Richardson, and Haston to recover damages occasioned by the death of Thompson. The first trial resulted in a verdict for the plaintiffs. A new trial was awarded, and in the second and third trials the jury failed to agree. The fourth trial resulted in a judgment for the plaintiffs, and the defendants, as plaintiffs in error, bring the case to this court.

Various errors are alleged, but there confronts us at the very outset the question as to whether, under the circumstances of this case, plaintiffs are entitled to recover at all. They are not unless it can be stated that Cleghorn was negligent in shooting as he did. No wantonness or *malice animus* is charged. Seeing the dogs running up the slope, Cleghorn procured the gun and discharged it at them, against the elevation or embankment of land. To be sure, the bullet was in some manner deflected, and in taking another course did the damage. One of the witnesses speaks of the ground as being frozen. To what extent, is not shown, but it is hardly credible that the frozen condition of the ground was responsible for the deflection of the bullet, as it appears that the bullet was marked with a small groove which ran lengthwise. This marking would probably not have so appeared had the deflection been occasioned by contact with frozen earth. 54 L. R. A.

From that cause it would have presented more of a bruised appearance. It is probable that the bullet struck some small or sharp stone, and was thus turned out of its course. Now, what constitutes actionable negligence? "Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." Pollock, *Torts*, 36. "Where a man, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune or to the act of God, and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary rule would obviously be against public policy, because it would impose so great a restraint upon freedom of action as materially to check human enterprise." *Thomp. Neg.* 1234, 1235. "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Ray, *Negligence of Imposed Duties*, p. 361. "It is conceded by all the authorities that the standard by which to determine whether the person has been guilty of negligence is the conduct of the prudent, careful, diligent, or skillful man in the particular situation." Bigelow, *Torts*, 289. So, in the case of *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649, which was a suit to recover for injuries caused by the falling of a liberty pole which had been erected in the street, it was held, following the general rule, that "one is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may therefore have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature." "Negligence is the want of proper care, caution, and diligence,—such care, caution, and diligence as, under the circumstances, a man of ordinary and reasonable prudence would exercise." *McCully v. Clarke*, 40 Pa. 402, 80 Am. Dec. 584. "Negligence is the failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case." *Gravette v. Minneapolis & St. L. R. Co.* 3 McCrary, 352, 10 Fed. 711. See also *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 387; *Sjogren v. Hall*, 53

Mich. 274, 18 N. W. 812; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236, 47 Am. Rep. 566, 16 N. W. 388; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 441, 25 L. ed. 507; *Chicago & A. R. Co. v. Adler*, 129 Ill. 335, 21 N. E. 846; *Heaven v. Pender*, L. R. 11 Q. B. Div. 507; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352, 18 N. W. 764; *McGowan v. Chicago & A. W. R. Co.* 91 Wis. 147, 64 N. W. 891; *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L. R. A. 654, 67 N. W. 16, 1132; 2 Bouvier, Law Dict. Rawle's Revision; Pollock, Torts, 37. We might extend quotations and multiply authorities to an almost unlimited extent, but we deem the above sufficient. We may say, then, that negligence, to be actionable, must result in damage to someone, which result under all the circumstances, might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act. There are very few, if any, of the injurious things that occur in human life but what may be traced back along the line of causation, and located in an act of omission or commission of someone else. We cannot be freed from the results of living in communities. There are some of those injurious results which may be directly traced, and for which the law and common consent make the author responsible. There are others which come out of the complex relationships of life, and which the law and common consent denominate "accidents," and relieve the author, near or remote, from liability. We deem the injury of which the defendants in error in this case complain to be one of these. It is suggested, however, that the fact that Cleghorn discharged the gun in the general direction of the highway, along which people might be passing at any time, was in itself negligence. To be sure, if the gun had been held at sufficient elevation, and the bullet, which was of comparatively small size, had gone far enough in the direction in which it was shot, it would finally have come to or crossed the highway, in which case, however, no harm would have come to Mr. Thompson. But the possibility of the bullet ever reaching the highway at all depended upon the almost inconceivable—at least, very highly improbable—combination of circumstances which caused its deflection; for otherwise it would have buried itself safely in the sandy elevation of the field towards which it was discharged. What reasoning would have lead to the conclusion that the bullet discharged by Cleghorn against this elevated field of sand would probably have struck a hard substance at exactly the angle it did, and be deflected at an angle so exact that, traversing a distance of 55 or 60 rods, would find in its exact course the body of a man, and enter it in such a place and follow such a course as to be fatal? What foresight would have guessed at such a result? What prudence would have avoided it? Certainly none, except such as would have restrained entirely from discharging the

gun. We may not say, however, that this extreme of caution is required by the law. Such a rule would paralyze human effort and action on all lines.

The defendants in error, however, claim that it is the peculiar province of the jury to determine whether Cleghorn was guilty of negligence, and that, it having found a verdict in their favor, the finding is conclusive on this court, and that we are not at liberty to weigh the evidence. It is well-settled law that it is the province of the jury, under proper instructions, to determine whether or not, upon any given state of facts, negligence ought to be inferred. It is equally well settled that it is the duty of the court, first, to say whether, upon the undisputed facts, or facts taken most favorable to the plaintiff, negligence can be inferred. The jury cannot arbitrarily and without evidence infer negligence. When the evidence fails to establish the defendant's duty and its nonperformance, there is no evidence which justifies the jury in finding negligence. See *Toledo, W. & W. R. Co. v. Brannagan*, 75 Ind. 490; *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66; *Patterson, Railway Accident Law*, § 373, and note 5. Before the court can submit the question to the jury, the evidence must affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant ought to have taken. See *Hayes v. Michigan C. R. Co.* 111 U. S. 228 28 L. ed. 410, 4 Sup. Ct. Rep. 369. "The judge has a certain duty to discharge, and the jurors have another and different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever." *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 197. See also *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Gregory v. Cleveland, C. C. & I. R. Co.* 112 Ind. 385, 14 N. E. 228; *Conner v. Citizens' Street R. Co.* 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441; *Woolery v. Louisville, N. A. & C. R. Co.* 107 Ind. 381, 5 Am. Rep. 115, 8 N. E. 226; Pollock, Torts, 365.

We are not called upon to weigh evidence. Neither are we proposing to disturb the rule that the finding of a jury upon a disputed

question of fact must be held conclusive on this court, when the same has been fairly determined under proper instructions. This is not a question as to the weight or quantity of evidence, but, rather, as to the nature or quality of the evidence. It is not, Was there enough evidence? but, Was the evidence of the right kind? We are forced to the conclusion that all the evidence taken together does not make out a case of actionable negligence in favor of the defendants in error against Cleghorn, and, of course, if not against him, not against anyone. The elements of such negligence are not found in the case, and therefore the demurrer of the defendants below to the evidence of plaintiff below should have been sustained, and judgment rendered in favor of the defendants below.

The case will be reversed, with the order to the court below to render such judgment.

All the Justices concur.

T. W. HARRISON, *Plff. in Err.*,
v.

John R. MULVANE *et al.*

(.....Kan.....)

*A person charged with the duty of selling corporation stock in order to raise a fund with which to pay encumbrances upon the property of the corporation, and who is himself the owner of one of the encumbrances, junior in time to the others, and acquired by him before he became obligated to sell the stock, is not a trustee as to the property of the corporation covered by the encumbrances, and forbidden to protect his own interests in it by buying the prior liens on it, merely because he was under obligation to sell the corporation stock to raise a fund to discharge the corporation indebtedness.

(February 9, 1901.)

ERROR to the District Court for Shawnee County to review a judgment in favor of defendants in an action to reach assets of the Topeka Capital Company for the settlement of a claim which plaintiff held against it. *Affirmed.*

The facts are stated in the opinion.

Messrs. T. W. Harrison and D. R. Hite, for plaintiff in error:

If trustees are holders of shares of stock in a company, their liabilities are the same as if they were the beneficial owners, though the fact of the trusteeship is noticed in the company's books.

Re Barker, 6 Wend. 50.

As trustee John R. Mulvane owes the duty of active management for the preser-

vation and protection of the trust estate. And where that consists of stocks in a corporation there is the duty of voting at elections therein.

Re North Shore Staten Island Ferry Co. 63 Barb. 556.

Hence he was charged with a much higher duty than that of a mere passive trustee.

While holding and exercising the powers of that trustee relationship he could not lawfully speculate in any manner out of the property which belonged to the Topeka Capital Company.

It is the duty of the trustee not to accept any position, or enter into any relation, or do any act, inconsistent with the interests of his beneficiary.

2 Pom. Eq. Jur. § 1077; 1 Beach, Trusts & Trustees, § 158, p. 330.

An agent employed to purchase an estate, or to transact any business for another, cannot purchase for himself, or act for his own benefit in relation to the subject-matter of the agency, to the injury of his principal.

Reed v. Warner, 5 Paige, 656; 1 Beach, Trusts & Trustees, § 159; *Mulvane v. O'Brien*, 58 Kan. 463, 49 Pac. 607.

If agents of a corporation knowingly participate in any misapplication of a fund held by it in trust, they are liable to the beneficiaries of that trust.

1 Morawetz, Priv. Corp. § 569; 2 Pom. Eq. Jur. § 1048.

Where a purchaser has notice of the trust or agency at the time of the purchase he becomes himself a trustee for the equitable owner.

1 Beach, Trusts & Trustees, § 184; *Russell v. Clark*, 7 Cranch, 97, 3 L. ed. 280; *Chicago & A. Bridge Co. v. Fowler*, 55 Kan. 27, 39 Pac. 727; *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. 409, 19 L. ed. 120; *Bradley v. Farwell*, Holmes, 433, Fed. Cas. No. 1,779.

The surplus proceeds arising from a judicial sale belong to the judgment debtor or the owner of the property that was sold.

Jenkins v. Green, 22 Kan. 562.

Messrs. Overmyer, Mulvane, & Gault and Holmes & Perry for defendants in error.

DOSTER, Ch. J., delivered the opinion of the court:

This was an action in the nature of a creditors' bill brought under § 481 of the Civil Code by the plaintiff in error, T. W. Harrison, as a judgment creditor of the Topeka Capital Company, against the defendants in error, J. R. Mulvane and others. The court below made a general finding on the evidence in favor of the defendants, and error has been prosecuted to this court. The question for consideration is, Did a trust exist, on the facts disclosed on the trial, in J. R. Mulvane, in favor of the creditors of

NOTE.—The above case is peculiar in its facts, and seems to be without any exact precedent.

For cases involving the general principles respecting trustee's purchase of property affected with a trust, see *Anderson v. Butler* (S. C.) 5 L. R. A. 186, and some cases in footnotes thereto; 54 L. R. A.

Manhattan Cloak & Suit Co. v. Dodge (Ind.) 6 L. R. A. 369, and cases in note thereto; *Wilson v. Brookshire* (Ind.) 9 L. R. A. 792, with cases in note; *Hindman v. O'Conner* (Ark.) 13 L. R. A. 490, and cases in note; and *Indiana, I. & I. R. Co. v. Swannell* (Ill.) 30 L. R. A. 290.

the Topeka Capital Company? As stated, the finding was general, and in favor of the defendants; hence we are bound to view the facts as claimed by them. If, therefore, there was evidence to support all of the material claims of the defendants, the judgment of this court must also be in their favor. Summarized, the facts were that J. K. Hudson was indebted to one C. C. Baker in the sum of \$15,000, secured by first mortgage upon a newspaper property, and also indebted to the late Senator P. B. Plumb in the sum of \$10,000, secured by a second mortgage, and to J. R. Mulvane in the sum of \$5,000, secured by a third mortgage upon the same property. All this indebtedness was incurred prior to 1890. In that year the newspaper property was sold to the Topeka Capital Company, a corporation, in consideration of 500 shares of stock in the company issued to Hudson. Contemporaneously with this sale a written agreement was made between Hudson and the company by the terms of which 495 of the shares of stock were deposited with the Bank of Topeka in trust and as security for the payment of all indebtedness constituting liens upon the property; such stock to be sold by the trustee, upon the written request of the board of directors of the Capital Company, for the purpose of raising funds with which to discharge the liens for indebtedness. The writing provided that the sale should be made by the president of the trustee bank, or, in case of his absence or inability to act, then by the vice president. At this and all subsequent times hereafter mentioned J. R. Mulvane was the president of the Bank of Topeka. Soon after the transaction last mentioned, Mulvane sold the debt and chattel mortgage owned by him to the Bank of Topeka, but bought it back in 1895. The amount paid for it was not shown. Its face value, including overdue interest, was nearly \$7,500. The precise date of the repurchase was not shown. It would appear to have been as early as July, 1895, because in that month Mulvane made an affidavit of renewal of the mortgage as a subsisting lien owned by him. However, there is some uncertainty in his testimony as to whether the transaction did not occur at a later time. October 23, 1895, the board of directors of the Topeka Capital Company, in pursuance of the aforementioned agreement with J. K. Hudson, requested Mulvane, the president of the Bank of Topeka, to sell the stock held by the bank as trustee, in order to raise a fund to discharge the indebtedness against the company's property; and at the same time they authorized the execution of a mortgage upon the property to the Bank of Topeka to secure \$3,900 previously borrowed from it, and an additional sum of \$1,100 for present purposes, making \$5,000 in all. This mortgage was executed, and constituted the fourth lien upon the newspaper property. In pursuance of the request of the board of directors of the Capital Company, Mulvane endeavored to sell the stock. It quite satisfactorily appeared from the evidence that

he made a diligent effort to dispose of it, but was unable to find a purchaser. At or about the time of the direction of the company to Mulvane to sell the stock, the latter, being the owner of the third lien upon the mortgaged property, bought the two prior liens. He bought the one owned by Baker for \$15,000, paying the principal sum, without an accumulation of several thousand dollars of interest which then existed. He bought the one owned by the heirs of the Plumb estate for \$8,000 which was \$2,000 less than the principal sum, without counting a like accumulation of several thousand dollars interest. His own lien at this time amounted to about \$7,500. He also bought the mortgage last mentioned,—the one given by the Topeka Capital Company to the Bank of Topeka,—for which he paid \$5,000. This made \$35,000 of actual investment in the various securities mentioned. In 1895, and previous to the matters heretofore stated, a suit in equity had been instituted in the United States circuit court for the district of Kansas by one J. E. Baker, to which all of the persons owning liens upon the newspaper property were made parties defendant, and required to disclose their interest in said property. August 5th of that year J. R. Mulvane filed a cross bill in said suit, claiming a chattel mortgage lien to secure the aforementioned indebtedness of about \$7,500 from the aforesaid J. K. Hudson. This would seem to be additional and confirmatory evidence of the claim made by him in this suit that the particular indebtedness mentioned was owned by him previous to the time of his purchase of the prior liens of C. C. Baker and the Plumb heirs. In the equity suit in the United States circuit court a decree was rendered in March, 1897, adjudging J. R. Mulvane to have liens upon the property in his own original interest, and as the successor by assignment of the indebtedness and liens of C. C. Baker and the Plumb heirs and the Bank of Topeka, to the amount of \$52,274, and also decreeing a sale of such property to satisfy the indebtedness. This sale was made and confirmed in April, 1897. The sale was made to one D. W. Mulvane, and, as reported by the master, was for the sum of \$52,000. As a matter of fact it was only for the sum of \$38,500. As before stated, the actual investment of J. R. Mulvane in the mortgages covering the property at the time of and including his purchase of the prior liens of Baker and Plumb and the subsequent lien of the Bank of Topeka, and inclusive of his own lien was \$35,500. The Baker mortgage of \$15,000 bore interest at 8 per cent, the Plumb mortgage of \$10,000, purchased for \$8,000, bore interest at 7 per cent; the Mulvane mortgage of \$5,000 bore interest at 12 per cent; and the Bank of Topeka mortgage of \$5,000 bore interest at 8 per cent. There had been, therefore, fully \$3,000 of interest accumulated upon J. R. Mulvane's investment of \$35,500 in October, 1895, when the most of it was made, and the date of the sale made by the master to D. W. Mulvane in April, 1897.

Upon the above state of facts, the plaintiff in error contends that J. R. Mulvane was a trustee for the Topeka Capital Company and its creditors, and is accountable to them for the difference between the amount actually invested by him in the various liens upon the company's property, and the amount reported by the master to have been realized at the foreclosure sale of such property. The reason for this claim is the familiar rule that a trustee is prohibited from purchasing the property which is the subject of his trust, and which rule, at the election of the *cestui que trust*, avoids the sale, or gives a right of action for resulting profits against the unfaithful trustee. It is said by the plaintiff in error that inasmuch as the Bank of Topeka was the trustee for the sale of the Topeka Capital Company's stock, and inasmuch as a corporation can only act by its officers, and inasmuch, also, as the president of the bank was specially designated in the trust agreement as the one to make the sale, Mulvane, as such president, was in reality the trustee. If this were a determining question in the case, we might agree with the plaintiff in error; but the question does not involve the relation between the bank and its officers, nor the duties devolving upon them to discharge trusts resting upon the bank, but the question is, Did the trust assumed by the bank, to sell the shares of stock to raise funds to pay the newspaper company's indebtedness, preclude Mulvane, or even the bank, as the trustee, from buying prior liens upon the company's property to protect a subsequent lien held by him or it? It must be observed that the trust was not in relation to the newspaper company's mortgaged property, but it was in relation to Hudson's shares of stock in the company, which had been pledged for the payment of the company's indebtedness. The trust was not in relation to the company's property, but it was in relation to Hudson's stock. It is true that the trust was to sell stock to pay indebtedness upon property, but that does not make the property or the indebtedness upon it the subject of the trust. The subject of the trust was not corporation property, but was shares of corporation stock. Had the trustee charged with the sale of the stock bought it for himself, the doctrine invoked by the plaintiff in error might have application; but the trustee did not buy the stock, the subject of the trust. He only bought liens upon the property to discharge which the proceeds of the sale of the stock were to have been applied if such sale could have been made. We do not believe that equity, rigid as it is in its scrutiny of the conduct of trustees, condemns such a transaction, in view of the fact that the trustee was himself the owner in good faith of a subsequent lien, to protect which it became advisable to make the purchase of prior liens. The Mulvane lien of \$5,000, the third in order of priority, antedated the making of the trust agreement. The debt, to secure which that lien was given, was contracted before Mulvane or the Bank of To-

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peka became a trustee, and it was in existence during all the time the trust agreement existed. A question has been raised by the plaintiff in error as to whether that indebtedness was in reality owned by Mulvane, or the bank of which he was president. It was contracted to Mulvane, but, as before stated, was afterwards sold to the bank, and by the bank sold back to Mulvane, as he claimed. Now, for the purposes of the case, it is immaterial whether Mulvane or the bank owned it. One or the other of them did. If in reality the bank owned it, no right has been lost to the plaintiff in error through an assertion of ownership by Mulvane, its president. The ownership of the mortgage by the bank, with the consequent right to protect it by the purchase of outstanding liens, would have been as potent against the plaintiff in error as the same ownership with the same right in Mulvane. It might have been different if the Mulvane mortgage had been acquired by assignment from some person other than the Topeka Capital Company subsequent to the making of the trust agreement, and with knowledge of the existence of that agreement. It might then have been claimed that the trustee was scheming to speculate in the trust property, assuming that such property was a newspaper property, and not shares of stock; but the trustee, if he were to be called such, purchased no interest in the trust property if it were to be called such, with a view to speculation in that property. What the trustee, if he were such, bought, was an outstanding prior lien upon the trust property, if it were such, to protect a subsequent lien acquired by him before he became trustee, and continuously held by him since that time. This, we feel sure, he was lawfully authorized to do. We might agree with the plaintiff in error that Mulvane, if a trustee as to the newspaper property or the liens upon it, was accountable for the difference made by him between his actual investment in the trust property and what he realized out of it at the master's sale. It is this difference which the plaintiff in error asks. He must therefore be held to have ratified Mulvane's acquisition of the legal title to the so-called trust property. He does not ask that the transaction be set aside as void, but he permits it to stand, and asks that Mulvane be compelled to pay him such portion of the profits realized out of the transaction as will discharge his judgment. If, therefore, Mulvane made no profits, the plaintiff in error cannot lawfully have the relief asked. As before shown, Mulvane made no profits, except the contract rate of interest on his actual investment. If we could concur with the view of the plaintiff in error as to Mulvane's liability, we could not hold him to the payment of a sum of money as profits upon an unlawful transaction merely because the master reported a sale for a larger sum than was actually realized. It would only be for actual profits that Mulvane could be held, if for anything. That, as before shown, was nothing but simple interest. The difference between his actual

investment of \$35,500 and \$38,500, the sum actually realized by him at the sale, did nothing more than cover the interest which accrued between the two periods mentioned on the actual investment made. This, of course, is a form of profit, but it is not of that exaggerated amount or fraudulent character as to be taken seriously into account even in a transaction which the law otherwise condemns.

Other claims of error have been made, but they are either subsidiary to the principal one above discussed, and therefore need not be mentioned, or they are not well taken. In the presentation of the case many authorities were cited on both sides, none of which, however, has a direct bearing upon the precise question. All of them were simply declarative of abstract and fundamental rules, the soundness of which cannot be disputed. Their applicability to the case in hand is not, however, perceived. The controversy is a peculiar one. That controversy relates to the right of a person charged with the duty of selling corporation stock, in order to raise a fund to pay liens belonging to himself and others, to protect his own lien by buying those prior to it, when his own lien had been acquired previous to the time he took upon himself the obligation to sell the stock. Upon this precise question counsel have not furnished us with any direct authorities, and the multiplicity of our labors has prevented research for ourselves.

The judgment of the court below is affirmed.

All the Justices concur.

KANSAS NATIONAL BANK, *Plff. in Err.*,
v.

C. M. BAY.

(.....Kan.....)

*One who signs a promissory note in the name of another, by himself as attorney in fact, but who, to the knowledge of the payee and a subsequent indorsee, has no authority to use the other's name, and who refuses their solicitation to sign his own name and bind himself personally, is not liable upon the note as his contract, notwithstanding the fact that it is given in a transaction of his own, and that he is generally using the name signed to the note as a tradename.

(April 6, 1901.)

ERROR to the District Court for Reno County to review a judgment in favor

*Headnote by DOSTER, Ch. J.

NOTE.—On the general question of the acquisition and use of a name by an individual, see note to *Lafin & R. Powder Co. v. Steytler* (Pa.) 14 L. R. A. 690.

It will be noticed that the court in the above case does not question the soundness of the authorities which hold that one who without fraud signs the name of another to a note for 54 L. R. A.

of defendant in an action brought to enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. Houston & Brooks, for plaintiff in error:

A person cannot, by the adoption of a false and fictitious name, escape liability on contracts which he has entered into. The law will fix the liability upon the person whom the name really represents.

Blinn v. Chessman, 49 Minn. 140, 51 N. W. 666; *David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 265, 38 Am. Rep. 418; *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347; *Jewett v. Whalen*, 11 Wis. 124.

Defendant might bind himself by any signature he thought proper to adopt, providing it appeared that he used it as a substitute for his own name.

Rogers v. Coit, 6 Hill, 322; *Brown v. Butchers' & D. Bank*, 6 Hill, 443, 41 Am. Dec. 755; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Palmer v. Stephens*, 1 Denio, 472.

At the common law a man may lawfully change his name. He is bound by any contract into which he may enter by his adopted or reputed name, and by his known and recognized name may sue and be sued.

Snook's Petition, 2 Pittsb. 26; *Petrie v. Woodworth*, 3 Cal. 219; *Linton v. First Nat. Bank*, 10 Fed. 897; *Bell v. Sun Printing & Pub. Co.* 10 Jones & S. 570; *Chandler v. Coe*, 54 N. H. 561; *Graham v. Eisner*, 28 Ill. App. 269; *Melledge v. Boston Iron Co.* 5 Cush. 158, 51 Am. Dec. 59; *Bryant v. Eastman*, 7 Cush. 111; *Fuller v. Hooper*, 3 Gray, 334.

Power to mortgage does not include power to execute a promissory note whereby a personal liability may be imposed upon the grantor of the power.

Mylius v. Copes, 23 Kan. 617.

Mr. H. Whiteside, for defendant in error:

The construction of this power of attorney is governed by the more liberal authorities.

Bailey v. Rawley, 1 Swan, 295; *Gould v. Bowen*, 26 Iowa, 78; *Marshall v. Shibley*, 11 Kan. 114; *Hatch v. Coddington*, 95 U. S. 48, 24 L. ed. 339; *Roche v. Pennington*, 90 Wis. 112, 62 N. W. 946.

Bay was authorized to buy cattle, and he did so in the ordinary and usual manner. His construction of the power of attorney was corroborated by that of plaintiff and its agents.

Johnson v. East Carolina Land & R. Co. 116 N. C. 926, 21 S. E. 28.

The power of attorney being actually executed and delivered by Bay's father-in-law, recorded and published to plaintiff and its agents, and Bay admittedly acting under it, it is immaterial whether it was suffi-

his own purposes will be held liable, but puts the decision in this case on the ground that it was clearly understood by all parties that the signer did not intend to be bound. The principles involved in cases of this kind, so far as they are illustrated in notes signed by officers of corporations, are set forth in a note to *Matthews v. Dubuque Mattress Co.* (Iowa) 19 L. R. A. 676.

cient to give the authority in question or not.

Abeles v. Cochran, 22 Kan. 414, 31 Am. Rep. 194; *Watson v. Rickard*, 25 Kan. 664.

The note and the power of attorney having been put in evidence by plaintiff, and it having been proved that Bay executed the note under the power of attorney, the objections of the defendant in error to parol evidence introduced for the purpose of affecting the written instruments in some manner or other should all have been excluded on the well-settled principle that, in the absence of fraud or mistake duly alleged, parol evidence cannot be introduced to vary the terms and effect of written instruments, and that, where a written instrument is not attacked on the ground of fraud or mistake, all conversations and declarations of the parties antecedent to the execution of the instrument are incompetent.

Rodgers v. Perroult, 41 Kan. 387, 21 Pac. 287; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017; *Abeles v. Cochran*, 22 Kan. 414, 31 Am. Rep. 194.

Doster, Ch. J., delivered the opinion of the court:

This was an action by the Kansas National Bank against C. M. Bay upon a promissory note. Judgment went for the defendant. The plaintiff has prosecuted error to this court. The note sued upon read as follows:

\$5,577.50. Wichita, Kansas, Oct. 8, '98.

One hundred and twenty days after date I promise to pay to the order of W. W. Graves and Company five thousand five hundred and seventy-seven and $\frac{1}{100}$ dollars, for value received, negotiable and payable, without defalcation or discount, at the Kansas National Bank of Wichita, Kansas, with interest at the rate of 10% per annum from Nov. 8, 1898. Interest payable annually. No. ——. Due Feb. 8, 1898.

H. R. Sloan,
by C. M. Bay, Atty. in Fact.

The petition averred that the defendant, Bay, under the name and style of H. R. Sloan, executed and delivered the note, and that the amount of it was due from the defendant, Bay, doing business as H. R. Sloan; wherefore judgment was demanded against said Bay. The facts were that Bay was doing his own business under the name of Sloan, and that as a cover for his transactions he had procured a power of attorney from Sloan. However, that instrument did not confer upon him the power to execute promissory notes. He bought cattle from W. W. Graves & Co., and to evidence the purchase price executed to them two promissory notes in form similar to the one in suit. To secure these notes he executed in Sloan's name a first and a second chattel mortgage on the cattle. These notes and mortgages were negotiated to the Kansas National Bank. At the time they were taken by the bank, Bay explained to its president that he was doing business in the name of Sloan under a power of attorney.

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The bank accepted the notes and mortgages, but required Bay to furnish it with a copy of the power of attorney. The cattle seemingly were taken under the first mortgage to pay one of the notes. This left the other one in the hands of the bank. It was held there as collateral security to an indebtedness due the bank from Graves & Co. The bank desired its renewal, and sent Graves, as its agent, to procure the renewal. As a renewal, Graves secured the note in suit, and indorsed it to the bank. He tried to induce Bay to assume personal responsibility upon the note by signing his own name to it. Bay refused to do this. There is no question but that the transaction for which the notes were given was Bay's individual business; but he fully explained to the bank president and to Graves & Co. that he was not doing business in his own name; that he could not do so because of indebtedness held against him. There is no claim of deception or fraud practised by Bay. His admission that he was conducting his own business in the name of another, and his reasons for so doing, were frank and open. While he seemed to be of the opinion that Sloan's power of attorney to him authorized the execution of promissory notes, yet it was not claimed that he fraudulently misstated his authority under that instrument, and, even if he had done so, the bank came into the possession of a copy of the power of attorney before the note in suit was executed, and therefore knew what it contained or did not contain. The question, therefore, is whether Bay is liable upon the note executed by him in the name of Sloan. The plaintiff in error contends that he is, because, as it says, the name of Sloan was a tradename adopted by Bay for the transaction of his own business, and, inasmuch as the giving of the note was his own business, he is liable on it as though executed in his own name. There are authorities to the effect that one who, for his own purposes, adopts the name of another, will be held liable in a transaction of his own conducted thereunder. We have no occasion to question the soundness of these authorities. We think, however, they are limited to cases where it appeared that, under the name of another as a tradename, the party contracted to bind himself and not the other; and in some of them the party using the name of another was held liable, not on the contract, but upon the transaction out of which the contract grew. It may be that Bay is liable in an action charging him upon the original transaction, but he is not liable upon the promissory note. He is not liable because he never made that note his contract. He never agreed to be bound upon it, but, on the contrary, refused to sign it as his contract or bind himself by it as an instrument of writing. No cases precisely in point have been cited to us, nor in considerable research ourselves among the authorities have we been able to find one entirely similar in its facts. We think, however, that the case is covered by the general principles of the law, and that these are well stated and elucidated in *Bartlett v. Tucker*, 104 Mass.

336, 6 Am. Rep. 240, the opening paragraph of the opinion in which case reads: "It is well settled that any person taking a negotiable promissory note contracts with those only whose names are signed to it as parties, and cannot, therefore, maintain an action upon the note against any other person. . . . That rule, of course, does not preclude charging a party who, instead of the name by which he is usually known, signs, with intent to bind himself thereby, his initials, or a mark, or any name under which he is proved to have held himself out to the world and carried on business.

The judgment of the court below is affirmed.

All the Justices concur.

William DEERING & COMPANY, *Plff. in Err.*,
v.

J. C. CUNNINGHAM *et al.*

(.....Kan.....)

- *1. An agreement that, for a pecuniary consideration, a person will withdraw opposition to the granting of a pardon, and will, by solicitation and the exercise of personal influence, endeavor to induce the pardoning authority to grant a pardon to one who has been convicted of a crime, contravenes public policy and is void.
2. A party is not concluded by the statements of any witness, but has the right to introduce other competent testimony to show the real facts, although such testimony may incidentally contradict or tend to impeach the testimony of a previous witness.

(June 8, 1901.)

ERROR to the District Court for Montgomery County to review a judgment in favor of defendants in an action brought to enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. Albert L. Wilson for plaintiff in error.

Mr. A. B. Clark for defendants in error.

Johnston, J., delivered the opinion of the court:

This was an action to recover upon a promissory note for \$100, bearing interest at the rate of 10 per cent per annum from date, given by J. C. and Mary E. Cunningham to Maud L. Sherrill. It is one of a series of notes given in pursuance of an agreement, of which the following is a copy:

This agreement, made and entered into by

*Headnotes by **JOHNSTON, J.**

NOTE.—As to validity of contract to procure legislation, see *note* to *Houlton v. Dunn* (Minn.) 30 L. R. A. 737; also *Houlton v. Nichol* (Wis.) 33 L. R. A. 166; *Crichfield v. Bermudez Asphalt Paving Co.* (Ill.) 42 L. R. A. 347; and *Richardson v. Scotts Bluff County* (Neb.) 48 L. R. A. 294.

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and between J. C. Cunningham and E. Sherrill and Maud L. Sherrill, witnesseth: That the said E. Sherrill is to dismiss, at his cost, the suit now pending in the state of Illinois entitled "*E. Sherrill against George C. Cunningham*," and brought for the recovery of damages, and the said Maud L. Sherrill is also to dismiss at her costs the suit now pending in Illinois entitled "*Maud L. Sherrill against George C. Cunningham*," and the said J. C. Cunningham is to make, execute, and deliver unto said Maud L. Sherrill his three promissory notes, each for the sum of \$100, and interest from the date of this agreement at the rate of 10 per cent per annum; one note to mature on the 1st day of October, 1892, one on the 1st day of October, 1893, and the other one on the 1st day of October, 1894; said notes to be secured satisfactorily to said E. Sherrill, and to be placed in the hands of O. F. Carson, to be held by him until the conditions of this agreement on the part of said Maud L. Sherrill as aforesaid are performed. The parties hereto are to be friends hereafter, and to quit talking about each other, and all unite in an effort to secure a pardon for said George C. Cunningham, now confined in the penitentiary. All remonstrances and letters against the said pardon are to be withdrawn, and the said E. Sherrill agrees to visit the judge who sentenced and the jury who convicted said George C. Cunningham, and try to have them sign a petition for said pardon. In witness whereof, the parties have hereunto set their hands this 4th day of June, 1892.

J. C. Cunningham.

E. Sherrill.

Maud L. Sherrill

The note in controversy was delivered to Maud L. Sherrill, who transferred it to William Deering & Co. before maturity; but it is contended that the contract in pursuance of which the note was given contravenes public policy, and that it and the accompanying notes are therefore void; that Deering & Co. had notice of the illegality in the consideration of the note before purchasing the same, and therefore took it subject to that defense. Two principal questions were presented for determination: First, was there illegality in the consideration of the notes? and, second, was Deering & Co., who acquired the note before maturity, an innocent purchaser? and both questions were decided in favor of the defendants in error.

George C. Cunningham, who had been convicted of a crime, and was then in the penitentiary, was a son of J. C. Cunningham; and it appears that the Sherrills—especially Maud L. Sherrill—had been active in the prosecution and in securing the conviction. An effort had been made to obtain a pardon

As to contracts to compound crime, see, in this series, *Loud v. Hamilton* (Tenn.) 45 L. R. A. 400; *Rock v. Mathews* (W. Va.) 14 L. R. A. 508; *Shattuck v. Watson* (Ark.) 7 L. R. A. 551; *Weber v. Shay* (Ohio) 37 L. R. A. 230; and *Springfield F. & M. Ins. Co. v. Hull* (Ohio) 25 L. R. A. 37.

for George Cunningham, and it appears that the Sherrills had remonstrated and protested against the granting of the same. In consideration of the notes given, the Sherrills agreed to withdraw all remonstrance and letters protesting against the pardon. Besides, they were to unite with the Cunninghams in an endeavor to obtain the pardon, and were required to visit the judge and the jurors before whom the conviction was had, and endeavor to get them to sign a petition to the governor for a pardon. The court below correctly advised the jury that the agreement was contrary to public policy, and that, as between the original parties or those who had notice of the illegality, the note was without consideration. There is necessarily nothing immoral or wrong in an application for a pardon. A person may have been wrongfully convicted. Subsequent developments may show that another than he committed the offense, or that there were mitigating circumstances, not known when sentence was pronounced, which require a mitigation of the penalty, or it may be that the conduct of the prisoner or his condition warrants the interposition of the pardoning power and the lightening of the punishment imposed. A person may therefore be legally employed to prepare a petition, collect evidence showing the right to a pardon, and submit the same, together with proper arguments, either oral or in writing, to the governor or other authority granting pardons. So it has been frequently held that contracts for the performance of legitimate professional services, such as have been mentioned, and which are openly presented, and appeal directly to the judgment and reason of the authorities to whom they are presented, are valid. But there is a marked distinction between services like these and those contracted for in the present case. The consideration of the notes in this instance was personal influence and lobby services, not by anyone skilled in such work, but because they had been instrumental in securing the conviction, and of their opposition to the granting of the pardon which had been applied for. The purchase of personal influence to obtain a pardon or to control the operations of any department of the government is immoral and pernicious in tendency, and cannot receive the sanction of courts. Aside from the fact that the Sherrills agreed to use their personal influence, and had hired out their services to influence the action of the governor, there was a purchase of the withdrawal of their opposition, — a sinister act, for which no excuse can be given, and which is clearly inconsistent with public policy and sound morality. Testimony tending to show that most of the considerations named in the agreement were free from taint, or that no bad motives were entertained, is not admissible, and no error was committed by the court in excluding the same. The rule in such cases was stated in *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213, where it was said that "the contract of an attorney for services as such, whether the services are to be rendered be-

fore a court, a department of the government, or a legislative body, is valid, and upon performance of the services a recovery can be had. The contract of a lobbyist, in the sense in which that term is now used, for his services as such, is against public policy and void. Where there is a single contract, and the services contracted for and rendered are partially those of an attorney and partially those of a lobbyist, and blended together as part and parcel of a single employment, the entire contract is vitiated. "That which is bad destroys that which is good, and they perish together." The claim that no improper influence or means were contemplated by the parties does not weigh much where, as in this case, the things expressly provided for in the agreement are so clearly under the ban of the law. In *Providence Tool Co. v. Norris*, 2 Wall. 54, 17 L. ed. 870, it was held that the invalidity of agreements like this one did not depend upon the question whether improper influences were intended or used, but, rather, upon the corrupting tendency of such agreements; and Justice Field remarked: "It is sufficient to observe generally that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void, as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." In *Wilkey v. Collier*, 7 Md. 273, 61 Am. Dec. 346, an agreement to procure favorable action of the governor, for a pecuniary consideration, was held to be void as against public policy, and the court said that "the reasons are obvious. They are designed to protect the exercise of this power from abuse through the intervention of designing persons, and, although in the particular instance no improper influences may have been resorted to, the public interest in such questions requires that the principle should be enforced in all cases." In *Chipfinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519, it was ruled that "it matters not that nothing improper was done, or was expected to be done, by the plaintiff. It is enough that such is the tendency of the contract; that it is contrary to sound morality and public policy, leading, necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the government. It may not corrupt all, but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal." See also *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Rose v. Truax*, 21 Barb. 361; *Mil-*

bank v. Jones, 127 N. Y. 370, 28 N. E. 31; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 877; *Trist v. Child*, 88 U. S. 441, *sub nom. Burke v. Child*, 22 L. ed. 623; *Buck v. First Nat. Bank*, 27 Mich. 293, 15 Am. Rep. 189; *Thompson v. Wharton*, 7 Bush, 563, 3 Am. Rep. 306; 9 Am. & Eng. Enc. Law, p. 900. In agreements providing for the use of personal influence to control official action, parties have sometimes stipulated that no improper means were intended, and that only reasonable and legitimate methods were to be used, but even these stipulations were not sufficient to save the agreements from the ban of the law or the condemnation of the courts. *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Elkhart County Lodge v. Orary*, 98 Ind. 238, 49 Am. Rep. 748; *Sweeney v. McLeod*, 15 Or. 330, 15 Pac. 275; *Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co.*, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. 17. Within the reasoning of the authorities cited, the agreement in question clearly involves the fatal elements, and a judicial interpretation of its terms warranted the court in telling the jury, as a matter of law, that it was illegal and void. The fact that it is void on its face renders unimportant some of the questions raised on the admission of testimony and on the instructions of the court.

The only question remaining is whether the transferee of the note had knowledge of its infirmity, or such notice as to fairly put him upon inquiry. On this question there is considerable contrariety in the evidence, but of the sufficiency of the testimony to put him upon notice there can be no doubt. It tends to show that the agent of the plaintiff in the purchase of the note was expressly warned, several days before the purchase was made, that the note was not good, and that the makers did not intend to pay it. It is contended that error was committed in the admission of testimony with reference to the good faith of the transfer. The agent of the plaintiff who purchased the note was called as a witness by the defendant, and, among other things, testified that he had no notice of the defense of illegality or of the infirmity in the note. By other witnesses was shown the time and manner in which the plaintiff acquired knowledge or notice of the defense, and the testimony was a contradiction of the statement made by the agent of the plaintiff. It is contended that, by producing the agent of the plaintiff as their witness, they vouched for his truthfulness and were bound by his testimony, and that it was error to allow him to be impeached. As a general rule, it is not permitted to produce a witness, and then attack his veracity if he fails to testify as was desired. Where a party has been entrapped or deceived by a hostile witness, he may, in the discretion of the court, be permitted to show that he was surprised or deceived, and counteract the injurious effect of the testimony by showing that the witness had previously made contrary declarations, and what such declarations were. *Johnson v. Leggett*, 28 Kan. 591; *Greenl. Ev.* § 442. 54 L. R. A.

There was no attempt, however, in this case to impeach the witness; and the fact that he was called and examined by the defendant did not preclude the defendant from showing the actual facts in the case, although they may have incidentally contradicted the statements of the witness. As was said in *Wallach v. Wylie*, 28 Kan. 138: "A party never was concluded by the statements of any one of his witnesses. He always had the right to introduce other competent testimony to prove his case, although such testimony might contradict the statements of a previous witness, and might incidentally tend to impeach the testimony of such previous witness." *State v. Keefe*, 54 Kan. 197, 38 Pac. 302; 29 Am. & Eng. Enc. Law, p. 812.

We find no reversible error in the case, and therefore the judgment of the District Court will be affirmed.

All the Justices concur.

William KINCAID, *Pff. in Err.*,
v.

NATIONAL WALL PAPER COMPANY.

(.....Kan.....)

*The members of an insolvent partnership, if in good faith, and all the partners consent, may appropriate their own interest in the partnership property to the payment of their individual debts in preference to those of the partnership.

(June 8, 1901.)

ERROR to the District Court for Sedgwick County to review a judgment in favor of plaintiff in a proceeding to reach property in possession of defendant as belonging to a partnership which was debtor to the plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Kos Harris and O. G. Eckstein, for plaintiff in error:

All partners consenting, partnership assets may be used to pay individual debts. And the actual insolvency of the firm, no actual fraud intervening, does not change the rule.

Woodmansie v. Holcomb, 34 Kan. 38, 7 Pac. 603; *Berkley v. Tootle*, 46 Kan. 336, 26 Pac. 730; *Mannen v. Bailey*, 51 Kan. 447, 32 Pac. 1085; *Tootle v. Rice*, 53 Kan. 581, 36

*Headnote by DOSTER, Ch. J.

NOTE.—For some authorities in this series upon the equitable rule as to the payment of the individual and social debts of partners, see *Purple v. Farrington* (Ind.) 4 L. R. A. 535; *notes to Darby v. Gilligan* (W. Va.) 6 L. R. A. 740; *Valentine v. Wysox* (Ind.) 7 L. R. A. 791; *Patton v. Leftwich* (Va.) 6 L. R. A. 570; *Hundley v. Farris* (Mo.) 12 L. R. A. 254; *Standish v. Babcock* (N. J. Eq.) 80 L. R. A. 604; and *Jackson Bank v. Durfee* (Miss.) 81 L. R. A. 470.

For power of firm to assume individual debts of partner, see *note to Re Edwards & Wigginton* (Mo.) 29 L. R. A. 681; *Vietor v. Glover* (Wash.) 40 L. R. A. 297; and *Noyes v. Ross* (Mont.) 47 L. R. A. 400.

Pac. 990; *King v. Sutton*, 42 Kan. 604, 22 Pac. 695; *Myers v. Tyson*, 2 Kan. App. 468, 43 Pac. 91; *Stigler v. Knox County Bank*, 8 Ohio St. 511; *Schmidlapp v. Currie*, 55 Miss. 597, 30 Am. Rep. 530; *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13; *Wilcox v. Kellogg*, 11 Ohio, 394; *Gwin v. Selby*, 5 Ohio St. 96; *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54; *Haben v. Harshaw*, 49 Wis. 379, 5 N. W. 872; *White v. Parish*, 20 Tex. 688, 73 Am. Dec. 204; *Schaeffer v. Fithian*, 17 Ind. 463; *M'Donald v. Beach*, 2 Blackf. 55; *Ex parte Ruffin*, 6 Ves. Jr. 119; *Whitton v. Smith*, Freem. Ch. (Miss.) 231; *Freeman v. Stewart*, 41 Miss. 138; *Potts v. Blackwell*, 37 N. C. (4 Jones Eq.) 58; *Purple v. Farrington*, 119 Ind. 164, 4 L. R. A. 535, 21 N. E. 543; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 211, 1 Sup. Ct. Rep. 369; *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. Rep. 899; *George v. Wamsley*, 64 Iowa, 175, 20 N. W. 1; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Wilson v. Soper*, 13 B. Mon. 411, 56 Am. Dec. 573; *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592; *Seaton v. Anderson*, 95 Mo. 381, 8 S. W. 564; *Pepper v. Peck*, 17 R. I. 55, 20 Atl. 16; *Coakley v. Weil*, 47 Md. 277; *Hanover Nat. Bank v. Klein*, 64 Miss. 141, 60 Am. Rep. 47, 8 So. 208; *Sickman v. Abernathy*, 14 Colo. 174, 23 Pac. 447; *Carver Gin & Mach. Co. v. Bannon*, 85 Tenn. 712, 4 S. W. 831; *Thayer v. Humphrey*, 91 Wis. 278, 30 L. R. A. 549, 64 N. W. 1007; *Harris v. Meyer*, 84 Wis. 147, 53 N. W. 127; *Poole v. Seney*, 66 Iowa, 500, 24 N. W. 27; *Bump, Fraud. Conv.* 4th ed. § 233; *Ellison v. Lucas*, 87 Ga. 223, 13 S. E. 445; *Bates, Partn.* §§ 565, 566; *Marks v. Hill*, 15 Gratt. 400; *Allen v. Center Valley Co.* 21 Conn. 130, 54 Am. Dec. 333; *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54; *Wilson v. Robertson*, 21 N. Y. 591; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683; *Clements v. Jessup*, 36 N. J. Eq. 572; *Arnold v. Hagerman*, 45 N. J. Eq. 186, 17 Atl. 93; *Phelps v. McNeely*, 66 Mo. 554, 27 Am. Rep. 378; *Davies v. Atkinson*, 124 Ill. 474, 16 N. E. 899; *Story, Eq. Jur.* § 1253; *Smith v. Smith Bros.* 87 Iowa, 93, 64 N. W. 73; *Murray v. Murray*, 5 Johns. Ch. 60; *Murrill v. Neill*, 8 How. 414, 12 L. ed. 1135; *Scudder v. Delashmut*, 7 Iowa, 39, 71 Am. Dec. 428; *Hawk Eye Woolen Mills v. Conklin*, 26 Iowa, 422; *Maquoketa v. Willey*, 35 Iowa, 323; *George v. Wamsley*, 64 Iowa, 175, 20 N. W. 1; *Ladd v. Griswold*, 9 Ill. 25, 46 Am. Dec. 443; *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Vietor v. Glover*, 17 Wash. 37, 40 L. R. A. 297, 48 Pac. 788.

The so-called lien of partnership creditors is destroyed by the waiver of the partner or consent of the partner to the transfer.

Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370; *Arnold v. Hagerman*, 45 N. J. Eq. 188, 17 Atl. 93; *Holloway v. Turner*, 61 Md. 217; *Couchman v. Maupin*, 78 Ky. 33; *Ely v. Hair*, 16 B. Mon. 237; *Farwell v. Huston*, 151 Ill. 239, 37 N. E. 864; *Hap-*

good v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; *Kimball v. Thompson*, 13 Met. 283.

If a partner uses firm assets for his private debt the real question is whether or not the other partner consented to such disposition. If there was such consent the transaction is valid.

Rogers v. Batchelor, 12 Pet. 221, 9 L. ed. 1063; *Cannon v. Lindsey*, 85 Ala. 198, 3 So. 676; *Liberty Sav. Bank v. Campbell*, 75 Va. 534; *Caldwell v. Scott*, 54 N. H. 414; *Ackley v. Staehlin*, 56 Mo. 558; *Janney v. Springer*, 78 Iowa, 617, 43 N. W. 461; 2 Herman, *Estoppel & Res Judicata*, § 1098; *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Kimball v. Thompson*, 13 Met. 283; *Flack v. Charron*, 29 Md. 311; *Fitzpatrick v. Flannagan*, 106 U. S. 654, 27 L. ed. 213, 1 Sup. Ct. Rep. 369; *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. Rep. 899.

It was only necessary that the disposition should have been bona fide, and not made with intent to hinder and delay.

Hove v. Lawrence, 9 Cush. 553, 57 Am. Dec. 68; *Locke v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631; *Purple v. Farrington*, 119 Ind. 164, 4 L. R. A. 535, 21 N. E. 543; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, 49 Am. Dec. 160; *Kennedy v. National Union Bank*, 23 Hun, 496; *Jones, Chat. Mortg.* § 44; *Re Kahley*, 2 Biss. 383, Fed. Cas. No. 7,593; *Warren v. Farmer*, 100 Ind. 593; *Trentman v. Swartzell*, 85 Ind. 443; *Goudy v. Werbe*, 117 Ind. 165, 3 L. R. A. 114, 19 N. E. 764; *Louden v. Ball*, 93 Ind. 232; *McFadden v. Fritz*, 90 Ind. 590; *McFadden v. Hopkins*, 81 Ind. 459; *Morris v. Stern*, 80 Ind. 227; *Schaeffer v. Fithian*, 17 Ind. 463; *Kistner v. Sindlinger*, 33 Ind. 117.

A partnership may prefer a creditor, or class of creditors, just as an individual may prefer creditors either by sale or mortgage.

29 Cent. L. J. 83; *Clarke v. White*, 12 Pet. 178, 9 L. ed. 1046; *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. ed. 903; *Vietor v. Glover*, 17 Wash. 37, 40 L. R. A. 297, 48 Pac. 788; *Jones, Chatt. Mortg.* § 44; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13; *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. Rep. 899; *Coffin v. Day*, 34 Fed. 687; *Seaton v. Anderson*, 95 Mo. 373, 8 S. W. 564; *Re Edwards & Wigginton*, 122 Mo. 426, 29 L. R. A. 681, 25 S. W. 904; *Wiggins v. Blackshear* (Tex. Civ. App.) 24 S. W. 918; *Winslow v. Wallace*, 116 Ind. 317, sub nom. *Fletcher v. Sharpe*, 1 L. R. A. 179, 17 N. E. 923; *Carver Gin & Mach. Co. v. Bannon*, 85 Tenn. 712, 4 S. W. 831; *Anderson v. Norton*, 15 Lea, 14, 54 Am. Rep. 400; *Reynolds v. Johnson*, 54 Ark. 449, 16 S. W. 124; *Purple v. Farrington*, 119 Ind. 164, 4 L. R. A. 535, 21 N. E. 543.

Mr. J. V. Daugherty, for defendant in error:

When the members of the firm of Garrett & Kincaid simply conveyed an undivided one-half interest in the stock of goods, they conveyed just what interest they had in the

property after partnership debts had been paid, and nothing more.

A creditor and mortgagee gets only the net interest of each partner after the partnership creditors are satisfied.

Jones, Chatt. Mortg. § 45; *Aldridge v. Elerick*, 1 Kan. App. 306, 41 Pac. 199; *Ewart v. Nave-McCord Mercantile Co.* 130 Mo. 112, 31 S. W. 1041; Bates, Partn. § 184; *Thompson v. Spittle*, 102 Mass. 210; *Monroe v. Hamilton*, 60 Ala. 232; *Rainey v. Nance*, 54 Ill. 29; *Tarbell v. West*, 86 N. Y. 287; *Deeter v. Sellers*, 102 Ind. 458, 1 N. E. 854; *Du Pont v. McLaran*, 61 Mo. 508; *First Nat. Bank v. Brenneisen*, 97 Mo. 150, 10 S. W. 884; *Norwalk Nat. Bank v. Saucyer*, 38 Ohio St. 339; *Kenneweg v. Schilansky*, 45 W. Va. 521, 31 S. E. 949.

Transfer of partnership property by the copartners, or by one partner with the consent of the other partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts.

Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93.

The measure of damages is the fair market value at the time of conversion.

Gensburg v. Marshall Field & Co. 104 Iowa, 599, 74 N. W. 3; *Smith v. Bates* (Tex. Civ. App.) 27 S. W. 1044; *Sears v. Lydon* (Idaho) 49 Pac. 122.

Doster, Ch. J., delivered the opinion of the court:

This was a garnishment proceeding, brought by the National Wall-Paper Company, the creditor, against William Kincaid, the garnishee. C. A. Garrett and H. O. Kincaid, as a partnership, owed the National Wall-Paper Company. Each of them, as individuals, was indebted to William Kincaid. These debts were each for the sum of \$420, and to secure them each partner executed a mortgage of his undivided half interest in the partnership property, and each partner indorsed on the other's mortgage his consent thereto. The partnership was insolvent at this time. The mortgages were given in good faith to secure bona fide debts. The question, therefore, is whether members of a partnership may prefer their individual to their partnership creditors by the execution of liens upon their own interests in the partnership property, each party consenting to the act of the other. This question has been several times discussed before the court, and adverted to in some of the opinions. *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. 603; *Berkley v. Tootle*, 46 Kan. 335, 26 Pac. 730; *Mannen v. Bailey*, 51 Kan. 446, 32 Pac. 1085; *Tootle v. Rice*, 53 Kan. 581, 36 Pac. 990. In the last two cases the question was stated, and attention called to opposing authorities, but no decision was made. In *Woodmansie v. Holcomb* it was ruled in the syllabus that, "while the partnership remains in existence and in a solvent condition, it may, upon a bona fide consideration, all the partners assenting, transfer and appropriate the firm 54 L. R. A.

property in payment of the individual debt of one of its members." In the opinion it was remarked: "The decisions of the courts have gone further than this, and, although not unanimous, the weight of authority seems to be that mere insolvency, where no actual fraud intervenes, will not deprive the partners of their legal control over the property and of the right to dispose of the same as they may choose; and, where the separate creditor purchases from the firm in good faith, and the individual indebtedness is a fair price for the property purchased, such purchase cannot of itself be held fraudulent as against the general creditors of the firm." In *Berkley v. Tootle* it does not clearly appear that the partnership was insolvent, but the case seems to have proceeded upon the assumption that it was, and the foregoing extract from the opinion in *Woodmansie v. Holcomb* was quoted as the law applicable to the facts under consideration. It is questionable, indeed, whether the remarks made in the case of *Woodmansie v. Holcomb* were necessary to the decision of that case; but subsequent cases, and especially that of *Berkley v. Tootle*, appear to have regarded the rule announced with favor. We are of the opinion, now that the question is directly presented, that the members of an insolvent partnership, all the partners consenting, may, if in good faith, appropriate their own interest in the partnership property to the payment of their individual debts in preference to those of the partnership. It has been loosely said that partnership creditors have a lien on the partnership property; but this is not true, and we think that no court has so decided in the sense those words imply. The partners themselves have an equity in the partnership property to compel its appropriation to the payment of partnership debts as against the debts of the individual members of the firm, and to this equity the partnership creditors succeed in cases and under circumstances which will enable them to enforce it; and that ordinarily, if not always, is when the partnership is in the control of the court, and its assets in the course of administration by the court, either through the bankruptcy of the firm or the creation of a trust in some mode. Strong and well-considered decisions in which this doctrine is asserted, with citations to numerous authorities, are *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Purple v. Farrington*, 119 Ind. 164, 4 L. R. A. 535, 21 N. E. 543. These cases are entirely in point in the present controversy. The facts in each are almost identical with those in the present case. In the one last cited it was tersely remarked that "members of a partnership largely indebted and insolvent may mortgage the firm property to secure an individual indebtedness if in so doing they act in good faith." This we believe to be the law.

The judgment of the court below is reversed, with directions to proceed in accordance with this opinion.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

J. M. MATHEWS *et al.*, *Appts.*,

v.

G. N. MURPHY.

(.....Ky.....)

A statute authorizing the state board of health to revoke a physician's license for grossly unprofessional conduct likely to deceive or defraud the public, without fixing any standard by which such fact shall be determined, is void.

(June 22, 1901.)

A PPEAL by defendants from a judgment of the Circuit Court for Warren County enjoining them from attempting to revoke plaintiff's license to practise medicine. *Affirmed.*

The facts are stated in the opinion.

Messrs. William S. Pryor, Clarence U. McElroy, Aaron Kohn, and Edward W. Hines, for appellants:

The state may, in the exercise of the police power, confer on a board of physicians the power to grant and refuse licenses to practise medicine.

Driscoll v. Com. 93 Ky. 393, 20 S. W. 431; *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Ex parte Frazer*, 54 Cal. 94; *Harding v. People*, 10 Colo. 387, 15 Pac. 727; *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *Iowa Eclectic Medical College Asso. v. Schrader*, 87 Iowa, 659, 20 L. R. A. 355, 55 N. W. 24; *Allopathic State Bd. of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809; *Hewitt v. Charier*, 16 Pick. 353; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *State ex rel. Hathaway v. State Bd. of Health*, 103 Mo. 22, 15 S. W. 322; *Craig v. State Bd. of Medical Examiners*, 12 Mont. 203, 29 Pac. 532; *Gee Wo v. State*, 36 Neb. 241, 54 N. W. 513; *Ex parte Spinney*, 10 Nev. 323; *Re Roe Chung*, 9 N. M. 130, 49 Pac. 952; *People v. Hawker*, 152 N. Y. 234, 46 N. E. 607; *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32; *State v. Randolph*, 23 Or. 74, 17 L. R. A. 470, 31 Pac. 201; *Re Bauer* (Pa.) 4 Atl. 913; *People v. Hasbrouck*, 11 Utah, 291, 39 Pac. 918; *State v. Carey*, 4 Wash. 424, 30 Pac. 729.

The power to revoke certificates to practise medicine is commensurate with the power to refuse, and, like the power to

grant and refuse, may be conferred by the legislature on a board of physicians.

Ky. Stat. § 98; *Baker v. Com.* 10 Bush, 597; *Atty. Gen. ex rel. Rich v. Jochim*, 99 Mich. 358, 23 L. R. A. 699, 58 N. W. 611; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Superintendent of Common Schools v. Taylor*, 20 Ky. L. Rep. 1241, 49 S. W. 38; *People use of State Bd. of Health v. McCoy*, 125 Ill. 289, 17 N. E. 786; *State ex rel. Chapman v. State Bd. of Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *Re Smith*, 10 Wend. 449.

Even though the right conferred by a certificate to practise medicine is regarded as property, it may be destroyed when the public good requires.

Jarman v. Patterson, 7 T. B. Mon. 644; *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208; *Orlando v. Pragg*, 31 Fla. 111, 19 L. R. A. 196, 12 So. 368; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 30 Atl. 648.

Ky. Stat. § 2615, empowering the state board of health to revoke a certificate to practise medicine "for grossly unprofessional conduct of a character likely to deceive or defraud the public," is not void for uncertainty.

Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Baker v. Com.* 10 Bush, 598; *Louisville & N. R. Co. v. Com.* 103 Ky. 605, 45 S. W. 880, 46 S. W. 697; *Superintendent of Common Schools v. Taylor*, 20 Ky. L. Rep. 1241, 49 S. W. 38; *People use of Bd. of Health v. McCoy*, 125 Ill. 289, 17 N. E. 786; *State ex rel. Chapman v. State Board of Medical Examiners*, 34 Minn. 387, 26 N. W. 123.

The fact that the power conferred may be abused does not render the statute void.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Atty. Gen. ex rel. Rich v. Jochim*, 99 Mich. 358, 23 L. R. A. 706, 58 N. W. 611; *Iowa Eclectic Medical College Asso. v. Schrader*, 87 Iowa, 659, 20 L. R. A. 360, 55 N. W. 24; *People ex rel. Nechamcus v. City Prison*, 144 N. Y. 529, 27 L. R. A. 722, 39 N. E. 686; *Allopathic State Bd. of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809.

The power of the board to correct a mistake in issuing a certificate, or to determine that the holder no longer possesses the requisite character or capacity, is not the judicial power to which the Constitution refers.

It has never been held that to grant or to refuse to grant, such a license as this is the exercise of judicial power.

State ex rel. Chapman v. State Bd. of Medical Examiners, 34 Minn. 387, 26 N. W. 123; *Fox v. McDonald*, 101 Ala. 51, 21 L. R. A. 529, 13 So. 416; *De Camp v. Archibald*, 50 Ohio St. 618, 35 N. E. 1056; *Pennington v. Woolfolk*, 79 Ky. 16; *Sinking Fund Comrs. v. George*, 20 Ky. L. Rep. 938, 47 S. W. 779; *Purnell v. Mann*, 20 Ky. L. Rep. 1146, 48 S. W. 407.

The legislature may confer upon executive officers the power of removal.

NOTE.—For cases in this series as to constitutionality of regulation of practice of physicians generally, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. on page 579; *State ex rel. Burroughs v. Webster* (Ind.) 41 L. R. A. 212; and *Scholle v. State* (Md.) 50 L. R. A. 411.
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State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; *Atty. Gen. ex rel. Rich v. Jochim*, 99 Mich. 358, 23 L. R. A. 699, 58 N. W. 611; *Voight v. Newark Excise Comrs.* 59 N. J. L. 358, 37 L. R. A. 292, 36 Atl. 686.

Messrs. Wilkins & Bradburn, with *Mr. Lewis McQuown*, for appellee:

The statute which confers on the state board of health the power to revoke the certificate of a physician is void for uncertainty.

Ky. Stat. §§ 2050, 2615; *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 129; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. 917; *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443; *Ex parte Jackson*, 45 Ark. 164; *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237.

Ky. Stat. § 2615, confers on the board of health judicial and legislative powers, and is therefore void.

Ky. Const. §§ 27, 28, 114, 130; *Com. v. Jones*, 10 Bush, 749; *Gorham v. Luckett*, 6 B. Mon. 160; *Lowe v. Com.* 3 Met. 238; *Page v. Hardin*, 8 B. Mon. 672; *Burkett v. McCarty*, 10 Bush, 758; 6 Am. & Eng. Enc. Law, 2d ed. p. 1026; *Ex parte Jackson*, 45 Ark. 164.

The police power of the state is subject, like all other legislative powers, to the paramount authority of the state and Federal Constitutions.

Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; 1 Dill. Mun. Corp. p. 143; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Varden v. Mount*, 78 Ky. 92, 39 Am. Rep. 208; *Armstrong v. Brown*, 20 Ky. L. Rep. 1766, 50 S. W. 17; Ky. Stat. § 2047.

A profession is property, and the deprivation of the right to pursue it is a punishment.

Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; *Com. v. Jones*, 10 Bush, 731; *Re Dorsey*, 7 Port. (Ala.) 293; *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 322.

Paynter, Ch. J., delivered the opinion of the court:

The principal question involved is the validity of § 2615, Ky. Stat. under which the appellants, the state board of health, undertook, for alleged unprofessional conduct, to revoke the certificate of the appellee, which had been granted him to practise medicine in this state. The section reads as follows: "The state board of health may refuse to issue the certificate provided for in § 2613 of this article to any individual guilty of grossly unprofessional conduct of a character likely to deceive or defraud the public, and it may, after due notice and hearing, revoke such certificates for like cause. In all cases of refusal or revocation the applicant may appeal to the governor, who may affirm or overrule the decision of the board, and this decision shall be final." From the averments of the petition it appears that the appellee received the degree

of M. D. from the Kentucky School of Medicine, a reputable medical college chartered under the laws of this state; that he took a post-graduate course in New York City, and also in Chicago; that he had spent a large sum of money in acquiring his medical education; that after his diploma had been registered in the office of the clerk of the Warren county court, as required by law, he was, on October 3, 1893, granted a certificate by the state board of health, which authorized him to practise medicine in this state. While it is not our purpose to discuss the charges upon which the state board of health proposed to try the appellee, it may be well to give an epitome of them. It is charged—First, that he advertised that he could cure cancer, tapeworm, and piles without the use of the knife; second, by advertising he reflected upon the medical profession; third, practising osteopathy; fourth, he guarantees a cure or no pay; fifth, that by reason of the alleged acts he has been guilty of unprofessional conduct of a character likely to deceive or defraud the public. Section 2613, Ky. Stat., authorizes the state board of health, upon application, to issue a certificate to any reputable physician, who is practising or who desires to begin the practice of medicine in this state, who possesses any of the following qualifications: "1. A diploma from a reputable medical college legally chartered under the laws of this state. 2. A diploma from a reputable and legally chartered medical college of some other state or country, indorsed as such by the state board of health. 3. Satisfactory evidence from the person claiming the same that such person was reputationally and honorably engaged in the practice of medicine in this state prior to February 23, 1864. Satisfactory evidence from any person who was reputationally and honorably engaged in the practice of medicine in this state prior to February 23, 1864, who has passed a satisfactory practical examination before said board. Applicants may present their credentials by mail or proxy, and the board shall issue its certificate to such applicants as are entitled thereto as though the applicant was present. All certificates shall be signed by the president and secretary, and attested by seal of the board, and not more than \$2 shall be charged for any certificate."

The appellee possessed the requisite qualifications, which entitled him to a license to practise his profession, and the state board of health accordingly gave it to him. It is sought now to deprive him of that license because of the alleged unprofessional conduct. The license which he received is certainly a "right" or "estate." The purpose of our statute, in conferring upon the state board of health the right to grant to persons possessing certain qualifications the right to practise medicine, was with the view of preventing them from entering the profession except they were fitted for it. The legislature recognized that the public was entitled to be protected from persons who desired to engage in the practice of medicine who did not possess the requisite

knowledge or qualifications to engage in it. The power to regulate it must be fixed somewhere, and the legislature thought it wise to lodge that power with the state board of health. It was never intended by the legislature that the power should be arbitrarily or capriciously exercised.

The appellee having fitted himself for this learned profession, and having been licensed to practise the same, the question arises, Has the state board of health the right to charge him with "unprofessional conduct likely to deceive or defraud the public," and erect a standard by which that conduct is to be measured, and if in its judgment he does not meet its requirements summarily deprive him of a right or estate or both? The effect of such action of the board would cause the appellee to lose a large sum of money which he has spent for his professional education, and bar him from the acquisition of a livelihood thereby, and at the same time mar his character in such a way that it would take years, if he could do so at all, to remove it.

The statute does not prescribe the manner by which a physician may regulate his conduct. It does not advise him in advance what act or acts may be in violation of its provisions. He is not told what is lawful or unlawful. He might do an act which he regarded as entirely proper, which neither violated moral law nor involved turpitude, still such acts might, in the opinion of the state board of health, amount to unprofessional conduct, and which in its opinion did or was calculated to deceive or defraud the public. The physician who did the act of which complaint was made before the state board of health could not know at the time the act was done what standard would be thereafter erected by the board by which its effect was to be determined. As the statute does not advise him beforehand as to what is unprofessional conduct, he could not knowingly or intentionally be guilty of it. The legislature, in effect, has attempted to commit to the state board of health the right, after the physician has done some act, to determine what its effect is to be, and, if in its judgment he should be deprived of the right to practise his profession, it can inflict the punishment upon him by revoking his license. If the legislature desires to declare for what acts or conduct a physician's license to practise medicine shall be revoked, it is competent to do so, and to vest in some tribunal the authority to investigate and try the charge which may be made under such a statute.

In the state of Arkansas a statute was enacted which declared it to be unlawful for one "to commit any act injurious to the public health, or public morals, or to the perversion or obstruction of public justice, or the due administration of the laws." In passing upon this statute in *Ex parte Jackson*, 45 Ark. 164, the court said: "The law is simply null. The Constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime or not, according to the moral sentiment which might happen to prevail with

the judge and jury after the act had been committed." This court, in *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 129, referred to the case of *Ex parte Jackson* with approval. It was held in *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237, that no one should be punished "for the violation of any vague, undefined notion of unprofessional conduct, which might, after the fact, be entertained by certain individuals constituting a board of examiners." What the present state board of health might consider unprofessional conduct might be adjudged by another board not to be. An act committed during the administration of the present board might be regarded by it as not being unprofessional conduct, yet the board which succeeds it might adjudge it to be, as the statute prescribes no rule which is to govern the conduct of the medical profession or the state board of health in adjudging its effect. For the reasons given, we do not think the act is valid in so far as it attempts to confer upon the state board of health the right to revoke a license which has been granted by it to a physician to practise his profession. This conclusion, however, applies alone to so much of the statute as authorizes the board to revoke a physician's license to practise medicine for unprofessional conduct. That part of the statute which authorizes the board to pass upon the qualifications of persons to practise medicine and to license them is valid. If the board should exercise that power, either arbitrarily or capriciously, the party injured may obtain relief in the courts.

The judgment is affirmed.

Du Relle, J., does not concur in the reasoning of the court. O'Rear, J., was not a member of the court when this case was decided.

Rehearing denied.

Ernest TYLER, Appt.,
v.
MOODY & OFFUTT et al.

(.....Ky.....)

1. Knowledge of the falsity of a warranty that an acetylene gas machine is safe

NOTE.—For a case in this series as to right to recover for personal injuries caused by horse warranted to be safe, see *Cameron v. Mount* (Wis.) 22 L. R. A. 512.

As to implied warranty of safety of horse or vehicle kept for hire, to give a right of action for personal injuries, see *Copeland v. Draper* (Mass.) 19 L. R. A. 283, and note.

As to liability for negligence in the escape and explosion of gas, see *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 837, and note.

As to liability of seller of dangerous machine or other article, for injuries caused thereby, see *Helzer v. Kingsland & D. Mfg. Co.* (Mo.) 15 L. R. A. 821, and *Schubert v. J. R. Clark Co.* (Minn.) 15 L. R. A. 818, and footnote thereto.

need not be alleged in an action to recover for its breach.

2. Damages for personal injuries caused by the explosion of an acetylene gas machine may be recovered in an action for breach of warranty of its safety.

(June 6, 1901.)

APPEAL by plaintiff from a judgment of the circuit court for Jefferson County in favor of defendants in an action brought to recover damages for personal injuries caused by the explosion of a gas generator sold to plaintiff by defendants. *Reversed.*

The facts are stated in the opinion.

Messrs. P. J. Beard and Willis & Willis, with *Messrs. Simrall & Doolan*, for appellant:

Representations made by the appellees to the appellant in this case amount to a warranty.

Lamme v. Gregg, 1 Met. (Ky.) 446, 71 Am. Dec. 489; *McClintock v. Emick*, 87 Ky. 160, 7 S. W. 903; *Bedford v. Magibben*, 12 Ky. L. Rep. 196, 13 S. W. 1082; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537.

Where an article is sold for a particular purpose, the law will imply a warranty of fitness for that purpose.

Shippen v. Bowen, 122 U. S. 582, 30 L. ed. 1174, 7 Sup. Ct. Rep. 1283; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; *Brown v. Edgington*, 2 Mann. & G. 279; *Borradaile v. Brunton*, 8 Taunt. 535; *Bedford v. Magibben*, 12 Ky. L. Rep. 196, 13 S. W. 1082; *Crutcher v. McManus*, 13 Ky. L. Rep. 592; *Haycroft v. Walden*, 14 Ky. L. Rep. 892; 28 Am. & Eng. Enc. Law, pp. 764, 765.

In a suit *ex contractu* for breach of warranty, the plaintiff may recover: (1) Such damages as are the natural and necessary result of the breach, and (2) such other or consequential damages as the parties may be reasonably supposed to have had in contemplation when the sale was made, as might probably result from the breach.

28 Am. & Eng. Enc. Law, pp. 748, 764, 836, 837, 840; *Hadley v. Baxendale*, 9 Exch. 341; *Smith v. Western U. Teleg. Co.* 83 Ky. 104; *Western U. Teleg. Co. v. Van Cleave*, 22 Ky. L. Rep. 55, 54 S. W. 827; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Marshall v. Peck*, 1 Dana, 612; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; 10 Am. & Eng. Enc. Law, 1st ed. p. 153; *Greenby v. Brooks*, 13 Ky. L. Rep. 296; *Broquet v. Tripp*, 36 Kan. 700, 14 Pac. 227; *Borradaile v. Brunton*, 8 Taunt. 535; *Longneid v. Holliday*, 6 Exch. 761; *Page v. Ford*, 12 Ind. 46; *Sinker v. Kidder*, 123 Ind. 528, 24 N. E. 341; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; *Bruce v. Fiss, D. & C. Horse Co.* 47 App. Div. 273, 62 N. Y. Supp. 96; *Deane v. Michigan Stove Co.* 69 Ill. App. 106; *Claghorn v. Lingo*, 62 Ala. 230; 2 Sedgw. Damages, 8th ed. §§ 765-769, 781; 8 Am. & Eng. Enc. Law, 2d ed. pp. 586, 587, 595, 614, 615.

In an action upon a warranty the *scienter* need not be alleged, or, if alleged, need not be proved.

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Shippen v. Bowen, 122 U. S. 582, 30 L. ed. 1174, 7 Sup. Ct. Rep. 1283; *Massie v. Crawford*, 3 T. B. Mon. 218; *Gregg v. Wood*, 3 Ky. L. Rep. 526.

Messrs. J. C. Beckham & Son, with *Messrs. P. B. Muir and Upton W. Muir*, for appellees Hall & Son:

An agent is not responsible for his representations, though false, unless made with knowledge of their falsity, or in bad faith, or fraudulently, or in reckless disregard of the truth.

Campbell v. Hillman, 15 B. Mon. 508, 61 Am. Dec. 195.

Unless the party who makes a representation knows, when he makes it, that it is false, he is not deemed guilty of fraud, however erroneous or untrue it may happen to be. The true doctrine is that an innocent misrepresentation—not being fraudulent—furnishes no cause of action.

Stewart v. Dougherty, 3 Dana, 480; *Mattlingly v. Russell*, 15 Ky. L. Rep. 875; *Jones v. Ross*, 98 Ala. 448, 13 So. 319; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Frohreich v. Gammon*, 28 Minn. 430, 11 N. W. 88; *Huyett & S. Mfg. Co. v. Gray*, 111 N. C. 93, 15 S. E. 940; *Hadley v. Baxendale*, 9 Exch. 341.

Messrs. W. S. Fryer and Fryer, O'Neal, & Fryer for appellees Moody & Offutt.

White, J., delivered the opinion of the court:

The appellant brought this action to recover for damages for personal injuries caused by an explosion of a gas generator for the manufacture of acetylene gas, sold by appellees Hall & Son, and manufactured by appellees Moody & Offutt. Appellant avers in his petition that appellees "guaranteed and represented to him at the time of said sale, and as a part of said contract, that the said machine, and the use thereof in generating acetylene gas, was and would be entirely safe, and that no danger or injury would or could result therefrom; and that said machine was and would be perfectly automatic in its action, and could only make gas equal to the consumption; and that same was so constructed as to be absolutely safe in its use, and that same could not generate gas beyond the capacity of the machine; and that same could always be depended upon to do the work claimed for it; and that same was so simple in construction that there was absolutely nothing about it to get out of order; and that the same was simple and safe, and that same could not generate gas in sufficient quantity to blow up or explode same; and this plaintiff relied upon said representations and statements as true. . . . But he says that said representations were false and untrue." and it is then set out that each representation was untrue, and that appellant was properly attending to the machine, and without fault on the part of appellant the generator did explode and blow up, by which he was seriously and permanently injured. Appellees answered, denying that representations alleged that they claimed or represented the machine as abso-

lutely perfect, or that no danger or injury could possibly happen in its use; and denied any representation that the machine could not generate gas in sufficient quantity to blow up or explode, though it is true, if kept in good order, and used with care, it cannot generate gas sufficient to cause an explosion. However it was admitted that they represented that the machine was safe, and they aver that with proper and careful use it was safe. Appellees Moody and Offutt also denied that appellees Hall & Son were their agents in making the sale and representations, such as were made, and they pleaded that the injury was caused by the negligence of appellant himself. These answers were filed without a demurrer to the petition. On trial the appellant introduced evidence tending to prove every allegation of his petition. He testified to representations and warranties by Hall & Son to him, before and at the time of the contract of sale, that the machine was perfectly safe, and would not and could not explode except by contract with fire; that appellant had no knowledge or information as to the machine, or the manufacture of acetylene gas, except as given him by Hall & Son, and also from a circular issued by Moody & Offutt, who were the manufacturers of the machine; that appellant relied on these statements and representations as true, and was thereby induced to buy, and he did buy, the machine, which appellees Hall & Son placed in his house, and put in operation; that in the use of the machine as directed, and while exercising due care and caution, and without fault on appellant's part, the machine exploded, causing appellant's injury. The extent of the injury was shown, which was considerable. The circular furnished by the manufacturers, Moody & Offutt, was introduced. At the conclusion of appellant's evidence the court directed a verdict for appellees, and, judgment being accordingly rendered this appeal is prosecuted.

In the judgment rendered the court required appellees to pay the costs from the time of filing their answers, including the trial; the court being of opinion that the petition was insufficient. Counsel for appellees rely on the case of *Jones v. Ross*, 98 Ala. 448, 13 So. 319, and cases cited, to sustain the judgment of the court below. In that case Ross sued Jones to recover damages for breach of warranty in the sale of a horse. The petition alleged that "defendant sold to plaintiff a horse, which defendant falsely represented to be gentle, and to work kind and gentle anywhere." The horse, being hitched to a buggy, ran away, whereby plaintiff was injured, for which recovery was sought. The petition further avers "that the defendant knew said horse was vicious and unsafe, and intentionally represented him to plaintiff to be safe and gentle." The supreme court of Alabama held the petition to be sufficient to enable Ross to recover for his injuries, but on the proof the court held that the case was not made out, and a peremptory instruction should have been given. The court on that

point said: "There is not one particle of evidence in the record tending to show that defendant knew, or had reason to believe, the horse to be vicious and unsafe, or that the affirmation was of that reckless character to be the equivalent of bad faith; and without proof of some fact or circumstance tending to sustain these averments plaintiff was not entitled to recover for personal injuries in this action." In that opinion the court refers to the case of *Herring v. Skaggs*, 82 Ala. 180, 34 Am. Rep. 4, as decisive of the question as to what averments were necessary to recovery. The averments in the petition of the case at bar are that appellees expressly warranted that the machine would not and could not explode. It is not alleged that appellees knew this to be false, but it is alleged that it was false, for the machine did explode and blow up. Counsel for appellees insist that there is not an averment of *scienter* in the petition, and it is therefore insufficient. In *Chitty*, Pl. 137, the author says that case or assumpsit may be supported for a false warranty on the sale of the goods, and that "in an action upon the case in tort for a breach of a warranty of goods the *scienter* need not be laid in the declaration, nor, if charged, would it be proved." In the case of *Shippen v. Bowen*, 122 U. S. 576, 30 L. ed. 1172, 7 Sup. Ct. Rep. 1283, the supreme court held that this rule of pleading, as stated by *Chitty*, applied where the action was for breach of an express warranty, and the *scienter* need not be alleged; for, if the warranty was expressly made, it made no difference whether the warrantor knew it was false, or did not know whether it was true or false. This case, and the authorities cited, are decisive of the question that it is not necessary to allege a knowledge of the falsity of the representation when made, where there is an express warranty of any particular thing, or of a machine for a particular purpose, or against particular damages.

It is argued that in no state of case can a recovery be had for the injuries to appellant, because they are too remote. A leading case upon the criterion of recovery for breach of warranty is *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696. The Supreme Court there said: "The damages recoverable for a breach of warranty or for a false representation include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act." In *Sutherland*, Damages, 2d ed. p. 1523, § 676, it is said, after a review of many cases: "A buyer may recover damages for personal injuries which result from selling property with a false warranty. . . . A dealer will be liable for like injuries from the explosion of illuminating oils sold with warranty, express or implied, which is untrue. And so will any vendor be held answerable for such injuries from vicious animals sold with warranty of gentle and docile nature. In such cases there is a negligence, which, though free from fraud, involves a serious breach of, social duty as well as con-

tract; and, when the injury comes to the vendee from an exposure induced by the warranty, doubtless the right to damages in an action upon the warranty would be coextensive with that allowed for compensation in actions for negligence. Where an act of negligence is imminently dangerous to the lives of others, the guilty party is liable to one injured thereby, whether a contract between them be violated by that negligence or not. If the law and a contract impose the same duty, the same redress for violation is due by either, and would be accorded, unless there should be practical restriction in the form of action necessarily resorted to to obtain that redress." The doctrine of liability for all damage which, in the contemplation of the parties, or according to the natural or usual course of things, may result from a breach of the warranty, is now well recognized, and is recognized by the *Jones v. Ross Case*, 98 Ala. 448, 13 So. 319, where the court held the petition sufficient. The exact criterion of recovery in this case, even if appellant should be entitled, on the proof, to recover at all, was not passed on by the court below, unless the court intended by his direction of verdict to hold that damages for personal injury could not be recovered, and that there was no claim of dif-

ference in value of the machine, and no recovery sought therefor. If this was the conclusion of the lower court, we are of opinion it was error. The warranty, as alleged and proved by appellant's evidence, was against explosion,—the very thing shown to have happened. Upon this showing by appellant, uncontradicted, we think he would be entitled to recover for his personal injury, as this evidently was in contemplation of the parties, or, according to the natural or usual course of things, might result from a breach of the warranty that the machine would not explode. An explosion of a machine of this sort would usually and ordinarily be attended with damage other than to the machine itself, and might injure persons,—being near a dwelling, would probably do so,—and so it must be held that personal injury was contemplated as a probable result of an explosion, and that was what appellant was assured would not happen. We conclude, therefore, that upon the case as presented by appellant a peremptory instruction should not have been given. Without contradictory evidence, he was entitled to recover.

For the reasons indicated, *the judgment is reversed*, and cause remanded for a new trial, and for further proceedings consistent herewith.

LOUISIANA SUPREME COURT.

Albert DELISLE

v.

Mrs. Henry P. BOURRIAGUE, *Plff. in Certiorari*.

(105 La. 77.)

- *1. An amendment of pleadings is more readily allowed than refused. There is no substitution of a new plaintiff when the original plaintiff amends his petition in order to make it clearly appear that his children, in whose name he sued, were the parties actually in interest. The supplement and amendment were duly served.
2. Minors have a cause of action for the personal injury which resulted in the death of their mother. The right of action of the mother is made to survive in the name of her children.
3. Weight is given to the findings of facts by the district judge affirmed by the court of appeal. Except in case of manifest error, they will be treated and considered as true.
4. Defendant's dogs were large, and had the appearance of being vicious, and it is inferred that defendant was placed on her guard as to their propensity to do harm.
5. Although an owner is not responsible when the damage is caused by an unforeseen accident, or an accident he could not guard against,—as, when it arises

from a *vis major*,—he is responsible when he is chargeable with the least fault.

6. The defendant requested the deceased to come into her yard, and, after she (deceased) had complied with the request, defendant did not protect her from the attack of her savage dogs. She is therefore responsible for the injury which the dogs inflicted.

(January 7, 1901.)

CERTIORARI to the Court of Appeals to review a judgment affirming a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action brought to recover damages for the death of plaintiff's wife, which was alleged to have been caused by dogs owned by defendant. *Affirmed*.

The facts are stated in the opinion.

Messrs. Sambola & Ducros, Joseph B. Derbes, and Albert Voorhies, for plaintiff in certiorari:

No new plaintiff may legally be substituted, by way of amendment, in the place of the original plaintiff.

Code Pr. arts. 112, 419; *Curacel v. Conlon*, 2 Mart. (La.) 143; *M'Rae v. M'Rae*, 11 La. 573; *Duncan v. Helm*, 21 La. Ann. 304.

No amendment is admissible in law which shows a right or cause of action, when none was originally shown.

Act No. 71, 1884; *Walton v. Booth*, 34 La. Ann. 914; *Chivers v. Roger*, 50 La. Ann. 60, 23 So. 100; *Hart v. Bowie*, 34 La. Ann. 325; *Raymond v. Palmer*, 35 La. Ann. 281;

*Headnotes by BREAU, J.

NOTE.—As to liability of owner of dogs for injuries by them, to persons coming upon owner's premises, see *Conway v. Grant* (Ga.) 14 L. R. A. 196, and *note*.
54 L. R. A.

Abadie v. Berges, 41 La. Ann. 283, 6 So. 529.

So it is with an amendment which would alter the substance of the demand by making it different from the one originally brought.

Code Pr. art. 419; *Castille v. Dumartrait*, 5 Mart. N. S. 70; *Rochelle v. Alvares*, 8 Mart. N. S. 171.

The minor children of a married couple, when the husband and father has survived the fatally injured wife and mother, have no right of action for damages for personal injuries received by her and from which she died, as provided by the aforesaid act No. 71, 1884.

Walton v. Booth, 34 La. Ann. 914; *Chivers v. Roger*, 50 La. Ann. 61, 23 So. 100; 1 Zacharise, § 40, p. 79; Rev. Civil Code, art. 2402; *Holsab v. New Orleans & C. R. Co.* 38 La. Ann. 188, 58 Am. Rep. 177; *White v. Vicksburg, S. & P. R. Co.* 42 La. Ann. 994, 8 So. 475; Act No. 190, 1898; *Hugh v. New Orleans & C. R. Co.* 6 La. Ann. 496, 54 Am. Dec. 565; *Hermann v. New Orleans & C. R. Co.* 11 La. Ann. 22; Act No. 223, 1855; Rev. Civ. Code, art. 2315.

The owner is responsible for the damages done by his animal only when it is shown that it was of a ferocious disposition, and the owner knew it. More especially as regards the quantum of damages is the scienter elementary.

McGuire v. Ringrose, 41 La. Ann. 1031; *Mullins v. Blaise*, 37 La. Ann. 92; *Montgomery v. Koester*, 35 La. Ann. 1091, 48 Am. Rep. 253; *Pike v. Doyle*, 19 La. Ann. 363; *McGary v. Lafayette*, 4 La. Ann. 440; *Grant v. McDonogh*, 7 La. Ann. 448; *Brown v. Crockett*, 8 La. Ann. 34; *Durbridge v. Wentzel*, 17 La. Ann. 20; *Rayne v. Taylor*, 18 La. Ann. 26.

The owner must be shown to have had notice of its viciousness, or to have been wanting in the exercise of reasonable care. The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind.

Ray, Negligence of Imposed Duties, Personal, chap. 27; *Mason v. Keeling*, 12 Mod. 332; 1 Hilliard, Torts, 3d ed. § 13, p. 569; *Goode v. Martin*, 57 Md. 606, 40 Am. Rep. 448; *Norris v. Warner*, 59 Ill. App. 300; *Moss v. Pardridge*, 9 Ill. App. 490; *Moynahan v. Wheeler*, 117 N. Y. 285, 22 N. E. 102; *State, Smith, Prosecutrix, v. Donohue*, 49 N. J. L. 548, 10 Atl. 150; *Klenberg v. Russell*, 125 Ind. 531, 25 N. E. 596.

Messrs. Dinkelspiel & Hart, Percy S. Benedict, and E. A. O'Sullivan, for defendant in certiorari:

The owner of a dog which does injury is responsible for the same. No scienter of the viciousness of the dog need be brought home to the owner. The act of the dog, being per se vicious, is sufficient to show its propensities.

Civil Code, art. 2321; *Mullins v. Blaise*, 37 La. Ann. 92; *Montgomery v. Koester*, 35 La. Ann. 1092, 48 Am. Rep. 253; *McGuire v. Ringrose*, 41 La. Ann. 1030, 6 So. 895. 54 L. R. A.

Breaux, J., delivered the opinion of the court:

Defendant asks for a review of the judgment and for its reversal. The suit was brought by the plaintiff in the district court in his own name and on behalf of his minor children for damages arising from the death of his wife and the mother of his children, who died from the effects of injury inflicted by defendant's dogs. Plaintiff averred in his petition in the district court that his wife was requested by the defendant, who was their next-door neighbor, to come into her back yard, and cut some wood; that the petitioner's wife, being indebted to defendant, and wishing to be obliging, after receiving defendant's assurance that she would be protected against the dogs, entered the yard, and, while chopping defendant's wood, in presence of defendant, she was attacked by her dogs, was maimed and torn almost to pieces, causing wounds of which she died a short time after the attack. Defendant filed an exception setting forth that plaintiff's petition disclosed no right or cause of action, that the children of plaintiff are not named therein, and that it contains no prayer for relief in so far as the minors are concerned. This exception was heard in the district court, and maintained, but the court reserved to plaintiff the right to amend his petition. Some time afterwards plaintiff filed a supplement and amendment in the district court, in accordance with the right reserved to him when defendant's exception was sustained. To the supplement and amendment defendant filed another exception, reiterating that plaintiff had no right or cause of action, and that thereby plaintiff was substituting another plaintiff entirely, and raising issues not raised in the original petition, and which were not consistent with the first demand. This exception was referred to the merits, and just prior to deciding on the merits it was overruled. The defendant filed the plea of general denial in answer to plaintiff's demand. The judge of the district court pronounced judgment for plaintiff in the sum of \$2,000. On appeal before the court of appeal the judgment of the district court was affirmed. Here the defendant reiterates that the plaintiff has no right or cause of action, and sets up that the original petition filed was the individual petition of Albert Delisle, stating that the death of his wife, the result of the bite of dogs, was caused by the defendant's fault; that he lost the companionship and assistance of his wife; that he has to pay large medical bills and funeral expenses; and that he has lost considerable time in attending to his injured wife's wounds prior to her death. In our view, plaintiff did not, by the amendment, substitute another plaintiff. His children were originally parties to the suit, as their father alleged that it was brought in behalf of his minor children. He was not their tutor at the time; none the less he sought to make them parties by alleging as before stated. After he had qualified as tutor, he not improperly was permitted to avail himself of

the right which had been reserved to him as tutor to become the party plaintiff. Whatever rights these minors had, they were entitled to them at the time suit was brought. As they were not properly before the court, allegations setting forth their claim were admissible by way of amendment and supplement. They were not parties strangers to the suit, but parties in whose behalf plaintiff had sought to set up a claim and failed to some extent, because of his omission to set forth the names of these minors. He was also permitted by way of amendment to aver more fully his cause of action, whether individually or for his minor children, and more specifically the items of damages sustained; and, in case of his failure thus to allege, his suit was ordered to be dismissed. These exceptions did not tend to defeat the action. They only retarded its progress. In cases on appeal this court will consider the granting of permission to amend is less likely to do an injustice than its refusal. This court has also held that amendment should be allowed when it prevents a multiplicity of suits. The amendment was granted contradictorily with the defendant. The court ordered the defendant to be cited, and we judge that the suit was placed at issue after legal service had been made. The deficiency in the allegations of the cause of action not sufficiently set forth may be supplied when the amendment and supplement is permitted contradictorily with all parties concerned. As relates to the two—an absolute dismissal or permitting one to amend contradictorily with those he sues—the difference is inconsiderable, and can well be considered on an application to review proceedings as coming within the rule, *De minimis non curat lex*.

This brings us to defendant's ground of defense that the minors have no cause of action. Originally, the article of the Revised Civil Code relating to damages growing out of offenses or quasi offenses was quite restricted in its scope in so far as related to the heirs of the one injured. Interpreting this article (2313, as originally written), the court held that the right of action was not heritable. In course of time this article was amended in order to prevent the right from perishing in case of the death of the one originally injured. By the first amendment, the right was inherited, in case of death, by the minor children and widow of the deceased, and, if there were no minor children or widow, then by the surviving mother and father. This amendment was interpreted by a decision of this court as not embracing within its terms the husband, but instead the father and mother. *Walton v. Booth*, 34 La. Ann. 914. This decision had been handed down a comparatively short time when statute No. 71 of 1884 was enacted, by which the right was made to survive by the use of the following language: The survivors above mentioned may also recover the damages "sustained by them by the death of the parent or child, or husband or wife, as the case may be." 54 L. R. A.

In *Chivers v. Roger*, 50 La. Ann. 57, 23 So. 100, this court decided that the right of action for the recovery of damages to an injured person who dies subsequent to receiving the injuries survives only in favor of the beneficiaries designated in the statute of 1884. Here the minors who sue are expressly designated (they are the children of a mother deceased, who suffered personal injuries), and it is not for us to determine that they shall not recover in the face of the plain provision of the statute designating them.

Defendant's insistence is that, where the injuries are suffered by a married woman, inasmuch as the right of action in her lifetime is the asset of the community, not the personal property of the injured spouse, this community right of action is extinguished by the death of the injured wife. We do not take it that this is the inference to be drawn from the language of the statute, which expressly provides that this right shall pass to the heirs. The language of the statute is imperative. The damage, in case of the death of the parent injured, shall pass to her minor children; and, if she left no minor children, then in favor of her surviving father and mother. We understand that, in order to avoid the extinguishment of the right, a right of action is given to the heir, as just stated. Although without legislation, the wife has no personal claim separate from the community. By legislation the right of action for her personal injury may be made to survive in the name of the forced heirs. But defendant further urges that the personal right of action of the children under the 2d clause of the law of 1884 exists only in case they are entitled to the inheritable right of action provided for by the first clause of the law; that a oneness or solidarity exists between the two rights of action granted by the statute by reason that under the 2d clause the survivors named in the 1st clause may also recover damages sustained by them by the death of the parent; that the copulative conjunction "also" manifestly shows this solidarity,—that is, unless a minor child has a right of action under the 1st clause, he can have none under the 2d clause, and *vice versa*. The word "also," connecting the 1st with the 2d clause, in our view, does not have the restrictive effect for which defendant contends. On the contrary, it has the effect of extending or broadening the rights, so as by implication, at least, to include the parent, whether it be father or mother.

We pass to a consideration of the defendant's responsibility for the injury inflicted by her dogs. The district judge, in a carefully prepared opinion, describes these hounds as being large, with long bodies and flapping ears, long tails, and of a brownish or reddish tan color. He concluded, from their description, that they were English bloodhounds, in all probability crossed with stag hounds, corresponding in description with the hounds kept in the prisons of this and other states, and trained for the pursuit of escaped convicts. He states further

that the dogs were vicious,—maybe inferred by their size, breed, and actual conduct. These are the views of the judge of the first instance, upon whom, in the first instance, devolves the task of sifting and weighing conflicting testimony. This opinion does not come up before us directly for review. Another constitutional authority is intrusted with the duty of giving it consideration, and of appreciating the facts as set forth by the witnesses, and of passing upon the first judgment based upon these facts. The court of appeals, in deciding the case, found that "there is conflict of evidence as to the character of the dogs and defendant's knowledge thereof, but we should accept the conclusion of fact of the judge, who heard and saw the witnesses. But, were this otherwise, we do not think that the doctrine that *scienter* is a prerequisite to the liability of the owner finds lodgment in our law and jurisprudence. Not only does any act whatever of man that causes damages to another oblige him by whose fault it happened to repair, but he is responsible for damages resulting from his negligence or imprudence, caused by the acts of the thing which he has in his custody. Rev. Civil Code, arts. 2315, 2316, 2318, are positive and equivocal. The owner of the animal is answerable for the damage he has caused. There is no qualification, no restriction, no condition affixed to the legal responsibility," citing *Marcade* and *Demolombe* in support of the views before expressed. The court of appeals in its opinion, also says: "In a case in which a father was sued for damages caused by his minor child, it was said 'the law itself imputes the fault to the father.' It presumes that it resulted from lack of sufficient care, watchfulness, and discipline on his part in the exercise of the parental authority. This is the very reason and foundation of the rule. For like reasons, the law imposes responsibility upon the owner for damages occasioned by his animals, who have certainly no greater powers of discernment than the infant of tender years;" citing *Mullins v. Blaise*, 37 La. Ann. 92. We are not inclined to question the correctness of the conclusion of facts at which the judge of the district court arrived, affirmed as they are by the court of appeal. Taking this conclusion of facts as found for a basis, it irresistibly follows that the defendant was at fault; that these dogs were not the mild and amiable creatures she says they were. But the defendant, in meeting plaintiffs' charges that these dogs were, to their knowledge, savage and fierce, insists that it was then imprudent on the part of the mother to venture to go in defendant's yard to cut wood for her. This insistence presents matter for consideration in fixing the amount of the damages, to which we will return in a moment. This brings us to a consideration of the doctrine of *scienter* as an element in fixing the owner's liability. We are not inclined to go to the extent that it is of no consequence, in determining the liability of the owner, whether or not he had knowledge of the

vicious propensities of his animals. True, the owner of the animal is responsible for the damage it has caused. We do not think, however, that there is no limitation to his liability, and that in all cases of bad conduct of the animal causing the injury he is to be held in damages. The article itself relating to the owner's responsibility contains restrictions and qualifications. The owner is not responsible if the animal had been lost or had strayed more than a day, and he may discharge himself from responsibility by abandoning it, save where the master has turned loose a dangerous animal, for then he must pay for all the harm done. There is no question before us of abandonment. We quote above from the article relating to injury caused by animals to sustain the proposition that there are limitations to the responsibility. Besides that, the damages caused by animals are not viewed, as relates to liability as being similar to the damages caused by a minor for which a tutor is responsible, or the damage for which employers are responsible growing out of the acts of their employees, teachers for their scholars, and artisans for their apprentices. The control and relation between one and other are not the same. The sentiment of consideration and respect and control between man and animals is not the same as that which exists between man and man, and, in consequence, the liability for damages is fixed by different rules. As to the animal, as it is in some cases with a mere thing, it may be abandoned in case it has caused damage. In our view of the authorities upon the subject, we have not found that under the civil law, from which the articles of our Civil Code are derived, it is always held that the character of the animal, and knowledge of its propensities to do harm, is of no consequence in passing upon the responsibility of the owner. We take it that the rule is the other way in so far as the damage is caused by an accident not to be foreseen or guarded against; as when it arises from a *vis major*. Article 2321 of the Revised Civil Code (Code Napoleon, art. 1385), is founded upon the presumption that the fault is chargeable to the owner of the animal that caused the damage, or to the person in whose use or under whose care it was at the time of the accident; and that presumption can be made to give way only in the presence of proof either of an unforeseen event or by the imprudence of the one injured. 3 Fuzier-Herman, p. 905, No. 37. The French commentators have approvingly referred to this view. From 20 Laurent, p. 675, we quote: "That is to say, that there is no responsibility when there is no fault; the one to whom the damage is imputable should be permitted to prove that he was not at all at fault. But it is only needful to prove the lightest fault (*culpa levis*) to hold the owner responsible." In all the cases in our jurisprudence to which we have been referred there was some fault for which the owner was responsible; notably the cases of *Montgomery v. Koester*, 35 La. Ann. 1094, 48 Am. Rep. 253, and *Mo-*

Guire v. Ringrose, 41 La. Ann. 1029, 6 So. 895.

The amount of the damages is the only question remaining for our determination. A moment ago we referred to the fact that the children of the deceased testified that the dogs in question acted with some degree of fierceness, and sought to annoy them from the neighboring yard. It none the less remains that defendant requested the mother (the deceased) to come into her yard to cut

wood for her, and that, after she had complied with the request, the defendant, Mrs. Bourriague, could not (did not even attempt to) protect her from their attack. For reasons assigned, the order nisi is recalled and set aside, and defendant's application is rejected.

Petition for rehearing denied April 1, 1901.

MARYLAND COURT OF APPEALS.

BALTIMORE CONSOLIDATED RAILWAYS COMPANY, *Appt.*,
v.

James W. ARMSTRONG.

(92 Md. 554.)

The modification of the rule that one guilty of contributory negligence cannot recover for injuries negligently inflicted, which permits a recovery in case defendant might, after discovering plaintiff's peril, have avoided the injury by the exercise of due care, is not applicable where plaintiff, in attempting to put a parcel on the front platform of a street car, negligently stood on the side towards the other track, and, upon perceiving a car approaching on it and receiving and assenting to instructions from its motorman as to reaching a place of safety, became confused and got caught between the cars and injured.

(January 23, 1901.)

APPEAL by defendant from a judgment of the Baltimore City Court in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. E. J. D. Cross, Fielder C. Slingsluff, and George Dobbin Penniman, for appellant:

Judge Thompson (Negligence, vol. 2, p. 1155) sums up the law as follows: 1. If A and B have both been guilty of negligence contributing or tending proximately to produce the injury complained of, A cannot recover damages of B unless, after discovering the negligence of A, B could have avoided the consequences of A's negligence—that is, could have avoided the injury which took place—by the exercise of ordinary care. 2. One person is not bound to anticipate that another person, being *sui juris*, will negligently expose himself or his property to injury, and is not bound to make provision

against the consequences of such negligence. Therefore, if A has negligently placed his person or his property in such a situation that B is liable to injure it in the exercise of his lawful business, and B, without discovering that A has done this, so injures it, B is not bound to pay damages to A, although at the time he committed the injury he was not proceeding with ordinary care.

Beach (Contrib. Neg. chap. 2) says: Whenever the plaintiff's case shows any want of ordinary care under the circumstances, even the slightest, contributing in any degree, even the smallest, as a proximate cause of the injury for which he brings his action, his right to recover is thereby destroyed.

The rule which was introduced into the law of contributory negligence by the case of *Davis and Mann*, 10 Mees. & W. 546, which permits the plaintiff to recover, although guilty of contributory negligence, if the defendant could have avoided the result of that negligence, must not be applied unless the plaintiff was in such a position that he was helpless, and therefore unable to continue to make proper efforts to escape from the approaching danger, and it must appear that the defendant had knowledge of this helplessness, and, after acquiring this knowledge, was able to prevent the accident, but did not try to do so.

The rule has been extended in this state improperly to cover cases where the plaintiff was fully capable, up to the time of the injury, of avoiding the accident.

Northern C. R. Co. v. State use of Price, 49 Md. 436; *Butterfield v. Forrester*, 11 East, 60.

The old limitation, that the rule was not to apply when the plaintiff was as free to avoid the injury as the defendant, and therefore the accident was concurrent, has been overlooked by the courts entirely, and, without meaning it, the decisions have to a great extent destroyed the defense of contributory negligence.

NOTE.—For a case in this series as to right to recover for injuries received in attempting to escape from an unexpected danger to which the injured party had exposed himself, see *Garrity v. Detroit Citizens' Street R. Co.* (Mich.) 37 L. R. A. 529.

As to rule of last clear chance in negligence cases, see also *Cincinnati, H. & D. R. Co. v. 54 L. R. A.*

Kassen (Ohio) 16 L. R. A. 674; *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 287; *Pickett v. Wilmington & W. R. Co.* (N. C.) 30 L. R. A. 257; *Brotherton v. Manhattan Beach Improv. Co.* (Neb.) 33 L. R. A. 598; *Thompson v. Salt Lake Rapid Transit Co.* (Utah) 40 L. R. A. 172; and *Tesch v. Milwaukee Electric R. & Light Co.* (Wis.) 53 L. R. A. 618.

Lake Roland Elev. R. Co. v. McKewen, 80 Md. 593, 31 Atl. 797; *Baltimore Traction Co. v. Appel*, 80 Md. 603, 31 Atl. 964; *Baltimore Consol. R. Co. v. Rifeowitz*, 89 Md. 338, 43 Atl. 762.

In the earlier cases in this state this rule had not been so extended.

Maryland C. R. Co. v. Neubeur, 62 Md. 391.

Messrs. Harry W. Henderson, Henry M. Nitzel, and Harold B. Scrimger, for appellees:

The plaintiff's first prayer was approved by this court in *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 262, 39 Atl. 859, and *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 Md. 515.

The instruction to the jury upon the measure of damages contained in the plaintiff's third prayer was accepted as a proper statement of the law in the case of *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32.

Pittsburg & C. R. Co. v. Andrews, 39 Md. 335, 17 Am. Rep. 568; *McMahon v. Northern C. R. Co.* 39 Md. 441.

There are no circumstances under which the defendant could be relieved of the duty of using ordinary care.

Baltimore & O. R. Co. v. State use of Trainor, 33 Md. 556.

The question of negligence or the want of ordinary care, in cases like the present, is one of fact for the consideration of the jury.

Baltimore & O. R. Co. v. Fitzpatrick, 35 Md. 44.

Schmucker, J., delivered the opinion of the court:

This is an appeal from a judgment obtained in the Baltimore city court by the appellee for damages sustained by him from having been caught and injured between two electric street cars operated by the appellant. There was evidence tending to prove the following facts: The appellee had been riding westward on Pratt street in a car, and alighted therefrom at the intersection of Pratt and Charles streets for the purpose of boarding a south-bound car on the latter street. When he left the Pratt street car, there was a south-bound car standing on Charles street at the north side of Pratt street, and a north-bound car standing on Charles street at the south side of Pratt street. He says that he looked for a car on Charles, and saw the south-bound one, which he wished to take, but saw no north-bound one. He at once took from the front platform of the car on which he had been riding "a cooling board," measuring about 37½ inches long by 20½ inches wide, and started with it in his hands for the south-bound car on Charles street. Instead of going around this car to its west side, which was nearest the sidewalk, and out of the way of other tracks, he went directly across Charles street to the east side of the car next to the north-bound track, and from that position handed his cooling board over the gate at the front platform of the car to its motorman. Just as he finished putting the board over the gate, the

north-bound car, which was then in motion, reached him, and he was caught between the two cars and injured. The evidence as to the precise manner in which he got between the two cars is explained by the witnesses as follows: The motormen on both cars, the conductor of the north-bound car, and a witness who was standing at the front of that car all testified that when the north-bound car reached the plaintiff he was standing in a safe place, on the step to the front platform of the south-bound car, handing his cooling board over the gate to the motorman. The witness who was standing at the front of the moving car and the motorman who was receiving the cooling board both say that the plaintiff stepped or jumped down between the cars. Both motormen say that they warned the plaintiff to lookout as the north-bound car was coming up to him, and the motorman on that car testified positively that the plaintiff responded "All right" to his warning, and then stepped up onto the step, where the car of the witness could have safely passed him if he had remained in that position. Both the motorman and conductor of the north-bound car testified that their car was slowly crossing Pratt street, with its gong ringing, when it came up to the plaintiff. The plaintiff, although he testified that he "could hardly tell how it happened" that he got between the cars, said: "I saw that the street [Charles street] was clear, when I started over, as far as the south side of Pratt street. There was no wagon or nothing in sight. I hurried across, and somebody said, 'Look out.' As I looked out, I found that I either had to be picked up by the car or get between the cars." He further testified that while he was putting the cooling board over the gate of the south-bound car to the motorman he looked right at the motorman, and did not keep his eye on the north-bound track, and that he heard no gong ring; that, just as he got rid of the board, the motorman who was taking it from him said "Look out," and he cast his eye down, and the north-bound car was right on him; that there was then no chance but to get between the cars; that he "had not the least idea that he would not have room there between the cars;" and that he got between them and was injured. He was a large, fleshy man. The motorman who took the cooling board from the plaintiff further testified without contradiction that when the latter started to go between the cars he called to him to go around in front of the south-bound car, and that there was plenty of room for him to do so safely, as the fender was narrower than the car; but the plaintiff, instead of taking his advice, got between the two cars. The plaintiff testified in rebuttal that he did not get upon the step of the north-bound car when he handed the cooling board over the gate to the motorman, but he did not refer to or deny the statements made by the witnesses for the defense that he had answered "All right" to the warning of the north-bound motorman, or that, as he was going between the cars, the

south-bound motorman told him to go around in front of the fender of his car, which was not in motion.

There is but one exception in the record, and that was taken to the action of the court upon the prayers. The plaintiff offered three prayers, all of which were granted, and the defendant offered seven prayers, of which the second and third were rejected, the fourth, sixth, and seventh were granted, and the first and fifth were granted as modified by the court. The plaintiff's second prayer and the defendant's first prayer as modified by the court substantially directed the jury that, if they found the plaintiff guilty of contributory negligence, that would not disentitle him to recover if the defendant's motorman could have avoided the accident by the exercise of due care after he saw or ought to have seen the plaintiff's peril. Neither of these two prayers was objectionable in the form in which it was granted if the facts of the case justified the court in modifying, in the manner just stated, the general doctrine that negligence on the part of a plaintiff contributing directly to the injury complained of will debar his recovery of damages therefor. The appellant earnestly contended in its brief and at the argument that this court in its recent decisions, especially in *McKewen's Case*, 80 Md. 593, 31 Atl. 797, and *Appel's Case*, 80 Md. 603, 31 Atl. 964, and *Rifcowitz's Case*, 80 Md. 338, 43 Atl. 762, had gone much further in the use of this modification of the general doctrine than in its earlier cases, and that it had in fact gone so far in that direction as to practically destroy the defense of contributory negligence. He cited *Maryland C. R. Co. v. Neubeur*, 62 Md. 391, as containing a statement of the views held by the court on this subject prior to the recent decisions. The fact, however, is that long prior to the decision of that case the use of precisely the same form of modification of the general doctrine as that employed in two prayers now under consideration had been definitely sanctioned by this court in *Northern C. R. Co. v. State use of Price*, 29 Md. 436, 96 Am. Dec. 545; *Baltimore & O. R. Co. v. State use of Trainor*, 33 Md. 554, and *Klipper v. Coffey*, 44 Md. 128, and it was declared to be "the settled law of this state" in the case of *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 494. The modification may be regarded as having originated in the cases of *Davies v. Mann*, 10 Mees. & W. 546, and *Tuff v. Warman*, 5 C. B. N. S. 573, both of which were cited with approval in *Price's Case*, 29 Md. 436, 96 Am. Dec. 545, and *Mulligan's Case*, 45 Md. 494. *Neubeur's Case* was one of a collision at a crossing on a steam railroad, and there was evidence that the plaintiff failed to exercise ordinary care in looking up and down the track as he approached it. The lower court granted a prayer instructing the jury that, even if they found the plaintiff guilty of contributory negligence, he was still entitled to recover "unless they further find that the defendant could not, by the exercise of care and diligence on its part, have avoided such

accident." This court held the prayer bad because it failed to define with accuracy the relative duties and obligations of the parties under the facts of that case, and left the jury at liberty to regard as negligence on the part of the defendant the omission by it of any one of a number of precautions mentioned in the evidence some of which it was and others of which it was not legally bound to observe. In defining the doctrine of contributory negligence the court in that case says: "The general principle is that, where both parties by their negligence directly contributed to the production of the accident, neither has a right to recover of the other for injuries sustained thereby. But there are exceptions to this general rule, and in cases like the present the exception is that if the defendant, or those acting for it, had become aware of the perilous situation of the plaintiff, though that peril had been incurred by the negligent or even reckless conduct of the plaintiff, yet the defendant or its agents would be bound to use all reasonable diligence to avoid the accident. But, in order that this qualification or exception to the general rule may be successfully invoked by the plaintiff, he must show knowledge on the part of the defendant or its agents of the peril in which he, the plaintiff, was placed, and that there was time after such knowledge within which to make the effort to save him from the impending danger." The difference between the modification of the general principle recognized as proper in *Neubeur's Case* and that sanctioned by this court in the recent cases is simply that in the former case the defendant was held liable if he could, by the exercise of reasonable care, after he became aware of the plaintiff's peril, have averted the accident, and in the later cases he was held liable if he could have prevented it after he became, or ought to have become, aware of the peril. There is no difference in principle between these two forms of instruction to the jury, for it cannot be seriously contended that when the defendant is in a position from which he ought to see, or by the exercise of reasonable care could see, the plaintiff's peril, he may avert his face, or close his eyes, and not see it, and then escape liability for an injury resulting from such conduct on his part. As was said by this court in *Cooney's Case*, 87 Md. 268, 39 Atl. 861: "The law will not permit the loss of life, limb, or even property, to be deliberately and carelessly inflicted, when it could, by reasonable care and caution, be avoided, merely because the injured person was negligent." This modification of the general doctrine of contributory negligence should not be constantly or indiscriminately used in instructing juries in suits for injuries caused by negligence, but its employment should be confined to those cases in which there is testimony placing the defendant or his agent in a situation affording him an opportunity to discover the plaintiff's peril, by the exercise of reasonable care, in time to avert it. The recent *Cases of McKewen, Appel, and Rifcowitz*, to

which we have referred, were all cases of injury by electric street cars to persons crossing their tracks at intersecting streets. In both *McKewen's* and *Risicowitz's Cases* the car which inflicted the injury was running at a high rate of speed, and the evidence tended to show that, if the motorman had slackened his speed, and held his car well under control, as he approached the crossing, he could have seen the plaintiff in time to have prevented the accident. In *Appel's Case* there was evidence that the motorman did not use the ample opportunity which he had after he ought to have seen the plaintiff to protect him from injury. In those three cases the evidence plainly called for the form of instruction given by the court to the jury.

Applying the principles which we have been considering to the case now before us, we do not think it was a proper one in which to modify the general proposition that the plaintiff's contributory negligence barred his right of recovery. He was palpably guilty of negligence which contributed directly to his injury, and without which the injury would not have happened. He had, it is true, an equal right with the car to be upon the track, which was laid in a public street of the city; but he went deliberately, when encumbered with his awkward cooling board, to the dangerous side of the south-bound car, when access to its safe side was unobstructed, and he stood there until he could pass the cooling board over the gate of the front platform to the motorman, and meanwhile kept no lookout for approaching cars on the north-bound track, which was almost under his feet. It is not denied that the motorman of the approaching car saw the plaintiff between the tracks as he came near him. The only question on that branch of the case is whether, after seeing the plaintiff, he used reasonable care to prevent injury to him. If the testimony of the motorman to which we have already adverted, and which is corroborated by three other witnesses, is to be believed, he gave the plaintiff timely warning; and the plaintiff at first heeded the warning, and got into a safe place, which he, in his confusion, afterwards abandoned. This testimony is only contradicted to the extent that the plaintiff in rebuttal said that he had not gotten upon the step of the car; but he himself had already testified that he could hardly tell how it happened that he got between the cars, and he was evidently much confused at the time of the accident. Furthermore, the uncontradicted testimony of the motorman of the south-bound car was that when he saw the plaintiff about to go between the cars he told him to go around the fender of his car, where there was room for him to go in safety. The plaintiff further testified that when he went between the cars he thought there was ample room for him there. The testimony in the case did not, in our opinion, justify the court below in granting the plaintiff's second prayer, or in modifying the defendant's first prayer as it did. We further think that, in view of the un-

doubted contributory negligence of the plaintiff, without which the accident would not have occurred, and the practical absence of evidence tracing the cause of the injury to negligence of the defendant's agents, the case falls within the principles laid down in *State use of Bacon v. Baltimore & P. R. Co.* 58 Md. 485, and the case there cited of *Dublin, W. & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1166, and the court below would have been justified in withdrawing it from the jury if an instruction to that effect had been asked for. We think that the judgment should be reversed, without a new trial, and for that reason it will not be necessary for us to review the action of the court below on the other prayers.

Judgment reversed, without new trial.

Rehearing denied.

Adelaide Colt WILLIAMS *et al.*, *Appts.*,
v.

COMMITTEE OF THE BAPTIST CHURCH
IN THE CITY OF BALTIMORE.

(92 Md. 497.)

An absolute gift, and not a trust, is created by a will bequeathing a fund to a church, and "suggesting" that it be used to complete the spire, or invested and the income used to carry on a church mission or for the benefit of the church poor,—especially in view of the fact that the objects designated are so vague as to render the trust void if established, and permit the property to revert to the next of kin, and the word "trust" is used in other parts of the will, where there is a plain intent to create a trust.

(January '18, 1901.)

A PPEAL by plaintiffs from a decree of the Circuit Court, No. 2, of Baltimore City in favor of defendant in a proceeding to recover property bequeathed by the will of John W. M. Williams, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. George Whitelock and Edward L. Koontz, for appellants:

The only conclusion inferable from the use of the word "trust" where the testator did not intend to create a separate beneficial interest, and the omission of that word where he did intend to create such an interest, is that he really did not know the technical meaning of the word "trust;" and therefore, in interpreting the controverted clause from which that word is omitted, the will falls directly within the *rationale* of the rule laid down in *Saylor v. Plaine*, 31 Md.

NOTE.—As to precatory words in will to create trust, see, in this series, *Knox's Appeal* (Pa.) 6 L. R. A. 353, and *note*; *Slattery v. Watson* (Mass.) 7 L. R. A. 393, and *note*; cases in *note* to *Powers v. Jeudevine* (Vt.) 7 L. R. A. on page 519; *Bryan v. Milby* (Del.) 13 L. R. A. 563, and *note*; *Bills v. Bills* (Iowa) 8 L. R. A. 696; *Orth v. Orth* (Ind.) 32 L. R. A. 298; and *Jewell v. Louisville Trust Co.* (Ky.) 58 L. R. A. 377.

164, 1 Am. Rep. 34, and applied in many cases, *e. g.*—

Smith v. Church Extension of M. E. Church, 56 Md. 396; *Riser v. Perry*, 58 Md. 114; *Dulany v. Middleton*, 72 Md. 70, 19 Atl. 146; *Trinity M. E. Church, South v. Baker*, 91 Md. 539, 46 Atl. 1020.

Controlling effect should be given to the circumstances that, while he did, in the first instance, give the entire beneficial interest to the legatee for its purposes generally, he did, in sharp contrast and in striking antithesis thereto, abandon the use of trust terms in the second instance, and unambiguously indicated the particular purposes, which necessarily exclude all other purposes, to which he intended that the fund should be devoted.

Smith v. Church Extension of M. E. Church, 56 Md. 396.

Any attempt to establish a nomenclature or lexicon of precatory words would necessarily result in endless confusion and an irreconcilable conflict of authorities, as the same words and phrases have been held to create or not to create precatory trusts in accordance with their place in the context.

Williams v. Worthington, 49 Md. 573, 33 Am. Rep. 286; *Handley v. Wrightson*, 60 Md. 199; *Nunn v. O'Brien*, 83 Md. 200, 34 Atl. 244; 1 Jarman, Wills, 5th ed. pp. 680-696.

The testator used the word "suggest" in the same sense, in speaking of the work at the Williams Chapel, as he did when he provided for the completion of the steeple. Yet in the case of the Williams Chapel there could be no question but that, upon a proper case based upon the maladministration of the fund, a court of equity would interfere, at the instance, even, of a single member of the church's board of trustees, to compel the withdrawal of the fund from its present investment in the ground rent and its devotion to the work at the church mission, if the bequest in favor of the chapel were valid in other respects.

Peter v. Carter, 70 Md. 140, 16 Atl. 450.

If the testator did not intend that the Baptist Church should take the beneficial interest, that interest was held by it in trust for the next of kin.

Needles v. Martin, 33 Md. 614.

If the testator, instead of giving the legacy to the church for its general purposes, saw fit to designate some certain specific purpose for which the fund should be held, the Baptist Church cannot hold it for any other purpose.

Smith v. Church Extension of M. E. Church, 56 Md. 396; *Yingling v. Miller*, 77 Md. 106, 26 Atl. 491; *Peter v. Carter*, 70 Md. 142, 16 Atl. 450.

The church, as between it and the next of kin, could not exercise the power, either by purchasing ground rents or otherwise, to invest the fund and devote the income to the work of the mission, because that trust and the power incident thereto constitute, separately or together, a violation of the rule against perpetuities.

Dashiell v. Atty. Gen. 5 Harr. & J. 401; 54 L. R. A.

Barnum v. Barnum, 26 Md. 172; *Needles v. Martin*, 33 Md. 618; *Missionary Soc. of M. E. Church v. Humphreys*, 91 Md. 131, 46 Atl. 320.

The imperative trust in favor of the poor is plainly void.

Yingling v. Miller, 77 Md. 106, 26 Atl. 491; *Maught v. Getzendanner*, 65 Md. 527, 57 Am. Rep. 352, 5 Atl. 471; *Nunn v. O'Brien*, 83 Md. 200, 34 Atl. 244; *McClerman v. McClernan*, 73 Md. 284, 20 Atl. 908.

Messrs. Gans & Haman and Vernon Cook, for appellee:

The word "suggest" is not such a word as will create a precatory trust.

Perry, Tr. § 113; 27 Am. & Eng. Enc. Law, p. 41; *Pratt v. Sheppard & E. P. Hospital*, 88 Md. 622, 42 Atl. 51; *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244; *Chase v. Plummer*, 17 Md. 165.

A suggestion is something intended for consideration, but not intended as a binding instruction.

The more modern tendency is to restrict this whole doctrine of precatory trusts.

Lewin, Tr. 9th ed. chap. 8, § 2, subsec. 11; *Pratt v. Sheppard & E. P. Hospital*, 88 Md. 622, 42 Atl. 51; *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286.

The uncertainty as to the objects of the alleged trust is a cogent reason for holding that no trust was intended.

It is clear that the testator did not by this clause intend to create a trust.

Page, J., delivered the opinion of the court:

In this case the testator, after making specific bequests of his furniture, clothing, and books, directed that all the rest and residue of his estate should be "converted into cash," and bequeathed, one half thereof to the Maryland Baptist Union Association, and the remaining half part he bequeathed, in the following words, to "the Committee of the Baptist Church in the City of Baltimore, a body corporate, incorporated of the state of Maryland, commonly called the 'First Baptist Church of the City of Baltimore,' and I suggest, if the spire or steeple of the said church property be unfinished at the time of my death, that the funds received, or such part thereof as may be necessary, be used for the purpose of completing the same; and further suggest, if the spire is finished, that the said funds, or what may be left after completing the said spire, be invested by the said committee, and the income devoted to the work at the church mission known as 'Williams Chapel,' but, if the work has been abandoned, then said income to be used for the relief of the poor of the said church." It is contended on the part of the appellant that, under this clause of the will, the Committee of the Baptist Church does not take an absolute beneficial interest in the sums so raised, but that a trust is created for the purposes there set forth. The bill charges that, by the true construction of the clause, the committee of the church did not take an absolute interest, but that the sum so bequeathed was to

be used by it in its absolute and uncontrollable discretion, either for the completion of the spire or for investment, and the devotion of the income therefrom in perpetuity to the work of the church mission, and in the event that it should not apply the sum to the completion of the spire, or the income thereof to the work of the church mission, then the income was to be used for the relief of the poor of the church. It is also charged in the bill that the committee did not apply any part of the sum to the completion of the spire, nor any part of the income to the work on the mission, but had applied the whole sum to the redemption of the ground rent on the ground covered by Williams Chapel, and that in such case the fund or the income not having been used for the completion of the spire, or for the work of the chapel, a "positive and mandatory trust attached to the fund for the relief of the poor of the chapel, and for no other purpose; and that, such trust being null and void for uncertainty, the said sum constitutes a trust fund, held by the committee of the defendant for the benefit of those who are next of kin of the testator." The contention, therefore, is that the fund in the hands of the Committee of the Baptist Church, under the terms of the will, is a trust fund (1) for the completion of the spire, or for the devotion of the income to the work on the chapel, if the committee should elect to do either; or, (2) if it should not so elect, then for the benefit of the poor of the church.

In determining this question, it is the intention of the testator that must be sought for; and unless it can be ascertained from the language of the will, taken alone or in connection with other circumstances proper to be considered, that the testator intended to create a trust, no such trust can be found to exist. *Chase v. Plummer*, 17 Md. 165; *Saylor v. Plaine*, 31 Md. 164, 1 Am. Rep. 34; *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244; *Pratt v. Sheppard & E. P. Hospital*, 88 Md. 622, 42 Atl. 51.

The main reason assigned by the counsel for the appellants for the claim that this clause creates, or was intended by the testator to create, a trust, is in the use of the word "suggest," which, it is insisted, must be regarded, in the connection in which it is used, as a precatory word. In considering what is the proper interpretation of this word as employed by the testator, it must be borne in mind that the bequest to the committee is without any limitation whatever, but is in terms that of themselves convey the grant of an absolute interest. The testator nowhere has said that the donation is made in trust. If, therefore, the subsequent words create a trust, it must do so by qualifying the terms which had been previously used, and undo that which he had previously done. It must also be noted that the word "suggest," as it occurs in the clause, applies to all the provisions which are supposed to designate the objects of the trust and the uses of the fund. The testa-

tor "suggests" that the spire be finished, and, if that is already done, that the income shall be devoted to the work on the chapel, and, if the one has been finished and the other abandoned, he further suggests that the income be devoted to the relief of the poor of the church. Can the word "suggest," when used in this connection, without qualifying or explanatory words, be regarded as a precatory word, sufficient to create a trust, as to property previously given absolutely?

We have been cited to no case, and have found none, where it has been so held. A suggestion alone, without other words or circumstances to affect the ordinary meaning, is a mere placing before another a matter for consideration, and, under ordinary circumstances, in no wise carries with it an expression of desire, will, or entreaty, and here it seems to amount to no more than this. The testator gives the whole interest in the fund absolutely to the church. He places no restrictions upon it as to its use, but he does mention several matters for consideration. He "suggests" that a proper disposition would be to finish the spire, or apply the income to the chapel, not as a requirement upon the committee, but as a matter for its consideration. So, also, in respect to the relief of the poor, there is no limitation imposed upon the committee, but a mere suggestion as to what would be a proper use of the fund. There is nothing in the word "suggest," either in its meaning as ordinarily employed or as affected by the context of the will, that can be regarded as expressive of confidence, or belief, or desire, or hope, or will, or as the equivalent of a word of entreaty or recommendation. "Suggest" is in fact, therefore, not a precatory word at all, in the ordinary sense, and there is nothing in this will to justify us in attributing to it any other than its ordinary meaning. If this interpretation of this word be correct, there was no duty upon the committee to perform the acts suggested.

These several matters are suggested for the consideration of the committee, but it is left to the exercise of its own discretion whether any of them should be performed; and where that is the case, and the prior disposition of the property imparts absolute and uncontrollable ownership, courts of equity will not create a trust from words even of a precatory character. *Nunn v. O'Brien*, 83 Md. 201, 34 Atl. 244.

But, aside from this, there remains a serious difficulty in declaring that the clauses in question create a trust, upon another ground. The claim of the appellant is that the clauses create a trust, but that such trust is void because of the uncertainty of the objects. The controversy here is not as to the indefiniteness of the objects,—that is conceded, as to the use of the fund for the relief of the poor,—but the question is whether the testator intended to raise a trust. Now, this court, in *Pratt v. Sheppard & E. P. Hospital*, 88 Md. 627, 42 Atl. 56, has discussed clearly and exhaustively the difference between "a trust that is void for uncer-

faintly and an uncertainty that is simply indicative of the absence of an intention to create a trust." The court there said: "Where it is sought to show by implication or from the use of precatory words, following an absolute gift, that a trust was intended to be fastened on the gift, an uncertainty as to the objects or as to the subject of the alleged trust will be a reason, not necessarily conclusive, but still a reason, for holding that no trust was designed by the testator." This principle, conformable as it is to the dictates of sound common sense, and amply supported by authority here and elsewhere, ought to have full force and effect given to it in a case like this, where the contention in favor of the trust rests on an expression so feeble to indicate a desire to create a trust as the word "suggest." In the absence of convincing proof to the contrary, it cannot be assumed that the testator intended to create a void trust. If other terms had been employed, clearly indicating an intention of the testator to raise a trust, and the objects expressed were vague and uncertain, the next of kin would take, because it would be clear the legatee was not designed to have a beneficial interest. But, when the gift is made to the legatee in absolute terms, it would be unreasonable to suppose that the testator thereafter, by the employment of a word of uncertain import, in the connection it is used, intended to create a trust for objects so vague and uncertain as to be incapable of enforcement.

The clause is wholly nugatory and void

as a devise, if it be held that it was the intention to create a trust, but, if the word "suggest" be taken in its ordinary meaning, it is clear that the intention of the testator was to present these several objects to the attention of the committee, as proper and worthy ones to receive the benefit of his donation, but that it was not his purpose to place any limitation upon the absolute right of the committee to the exercise of its uncontrollable discretion. Moreover, it is clear that the testator or the draftsman of his will had a knowledge of what were apt words for the creation of a trust, though it is possible he might have had some confusion as to the description of the objects of the trust. In view of this, it is significant, at least, that in the previous bequests he gives one half of the fund "in trust" to the Maryland Baptist Union Association, but, when the bequest of the other half is made to the Committee of the Baptist Church, the word "trust" is omitted, and instead is employed the word "suggest." It cannot be assumed that this change of expression was the result of accident or mistake. If it was not, but the word "suggest" was deliberately used instead of "trust," it would be impossible to hold that, by a mere suggestion, he intended to create a trust.

It follows from what we have said that we are of opinion that the legacy to the Committee of the Baptist Church is absolute, and not subject to any trust, and *the decree of the lower court must be affirmed.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

Re HOUSE BILL NO. 1,291.

(.....Mass.....)

Constitutional requirements of a written vote, and provisions for sorting and counting, will not preclude the use of a voting machine by which the result is effected by a system of wheels, cogs, and indexes in connection with written or printed names of the candidates,—at least if the action of the machine in registering each vote cast is visible to the voter casting it, and the work of the machine in adding the votes is done under the supervision of someone duly charged with counting the votes cast.

(Morton, Barker, and Hammond, JJ., dissent.)

(April 25, 1901.)

SUBMISSION by the House of Representatives for the opinion of the Supreme Court as to the right to adopt machines for the purpose of registering the vote at elections. *Favorable answer returned.*

NOTE.—For another case in this series as to right to use voting machine under constitutional provision providing for voting by ballot, see also Opinion of the Justices (R. I.) 36 L. R. A. 547. 54 L. R. A.

The question involved sufficiently appears in the opinions of the judges.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The undersigned justices of the supreme judicial court, having considered the question proposed by the honorable house of representatives by its order of March 29, 1901, a copy of which is annexed, respectfully submit the following opinion:

The ground for doubt as to the power of the general court under the Constitution of the commonwealth is to be found in the requirement that representatives "shall be chosen by written vote" (part 2, chap. 1, § 3, art. 3), and in the implication of the provisions for sorting and counting the votes for governor (part 2, chap. 2, § 1, art. 3), and for senator (part 2, chap. 1, § 2, art. 2). To these may be added the requirement that certain militia officers shall be elected by written vote (part 2, chap. 2, § 1, art. 10), and articles 16 and 17 of the amendments, one or both of which might be held to adopt the method of voting for governor for the election of certain other officers. Whether the first-mentioned requirement, as to representation, has been repealed by ar-

ticle 21 of the Amendments, giving the legislature power to prescribe the "manner of ascertaining" the election of representatives, it is unnecessary to consider, although it may be well to bear that amendment in mind in weighing the arguments which we shall adduce. Apart from these provisions, no doubt, the general power of the legislature would extend to authorizing the use of a voting machine. See, for example, Const. Amend. art. 19.

With regard to votes for representatives in Congress it is provided by chapter 154 of the Statutes of the United States for 1899 (30 Stat. at L. 836) that they may be by "voting machine the use of which has been duly authorized by the state law," so that the elections of national officers require no separate consideration.

We assume that the voting machines which the honorable house has in mind vary in their mode of recording votes; that all of them dispense with the use of a separate piece of paper for each vote; that some of them register a large number of successive votes by successive punches upon one strip of paper, in separate lines for separate candidates, with the names, if necessary, against the lines; and that some of them abandon the use of paper altogether in recording, each vote being marked by the partial revolution of a cogwheel or other similar device, and the total number being shown by some easily adapted index. If necessary, however, in this class of machines the names of the candidates may appear in writing attached to the point where the voter registers his vote, in such manner as to indicate that his turning a particular key or pressing a particular knob expresses a vote for the name written above.

The question whether such a machine satisfies whatever requirements or implications there may be in the Constitution of the commonwealth depends upon how far we are to follow the line of argument started by Chief Justice Parker in *Henshaw v. Foster*, 9 Pick. 312. In that case it was pointed out, with regard to this very matter, that, as the chief justice puts it, "words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce." Page 317.

To state in our own way the mode of approaching the question, it is not so important to consider what picture the framers of the Constitution had in their minds as what benefits they sought to secure, or evils to prevent,—what they were thinking against in their affirmative requirement of writing, and what they would have prohibited if they had put the clause in a negative form. The answer, or a part of it, is given by Chief Justice Parker in the case already cited: "The practice had been to elect many town officers by hand vote, and probably in some

instances representatives had been so chosen. It became necessary, therefore, to prescribe that the choice should be made by ballot. But, even the word 'ballot' itself is ambiguous, and therefore it was required that representatives shall be elected 'by written votes.'" No doubt the picture in the minds of those who used the words was that of a piece of paper with the names of the candidates voted for written upon it in manuscript, but the thing which they meant to stop was oral or hand voting, and the benefits which they meant to secure were the greater certainty and permanence of a material record of each voter's act and the relative privacy incident to doing that act in silence. They did not require the signature of the voter, or any means of identifying his vote as his after it had been cast. It was settled by *Henshaw v. Foster* that they did not require manuscript. In our opinion, they did not require a separate piece of paper for each voter. That is to say, by requiring writing they did not prevent the legislature from authorizing several voters to use a single ballot if the voters all signed it, or in some way sufficiently indicated that a single paper expressed the act and choice of each. It seems to us that the object, and even the words, of the Constitution in requiring "written votes" are satisfied when the voter makes a change in a material object,—for instance, by causing a wheel to revolve a fixed distance,—if the material object changed is so connected with or related to a written or printed name purporting to be the name of a candidate for office that, by the understanding of all, the making of the change expresses a vote for the candidate whose name is thus connected with the device.

So far we have been considering the requirement of written votes alone, and have assumed that all other constitutional conditions are complied with. But it remains to consider whether the result is changed by the provisions as to sorting and counting votes where those provisions apply. These seem to us to raise less difficulty. The provisions do not express a constitutional end. They express merely assumptions that sorting and counting will be necessary if you have written votes, as they would have been necessary a hundred years ago. It would not be true to say that the framers of the Constitution chose the risk of errors incident to sorting and counting in preference to the risk of errors of a different class incident to some different way of finding out the result. They never thought of any other way. Probably the only distinctions which occurred to them concerned different modes of sorting and counting.

It is theoretically possible to exclude by a mechanical device every chance of error in the sorting and counting of votes. Whether that is accomplished by existing machines is a matter about which we have no adequate information, and is a question of fact which it would not fall within our province to determine. We assume that the legislature, before authorizing the use of a machine, would satisfy itself that the voter

would be sufficiently apprised of what to do in order to vote for his candidate, that the machine really would carry out and express the intent which it purported to be ready to express, that it was of such mechanical perfection as to exclude the possibility of internal error, and that sufficient arrangements were made to prevent external fraud. Under such circumstances the sorting and counting of the votes shrink by atrophy to a mere survival, but there is nothing contrary to the Constitution in that. If it be deemed technically necessary that the possibility, at least, of sorting and counting should remain, it does remain. Whether in the form of successive punches in a line upon paper, or in the marked revolutions of a wheel appropriated to a given candidate, material changes abide which signify by predetermined language the number of votes cast, exactly to the same extent that it would be signified by slips of paper bearing characters in printer's ink. The votes could be counted as cast, if it were necessary. They can be counted afterwards as well. The fact that the index of machinery has cut down the chance of personal error to a minimum surely is not an objection sanctioned by the Constitution.

The views which we express coincide with the opinion of a majority of the judges of the supreme court of Rhode Island in regard to the McTammany machine (*Re Tax Assignment Orders*, 19 R. I. 729, 36 Atl. 426), and with some other discussion of the subject which we have seen.

It is proper to add that we have considered only the answer to the general question. What provisions should be made in the exceptional case of challenged votes, etc., is a question of detail, easily dealt with by special arrangements.

OLIVER WENDELL HOLMES.

MARCUS P. KNOWLTON.

JOHN LATHROP.

I agree with this conclusion, provided the result of the action of the machine in registering each vote cast is visible to the voter casting the vote, and the work of the machine, in adding up the votes cast, is done under the supervision of some person duly charged with counting the votes cast. I agree that machinery can be used by the voter in making a written vote within the meaning of the Constitution, and also that there is nothing in the Constitution which forbids machinery being used in counting the votes cast. The first difficulty in holding that the provisions of the Constitution are complied with by any one of the several voting machines which are now in use (so far as I know) comes from the fact that in none of them can the voter see what his written vote is. In the method of voting prescribed by the Constitution the voter knows what the written vote cast by him is. It is manifest that the use of a voting machine, which records a written vote without disclosing to the voter what that vote is, involves chances of error quite different from those involved in the method of voting contemplated by the Constitution. There
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are similar difficulties arising from the fact that the addition of the several votes cast made by many of the voting machines is also invisible, and that the correctness of the result produced by the machine depends entirely upon the machine's having made the addition correctly in the first instance, without the possibility of knowing whether that addition was or was not correctly made, and without the possibility of correcting it if it was not correctly made. And, again, the only guard against a voter's casting more than one vote lies in the fact that the mechanical device put into the machine to prevent double voting has worked correctly, and in that fact alone, without there being any means of knowing whether it did or did not work correctly, and without the possibility of correcting such a fraud if one were committed. It is manifest that in the matter of the record made by the machine being in each instance what the voter intended his vote should be, in the matter of the several votes cast being correctly added together by the machine, and in the matter of double voting, the chances of error involved, where the result of an election is made to depend solely upon the result produced by the voting machine, are quite different from those incident to the method of voting contemplated by the Constitution; at least so far as the voting machines now in use are concerned. And, in my opinion, the chances of error to which I have referred are so far different as to forbid votes cast and counted only by such a machine being held to be a compliance with the provisions of the Constitution in that connection. It is evident that the use of voting machines which I have suggested would destroy to a great extent the secrecy of the ballot; but I find nothing in the Constitution requiring that the written vote there provided for should be a secret one. It has been suggested that a machine could be devised which would indicate that a vote had been cast for some person for a designated office, without disclosing the person voted for, and that by the use of such a machine the secrecy of the ballot could be maintained, and the requirements of the Constitution met. In my opinion, the use of such a machine would not meet the requirements of the Constitution.
WILLIAM CALES LORING.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The undersigned justices of the supreme judicial court respectfully submit the following as their opinion upon the question of law stated in your order of March 29, 1901, which question is: "Has the general court the right to authorize the use of voting and counting machines at elections by the people of national, state, district, county, city or town officers?"

First. As to county, city, and town officers, and as to officers chosen by districts, other than councilors, senators, and representatives, we know of no constitutional re-

striction upon the power of the general court to direct the manner of choice.

Second. As to councilors, senators, and representatives, and as to the governor, lieutenant governor, secretary, treasurer, and receiver general, auditor, and attorney general, there are constitutional provisions which must be considered in answering your question.

The provisions to which we refer are these:

Declaration of Rights, art. 9: "All elections ought to be free. . . ." Part 2, chap. 1, § 1, art. 4: "And further, full power and authority are hereby given and granted to the said general court from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defense of the government thereof; and to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government, otherwise provided for. . . ."

Part 2, chap. 1, § 2, art. 2: "The senate shall be the first branch of the legislature; and the senators shall be chosen in the following manner, *viz.*: . . . The selectmen of the several towns . . . shall receive the votes of all the inhabitants of such towns. . . . and shall sort and count them in open town meeting, and in presence of the town clerk, who shall make a fair record, in presence of the selectmen, and in open town meeting, of the name of every person voted for, and of the number of votes against his name; and a fair copy of this record shall be attested by the selectmen and the town clerk, and shall be sealed up, directed to the secretary of the commonwealth, for the time being, with a superscription expressing the purport of the contents thereof, and delivered by the town clerk of such towns, to the sheriff of the county in which such town lies. . . ."

Part 2, chap. 1, § 3, art. 3: "Every member of the house of representatives shall be chosen by written votes." Part 2, chap. 2, § 1, art. 3: "Those persons . . . qualified . . . within the several towns of this commonwealth, shall, at a meeting to be called for that purpose, . . . annually, give in their votes for a governor, to the selectmen, who shall preside at such meetings; and the town clerk, in the presence and with the assistance of the selectmen, shall, in open town meeting, sort and count the votes, and form a list of the persons voted for, with the number of votes for each person against his name; and shall make a fair record of the same in the town books, and a public declaration thereof in the said town meeting; and shall, in the presence of the inhabitants, seal up copies

of the said list, attested by him and the selectmen, and transmit the same to the sheriff of the county. . . ." Part 2, chap. 2, § 1, art. 10: "The captains and subalterns of the militia shall be elected by the written votes of the trainband and alarm list of their respective companies; . . . the field officers of regiments shall be elected by the written votes of the captains and subalterns of their respective regiments; the brigadiers shall be elected in like manner, by the field officers of their respective brigades. . . ." Part 2, chap. 2, § 2, art. 1: "There shall be annually elected a lieutenant governor . . . in the same manner with the governor. . . ."

Amendments, art. 16: "Eight councilors shall be annually chosen by the inhabitants of this commonwealth, qualified to vote for governor. The election of councilors shall be determined by the same rule that is required in the election of governor. . . . The day and manner of the election, the return of the votes, and the declaration of the said elections, shall be the same as are required in the election of governor. . . ."

Article 17: "The secretary, treasurer, and receiver general, auditor, and attorney general, shall be chosen annually. . . . The qualification of the voters, the manner of the election, the return of the votes, and the declaration of the election, shall be such as are required in the election of governor. . . ."

Article 21: "The manner of calling and conducting the meetings for the choice of representatives, and of ascertaining their election, shall be prescribed by law. . . ." Article 22: "The manner of calling and conducting the meetings for the choice of representatives, and of ascertaining their election, shall be prescribed by law. . . ."

Article 24: "Any vacancy in the senate shall be filled by election by the people of the unrepresented district, upon the order of a majority of the senators elected."

In our opinion, the requirements as to the choice of senators found in part 2, chap. 1, § 2, art. 3, of the Constitution were not abrogated by articles 22 and 24 of the amendments, nor was the provision of part 2, chap. 1, § 3, art. 3, that "Every member of the house of representatives shall be chosen by written votes," abrogated by article 21 of the amendments. The provision that representatives shall be chosen by written votes was before this court in the year 1830 in the case of *Henshaw v. Foster*, 9 Pick. 312, in which decision it was held that printed votes are written votes, within the meaning of the provision. The same decision states the general considerations which should have weight in construing the provision, and with that statement we agree: "In construing so important an instrument as a constitution, especially those parts which affect the vital principle of a republican government,—the elective franchise, or the manner of exercising it,—we are not on the one hand, to indulge ingenious speculations, which may lead us wide from the true sense and spirit of the instrument; nor, on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it. We are to suppose that the authors of

such an instrument had a thorough knowledge of the force and extent of the words they employ, that they had a beneficial end and purpose in view, and that more especially in any apparent restriction upon the mode of exercising the right of suffrage there was some existing or anticipated evil which it was their purpose to avoid. If an enlarged sense of any particular form of expression should be necessary to accomplish so great an object as the convenient exercise of the fundamental privilege or right, that of election, such sense must be attributed. We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies; so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce." The decision from which we have quoted applied these principles; and, because printing was, in law, writing, from a time before that when the Constitution was made, and because the use of printed votes was equally well calculated to avoid the evils which the framers of that instrument thought would attend elections if conducted by nomination and hand vote, or *viva voce*, the court held that printed votes were constitutional, although the uniform practice had been, for some fifty years, to use manuscript votes only. The same decision says further: "This requisition of written votes in the Constitution is confined to the choice of representatives. The important election of governor, senators, and councilors is left unprovided for in this respect, except by implication, and that implication does not exclude printed votes. The votes of all the different communities were to be sorted and counted, and a certificate of the result transmitted to a common focus, the secretary's office, where they were to be examined and compared. This process necessarily requires tickets or ballots, so that there was no occasion to require expressly that the votes should be in writing or in print. There can be no ground to exclude printed votes for these state officers, for all that is required is that they should be so given as that they may be sorted and counted."

Bearing in mind the statement of the Declaration of Rights that "all elections ought to be free," and also the general rules laid down in the case of *Henshaw v. Foster*, we have examined the published laws under which, during our colonial and provincial periods, and the interval between the Declaration of Independence and the inauguration of our present government, officers have been chosen or appointed. Without giving

the citations, it is enough to say that such an examination shows that, while higher officers often were chosen by the casting of separate paper votes by the individual voters, some elections were made by the use of Indian corn and beans as ballots, and that as to much the greater number of officers chosen by the people there was no specific direction as to the manner in which the choice of the individual voter should be expressed; but representatives to the general court were selected by the voters in town, district, or plantation meetings, the votes being given under statutory directions as to the manner of voting contained in Prov. Stat. 1693-94, chap. 14. §§ 2, 6, 7 (1 Prov. Laws [state ed.] p. 147). These directions provide that no voter shall put in more than one vote for any one person, and that "all persons shall put in their votes unfolded to the selectmen or constables appointed to receive the same." These provisions plainly imply that the only legal method of voting for representatives under the provincial government was for each voter to put in his own separate written vote. An examination of the printed records of the town of Boston shows that this was the method there used up to 1780, and the only reason we have found for supposing that representatives to the general court of the province ever were chosen by nomination and hand vote, or *viva voce*, is the statement in the decision in *Henshaw v. Foster* [9 Pick.] at page 319, that "probably in some instances representatives had been so chosen." In most elections the votes given in at town meeting were not preserved after the declaration of the result in open meeting. But in the case of the nomination of magistrates or assistants under the Massachusetts Bay Colony charter, the votes cast in the meetings were there sealed up, and then carried to the shire towns, and from each shire town to Boston, where they were finally opened, and the result of the voting in the towns and plantations ascertained. And in the case of county treasurer and registers of deeds under the provincial government the votes given in by the individual voters at the town meetings were there sealed up, and taken to the court of sessions of the county, and opened and sorted in the presence of the justices by men appointed by them for the purpose, and the result thus ascertained in that court.

Interpreting the Constitution in the light of the circumstances existing at the time of its adoption, as well as of the laws and customs which had theretofore prevailed, we think that the language prescribing the way in which the will of the voters shall be expressed and ascertained in the case of the election of governor and of the other state officers, where similar language is used, necessarily implies at least that the choice of the voter shall be indicated by some kind of writing upon a paper or other material thing; that this material thing, bearing this written expression of the choice of the voter, shall, by his act of voting, pass from his possession and control into that of the officers charged with the duty of conducting

the election, and that the voter shall have reasonable opportunity to see that it has so passed; that it shall be distinct from that handed in by any other voter; and that these written votes so handed in shall continue to be the same material things capable of being handled, sorted, and counted, and that the whole work of ascertaining and declaring the result shall be the personal act of the election officers, with the written votes before them; the sorting and counting, as well as the declaration of the result, being done by sworn officers. One reason for the requirement of a written vote is that the voter may have a reasonable opportunity of making his choice without immediate influence upon the part of others, and the reason for the requirements applicable to the sorting and counting is that the votes may not fail of their proper force by reason of mistake or fraud in the count. The safeguard erected by the Constitution is that there shall remain after the closing of the voting, in a material form, capable of being read and understood by men, a written vote cast by each voter; and that all these individual votes, each given by the voter to the election officers, shall be read, sorted, and counted in accordance with the several tenor of each, by men acting under the sanction and obligation of their respective official oaths.

So far as we have been informed as to the nature of the machines mentioned in your order, none of them provides for or allows the individual voter to have in his own hands a paper or other material thing bearing upon itself the expression of his choice; none of them allows him to cast or deposit in the custody of the election officers a paper or other material thing bearing such expression as his individual written vote; and none of them, upon the casting of the vote, or at the closing of the polls, places in the hands of the election officers a separate, material thing given in by the voter, which the officers can handle, sort, and count. None of them is so built and worked that the voter can know that, unless sworn officers err, or are false to their oaths, the choice which the Constitution commands him to express by "written vote" will be counted, and counted as he cast it. Yet to give him that certainty, and to give the state the safeguard which comes from his having that certainty is one purpose of the constitutional requirement of "written votes," "sorted and counted" in open meetings, so that each vote must have its legitimate weight in the election, unless an intelligent and responsible man fails in the performance of a simple, sworn duty. The turn of a wheel or of a dial, the punching of a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a key, is not the use of a written vote, within the meaning of the Constitution; nor is the inspection of a dial, even if preceded or followed by an inspection of all the cogs and mechanism which have moved the hands of the dial, or the counting of holes in such a paper and the inspection of the machinery which made the holes, the

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sorting and counting of votes by election officers. If it be said that these are the best and most efficient means to secure a free and honest election, the answer is that they are not the means prescribed for those ends by the Constitution. The Constitution does not authorize the general court to put the expression of the voter's will to the chance of being nullified or perverted by slipping cogs, defective levers, or other mechanical devices which have no living intelligence, no conscience, and no liability to punishment to insure their going right. It requires that every step in the task of seeing that votes, whether given by Indian corn and beans or other ballots, by show of hands, by the living voice, or by paper writing, are counted rightly, shall be intrusted to and performed, not by an inanimate machine, but by sworn officers, and in open meeting, where each step of the work can be verified, and mistakes corrected.

In our opinion, the general court has not the right to authorize the use of the machines mentioned in your order at elections by the people of the governor, the lieutenant governor, the councilors, senators, and representatives, the secretary, the treasurer, and receiver general, the auditor, or the attorney general. A law of Congress requires votes for representatives in Congress to be by written or printed ballot or voting machine, the use of which has been duly authorized by state law. In our opinion, the general court has the right to authorize the use of machines referred to in your order in elections for representatives in the Congress of the United States. In the case of electors for President and Vice President, it might, perhaps, be different, although long usage has given to the manner in which they are now chosen almost the force of an inviolable sanction.

JAMES M. MORTON.
JAMES M. BARKER.
JOHN W. HAMMOND.

BREWER LUMBER COMPANY
v.
BOSTON & ALBANY RAILROAD COMPANY.

(.....Mass.....)

1. The right of stoppage in transitu of a carload of lumber is not lost by the storage of the lumber by the carrier for failure to unload within the time required by its rules, when the freight charges remain unpaid, and the carrier has made no agreement to hold the property for the consignee.

NOTE.—As to delivery of part of a consignment of goods to defeat stoppage *in transitu*, see, in this series, *Jeffris v. Fitchburg R. Co.* (Wis.) 33 L. R. A. 351.

As to right to stoppage *in transitu* in general, see *Farrell v. Richmond & D. R. Co.* (N. C.) 3 L. R. A. 647, and *note*; *Fenkhausen v. Fellows* (Nev.) 4 L. R. A. 732, and *note*; and *Kingman v. Denison* (Mich.) 11 L. R. A. 347, and *note*.

2. Taking the purchaser's worthless notes in payment for goods shipped will not defeat the right of stoppage *in transitu*.
3. The negotiation of notes taken in payment for property shipped will not defeat the right of stoppage *in transitu*, if they are recovered and tendered back to the maker or his representative before the right is exercised.

(June 1, 1901.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after finding for plaintiff in an action brought to enforce the right of stoppage *in transitu* of certain lumber sold by plaintiff to George A. Paul. *Judgment for plaintiff.*

The facts are stated in the opinion.

Mr. E. N. Hill, for plaintiff:

The plaintiff had the right of stoppage *in transitu*.

The possession of the defendant was unbroken. The retention of the lumber in a place of deposit, connected with its transmission and delivery, at the place the lumber is to go, does not terminate the transit.

Benjamin, Sales, 7th Am. ed. § 839; *Seymour v. Newton*, 105 Mass. 275; *Mohr v. Boston & A. R. Co.* 106 Mass. 67; *Durgy Cement & Umber Co. v. O'Brien*, 123 Mass. 12; *Kendall v. Marshall*, L. R. 11 Q. B. Div. 364.

So long as the freight and storage remain unpaid there is a strong presumption that the carrier continues to hold the goods as carrier, and in no other capacity; and in order to rebut this presumption there must be some proof of an agreement between the carrier and the vendee, whereby the carrier becomes the agent of the buyer to keep the goods for him.

Ex parte Barrow, L. R. 6 Ch. Div. 783; *Ex parte Cooper*, L. R. 11 Ch. Div. 68; *Kemp v. Falk*, L. R. 7 App. Cas. 584; *McLean v. Breithaupt*, 12 Ont. App. Rep. 383.

Giving the utmost effect to the general expression of Paul that he ordered it to be stored, when it was sure to be stored in the course of business, it shows an attempt of the vendee to change the capacity in which the defendant held possession, without its assent. Neither party can so change the relations of the other without an assent. These intents must concur, and there must be an affirmative agreement and something equivalent to an attornment on the part of the carrier, so that the property is held, not as carrier, but as agent of the purchaser.

Ex parte Barrow, L. R. 6 Ch. Div. 783; *Ex parte Cooper*, L. R. 11 Ch. Div. 68; *Kemp v. Falk*, L. R. 7 App. Cas. 573; *James v. Griffin*, 2 Mees. & W. 623; *Jackson v. Nichol*, 5 Bing. N. C. 508; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63; *Synns v. Schotten*, 35 Kan. 310, 10 Pac. 828; *Jeffris v. Fitchburg R. Co.* 93 Wis. 250, 33 L. R. A. 351, 67 N. W. 424; *McLean v. Breithaupt*, 12 Ont. App. Rep. 308.

This is a question of fact to be decided on all the evidence, of which there is sufficient

to justify a finding that the defendant did not agree, and did not intend, to change its relations and hold the goods other than as carrier. This fact, having been found for the plaintiff, is not subject to revision by this court.

Fitchburg R. Co. v. Freeman, 12 Gray, 401, 74 Am. Dec. 600; *Whiton v. Nichols*, 3 Allen, 583; *Crocker v. Foley*, 13 Allen, 370; *O'Connell v. Jacobs*, 115 Mass. 21; *Clark v. Burns*, 118 Mass. 275, 19 Am. Rep. 456.

The notes given in settlement do not take away the right of stoppage *in transitu*.

Stubbs v. Lund, 7 Mass. 453, 5 Am. Dec. 63; *Parks v. Hall*, 2 Pick. 206; *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Seymour v. Newton*, 105 Mass. 275; *Mohr v. Boston & A. R. Co.* 106 Mass. 67; *Re Batchelder*, 2 Low. Dec. 245, Fed. Cas. No. 1,099; *Atkins v. Colby*, 20 N. H. 154; *Clapp Bros. v. Sohmer*, 55 Iowa, 273, 7 N. W. 639; *Milliken v. Warren*, 57 Me. 46.

Messrs. Frank Paul and Frederick F. Haskell, for defendant:

The plaintiff did not have the right to stop the lumber *in transitu*, because the plaintiff was not an "unpaid vendor."

Blackburn, Sales, 2d Eng. ed. p. 326; Benjamin, Sales, 1st Am. ed. § 835; 2 Am. & Eng. Enc. Law, p. 906.

At the time when the plaintiff undertook to stop the lumber *in transitu*, the transit was at an end.

In the earlier cases it was thought that nothing but the actual delivery to the vendee would defeat the exercise of the right of stoppage *in transitu*; but this doctrine has been long abandoned.

Chitty, Contr. 11th Am. ed. p. 603; *Reynolds v. Boston & M. R. Co.* 43 N. H. 590.

Stoppage *in transitu*, as its name imports, can only take place while the goods are on their way; if they once arrive at the termination of their journey, and come into the actual or constructive possession of the consignee, there is an end to the vendor's right over them.

Blackburn, Sales, 2d Eng. ed. pp. 333, 334; *Kendall v. Marshall*, L. R. 11 Q. B. Div. 356; *Reynolds v. Boston & M. R. Co.* 43 N. H. 590; *Inslee v. Lane*, 57 N. H. 459; 23 Am. & Eng. Enc. Law, p. 908.

The goods are *in transitu* so long as they are in the hands of the carrier as such.

Benjamin, Sales, 1st Am. ed. §§ 841, 849; Blackburn, Sales, 2d Eng. ed. p. 335; Chitty, Contr. 11th Am. ed. p. 602; *Ex parte Rosewear China Clay Co.* L. R. 11 Ch. Div. 570.

The goods have been constructively delivered to the vendee, and the transit is at an end, when the carrier ceases to hold them *qua* carrier, and enters into an agreement with the buyer to hold them as his agent or warehouseman.

Benjamin, Sales, 1st Am. ed. §§ 841, 849; Blackburn, Sales, 2d Eng. ed. pp. 364, 375; Chitty, Contr. 11th Am. ed. p. 606; *James v. Griffin*, 1 Mees. & W. 20; *Whitehead v. Anderson*, 9 Mees. & W. 534; *Nicholls v. Le Fœuvre*, 2 Bing. N. C. 83; *Bolton v. Law-*

cashire & Y. R. Co. L. R. 1 C. P. 431; Reynolds v. Boston & M. R. Co. 43 N. H. 590; Inslee v. Lanc. 57 N. H. 459.

The agreement by the carrier to hold the goods for the consignee as his agent, for the purpose of custody on his account, may be implied, as from the course of dealing between the carrier and the consignee, as well as expressly made.

Whitehead v. Anderson, 9 Mees. & W. 534; Bolton v. Lancashire & Y. R. Co. L. R. 1 C. P. 431; Reynolds v. Boston & M. R. Co. 43 N. H. 590; 2 Am. & Eng. Enc. Law, pp. 908, 909.

It is not necessary that the freight charges should be paid before the carrier can agree to hold the goods as the agent of the consignee. His change of character into that of an agent to keep the goods is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or freight charges is satisfied.

Benjamin, Sales, 1st Am. ed. § 853; Blackburn, Sales, 2d Eng. ed. p. 367; Chitty, Contr. 11th Am. ed. p. 606.

Lathrop, J., delivered the opinion of the court:

This case comes before us in a somewhat unsatisfactory manner. It is a report of a justice of the superior court, before whom the case was tried without a jury. The report sets forth certain facts, certain evidence, and requests for rulings by both parties, which were passed upon, and a general finding for the plaintiff, without any findings of specific facts. The report concludes as follows: "Upon the foregoing evidence the court found for the plaintiff, and now, with the assent of both parties, reports the case for the determination of the supreme judicial court, both parties agreeing that if, upon the foregoing evidence, the rulings and refusals to rule and finding were right, judgment is to be entered for the plaintiff in accordance with the finding; otherwise, judgment is to be entered for the defendant." The word "evidence" is shown by another paragraph in the report to include statements of facts, documentary evidence, and testimony of witnesses. As this is an action at law, the only question can be whether the evidence warranted the finding. We have no right, if the testimony of witnesses is conflicting, to decide the case upon a view of the testimony which we might take if the evidence were before us for our decision. The action is replevin of a car load of lumber sold by the plaintiff to George A. Paul, a lumber dealer at Boston, and forwarded by the plaintiff, over the defendant's railroad, from East Saginaw, Michigan, to him. The plaintiff claimed the lumber by reason of the exercise of the right of stoppage in transitu, and the action was defended by the trustee in bankruptcy of Paul. The lumber was sold on January 26, 1898, for the sum of \$678.28, Paul to pay the freight, and to deduct it from the amount of the invoice. The terms of the payment were to be 2 per cent off for cash, if paid

within ten days, or a three months note from date of invoice. On January 31, 1898, the lumber was duly shipped, consigned to Paul, and the invoice forwarded to him. On February 19, 1898, the lumber arrived at the Huntington avenue yard of the defendant in Boston, and Paul was notified of the fact by the agent of the defendant by a postal card, which, in addition to the notice of the arrival of the car, contained the following: "If not unloaded within ninety-six hours from February 19, 6 o'clock P. M. of this date, Sundays and legal holidays not included, the freight will be subject to storage charges, as per rules of the Massachusetts and New Hampshire Car Service Association." On March 4, 1898, the defendant stored the lumber in one of its sheds at its Huntington avenue yard, and notified Paul of the fact. On March 10, 1898, Paul sent a promissory note for \$300, dated the same day, and payable to the plaintiff's order at any bank in Boston. This note was indorsed by the plaintiff payable to order of Second National Bank, and under the name of the plaintiff were the letters "B. D." This note was protested on June 10, 1898. On March 11, 1898, the plaintiff sent a letter to Paul, stating that it had placed the \$300 note to his credit, and calling his attention to the fact that the date of the note, March 10, was not in accordance with the contract, which called for a three-months note from the date of the invoice, and requested a settlement for the balance. On March 26, 1898, Paul sent the plaintiff a promissory note for \$313.68, dated that day, and payable to the order of the plaintiff at any bank in Boston. This note was indorsed in the same way as the other, and it was protested on June 28, 1898. These notes, the report states, were sent to the plaintiff in payment for the full value of the lumber, with interest added from the date of the invoice to the dates of the notes, less freight, which was to be deducted from the amount of the invoice. On receipt of the second of the notes, the plaintiff sent to Paul a statement of account dated January 31, 1898, stating the terms of sale, the items of the lumber, and the amount due less freight, being \$607.61. Across the face of the paper was written: "Received settlement as follows: 3 mos. note from March 10/98, \$300.00; 3 mos. note from March 28/98, \$313.68,—\$613.68." This paper also contained a request for the freight receipt, which was not sent, nor was the freight paid by Paul. On April 9, 1898, Paul made a common-law assignment of all his property for the benefit of his creditors, and the assignee accepted the trust. The plaintiff was notified of the assignment, and a representative of the plaintiff attended the first meeting of Paul's creditors. On April 16, 1898, the plaintiff gave notice to the defendant not to deliver the lumber to Paul, and requested the defendant to keep it on storage for it, claiming the right of stoppage in transitu. On July 27, 1898, the plaintiff's attorney tendered the notes of March 10th and March 28th to Paul's as-

signee, who refused to receive them; and at the trial of this case they were again tendered and refused. This action was brought on August 30, 1898, and before obtaining the lumber the plaintiff was obliged to pay the defendant its claim for freight and storage. We find it unnecessary to state the testimony of witnesses at this point, though we shall refer to some of it hereafter. There being no contention that Paul was not insolvent, the principal questions of law in the case are whether the transit had ended, and what the effect was of giving and receiving the notes.

1. As to the first question, we are of opinion that the transit was not ended when the plaintiff asserted its right to the lumber. It makes no difference whether the goods are in the hands of the carrier *qua* carrier, or whether he puts them, at the journey's end, in a warehouse. In other words, the transit does not terminate until the goods arrive in the possession, actual or constructive, of the purchaser. *Seymour v. Newton*, 105 Mass. 272, 275; *Mohr v. Boston & A. R. Co.* 106 Mass. 67; *Dingy Cement & Umber Co. v. O'Brien*, 123 Mass. 12; *Inslee v. Lane*, 57 N. H. 454. So long as the carrier, or a warehouseman acting for him, is in possession of the goods, he has a lien for the freight or other charges. The purchaser is not in possession or entitled to possession until he discharges the liens, and the right of stoppage *in transitu* remains. See Benjamin, Sales, 7th Am. ed. 914 (2), and cases cited. While the position of the carrier may be changed to that of bailee or agent for the purchase of the goods, yet that is a question of an agreement between the carrier and the purchaser. *Jackson v. Nichol*, 5 Bing. N. C. 508; *James v. Griffin*, 2 Mees. & W. 623; *Ex parte Barrow*, L. R. 6 Ch. Div. 783; *Ex parte Cooper*, L. R. 11 Ch. Div. 68; *Kemp v. Falk*, L. R. 7 App. Cas. 573, 584; *McLean v. Breithaupt*, 12 Ont. App. Rep. 383; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63; *Jeffrie v. Fitchburg R. Co.* 93 Wis. 250, 33 L. R. A. 351, 67 N. W. 424; *Symms v. Schotten*, 35 Kan. 310, 10 Pac. 828. In the case before us an attempt was made by the trustee in bankruptcy to show that such an agreement was made, but the testimony of Paul falls far short of this. He testified that within a few days after receiving the postal card of February 19th he telephoned to the defendant to store the lumber. He was then asked, "What did they say to you?" and his answer was, "'All right,' or something to that effect." He was then asked, "Will you say that they said anything?" and answered: "They probably said 'All right.' They might say 'Yes, all right,' or something like that." He was again asked, "What did they say?" and answered, "I don't know." On redirect examination he testified that he did not know whether he received any reply to his telephone message, and, in answer to the next question but one testified that he did receive a reply. It seems to us that the judge might well disregard this testimony as too uncertain and vague for considera-

tion. But, if it was to be taken into consideration, the testimony of Turner, the freight agent of the defendant in charge of the Huntington avenue yard, was contradictory to that of Paul. He testified that he remembered the car of lumber, and stored it in the ordinary course of business; and that he received no directions from anyone to store it. If the testimony of Paul can be said to contradict this, it was for the judge sitting without a jury to decide what the fact was. We are therefore of opinion that the judge rightly refused to rule, as requested by the defendant, that the plaintiff had lost the right of stoppage *in transitu*, or had not seasonably exercised that right. It follows, from what we have said, that the third ruling given at the request of the plaintiff was correct. This ruling was as follows: "The storage of the lumber in question by the defendant, whether according to the custom of storing after the expiration of the limit of time set forth in the notice given by the defendant to the consignee, or in accordance with the notice to store given by the consignee, does not terminate the transit, without evidence of the attornment by the defendant to the consignee, or an agreement to hold as the agent of the consignee." The fourth ruling given was as follows: "The existence of the defendant's lien for the unpaid freight raises the presumption that the defendant continued to hold the merchandise as carrier, and, in order to rebut this presumption, there must be some proof of some agreement or arrangement between the defendant and Paul, whereby the defendant, while retaining its lien, became the agent of Paul to keep the goods for him." While we do not think that this ruling is well expressed, we are of opinion that no harm was done in giving it. We have already stated the law bearing on this subject, and need not repeat it. The undisputed facts in the case showed that the defendant was holding the lumber for the freight and other charges; and it made no difference whether the goods remained in the car or in the warehouse, unless there was proof of some agreement or arrangement whereby the defendant became the agent of Paul. Taking the ruling as a whole, we are of opinion that it means no more than this.

2. The next question is as to the effect of the giving of the notes. The instructions requested by the defendant on this point are the first and second, and are as follows: "(1) If the consignee, intending to pay for the lumber according to agreement, gave to the plaintiff his negotiable promissory notes, dated at Boston, Massachusetts, and payable on time at said Boston, and thereupon the plaintiff receipted its bill for the lumber, and there was no agreement that said notes were accepted as conditional payment, then the law presumes that such notes were given and accepted as absolute payment, and in that case the plaintiff is not an unpaid vendor, and has no further right on the lumber, and must seek his remedy on the notes. (2) The notes constituted a contract to be

construed according to the law of Massachusetts. It is the law of Massachusetts that a negotiable promissory note, given in payment of an obligation, is to be deemed to be given and taken as absolute payment of such obligation, in the absence of evidence that the parties intended it to operate only as a conditional payment." On these requests the judge ruled "that, while the rules of law in the first and second requests were correct as general statements, they did not, on the evidence, require a finding for the defendant." The rule in Massachusetts, in simple contract debts, is that a promissory note given by a debtor to his creditor is presumed to be a payment; that the presumption is one of fact, and not of law, which may be rebutted and controlled by evidence that such was not the intention of the parties. In *Curtis v. Hubbard*, 9 Met. 322, 328, it is said by Chief Justice Shaw: "The rule adopted in Massachusetts that a negotiable promissory note, given for a simple contract debt, shall be deemed payment, is to be taken with considerable qualification. It is founded on the consideration that, when a note is given for goods, even if it is not negotiated, it is equally convenient to the creditor (and generally more so) to sue on the note, as on the original consideration, and so there is no reason for considering the original simple contract as still subsisting and in force; and therefore a presumption arises that it was intended by the parties that the note should be deemed a satisfaction. But this is a presumption of fact, which may be rebutted by evidence showing that it was not so intended, and the fact that such presumption would deprive the party . . . of a substantial benefit has a strong tendency to show that it was not so intended." In a late case the reason of the rule was stated to be for the protection of the debtor, who might otherwise be compelled to pay both the note and the debt; and it is further said: "But full protection is given to him if, in the proceedings to enforce the original debt, it is shown that he has not paid the note, and that it is then owned by the creditor, and if it is surrendered in court for the benefit of the maker." *Davis v. Parsons*, 157 Mass. 584, 588, 32 N. E. 1117. It is obvious that the rule can have little or no application where a person has a lien, which is a valuable right; and that the court would be slow to deprive a lien creditor of the right to enforce his claim on the ground that he had taken a worthless negotiable promissory note, where the note was produced at the trial, and tendered to the maker, or to his representative, whether the above-mentioned reasons for the rule are the final ones or not. Thus, in *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754, a vendor's lien at common law was enforced, notwithstanding a promissory note was given, and also a receipt for the price; and it was said by Chief Justice Shaw that a lien for the price is incident to the contract of sale; that, when a credit is given, the vendee has a right to the possession of the goods, and, if he does so, the lien is

gone. It was then added: "But the law, in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retain the custody of the goods, or any part of them; or if the goods are in the hands of a carrier or middleman on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession by a stoppage *in transitu* then his lien is restored, and he may hold the goods as security for the price." In respect to the contention that the note was payment it was said: "We think the answer is that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor, and not negotiated, but ready to be delivered upon the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties." If this is true of a vendor's lien, it is equally true of the right of stoppage *in transitu*, which is merely an extension of the vendor's lien. *Grout v. Hill*, 4 Gray, 361, 366, per Shaw, Ch. J. See also 1 Parsons, Maritime Law, 340, and cases cited in note 2. In *Seymour v. Newton*, 105 Mass. 272, the goods were to be paid for by a draft at three days' sight. The draft was accepted, but was not paid, and it was held that neither the acceptance of the draft nor the sending to the purchasers of an account, in which they were credited with the draft, prevented the plaintiffs from stopping the goods *in transitu*. To the same effect is *Mohr v. Boston & A. R. Co.* 106 Mass. 67. See also *Re Batchelder*, 2 Low. Dec. 245, 248, Fed. Cas. No. 1,099.

There is some contention on the part of the trustee in bankruptcy that the notes were negotiated. There was no evidence in the case to show the meaning of the letters "B. D.," and the fact that the notes were indorsed by the plaintiff to the order of the Second National Bank is not important. Whether they were sent to that bank for collection, or were discounted by it, is immaterial. They were not paid by Paul, and were tendered by the plaintiff to the common-law assignee, and to the trustee in bankruptcy. The fact that the plaintiff was then in possession of the notes, and tendered them, is all that is required. *Davis v. Parsons*, 157 Mass. 584, 588, 32 N. E. 1117. It follows that the second ruling requested by the plaintiff, as modified by the judge, was rightly given. This ruling, so modified, was as follows: "That the giving of the two notes in payment for the lumber according to the agreement, while in form negotiable, does not prevent the right of stoppage *in transitu*, as they remained in the hands of the vendor, and ready to be delivered up." Nor do we regard it of importance that on receipt of the last note the plaintiff sent to Paul a statement of the account between them. The report does not

show that this statement was signed by the plaintiff. But, if it were so signed, the case would stand no stronger for the defendant than if the statement had been, "Received payment by two notes." Then the

case would have fallen within the case of *Arnold v. Delano*, 4 Cush. 33, 34, 50 Am. Dec. 754. See also *Seymour v. Newton*, 105 Mass. 272, 273.

Judgment for the plaintiff.

ALABAMA SUPREME COURT.

W. W. WRIGHT, Appt.,

v.

J. E. WALLER.

(.....Ala.....)

A note is not rendered void by the fact that at the time of signing it the maker is voluntarily intoxicated, merely to the extent that he cannot give proper attention to it,—that attention that a reasonably prudent man would be able to give.

(November 27, 1900.)

NOTE.—As to validity of contract made with intoxicated person.

- I. Degree of intoxication.
- II. Taking advantage of intoxicated person.
- III. Fraud.
- IV. Intoxication produced by the other party.
- V. Ratification.
- VI. Habitual drunkards.
- VII. As affecting a bona fide holder of note.
- VIII. Implied contracts.
- IX. Obtaining relief.
- X. Who may show intoxication of party.
- XI. Summary.

I. Degree of intoxication.

In *WRIGHT v. WALLER* it is held that a man may plead his own drunkenness in avoidance of his contract. But in accordance with the weight of authority, it must be shown that he was incapable of exercising judgment, of understanding the proposed engagement, and of knowing what he was about when he entered into the contract, or else it will be held binding.

The weight of authority at the present day is that a party may plead his intoxication in avoidance of a contract. There is some variance as to what degree the intoxication must reach in order to avoid the contract, although the courts do not often discuss the degree. The decisions, which hold that drunkenness avoids the contract, frequently state the condition of the party in that case on which the holding is made. On this matter they differ somewhat, and in the following cases holding that drunkenness avoids the contract the rule as to the condition of the party is stated as follows:

Drunk. Hyman v. Moore, 48 N. C. (3 Jones, L.) 416; Wigglesworth v. Steers, 1 Hen. & M. 70, 3 Am. Dec. 602; Rich v. Sydenham, 1 Ch. Cas. 202.

Intoxicated. Conant v. Jackson, 16 Vt. 335; Fenton v. Holloway, 1 Starkie, 126; Wilmurt v. Morgan (N. J. Eq.) March, 1827.

In a state of thorough intoxication. Phelan v. Gardner, 43 Cal. 306.

In a state of complete intoxication. Burroughs v. Richman, 13 N. J. L. 233, 23 Am. Dec. 717; Pitt v. Smith, 3 Campb. 33.

In a constant state of intoxication. Staats v. Freeman, 6 N. J. Eq. 490.

In a state of absolute and total drunkenness. Erskine, Inst. 814, 815.

54 L. R. A.

A PPEAL by plaintiff from a judgment of the Circuit Court for Lee County in favor of defendant in an action on a rent note. *Reversed.*

The facts are stated in the opinion.

Messrs. Barnes & Duke, for appellant:

A contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency is produced by intoxication, is voidable, and may be avoided by himself, though the intoxication is voluntary, and not procured by the circumvention of the other party.

So drunk as not to know the nature of the acts he was doing. *Hawkins v. Bone*, 4 Fost. & F. 311.

So drunk that he did not know what he did. *Cole v. Robins*, Bull. N. P. 172a.

Incapable of comprehending what he was doing. *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 80 N. W. 290.

Intoxicated with liquor, and incapable of contracting. *Reynolds v. Waller*, 1 Wash. (Va.) 164.

So intoxicated as to render him incompetent to contract. *Cummings v. Henry*, 10 Ind. 109.

So intoxicated that he was wholly void of judgment and discretion. *Cavender v. Waddingham*, 2 Mo. App. 551; *French v. French*, 8 Ohio, 214.

Absolute drunkenness, and consequently deprived of the exercise of reason. *Stair*, July 29th, 1672, *Lord Hatton*, *Pitt v. Smith*, 3 Campb. 34, note; *Drummond v. Hopper*, 4 Harr. (Del.) 327; *Hale v. Stery*, 7 Colo. App. 165, 42 Pac. 598.

If carried so far that the reasoning power is destroyed. *Birdsong v. Birdsong*, 2 Head, 289.

From excessive intoxication is deprived the use of his reason, so that he is incapable of giving his serious, deliberate consent to the act. *Donelson v. Posey*, 13 Ala. 752.

So excessively drunk that he is utterly deprived of the use of reason, and understanding. *1 Fonblanque*, Eq. 67; *Johnson v. Phifer*, 6 Neb., 401.

So drunk as to be without reason and understanding; so destitute of reason as not to know the consequences of this contract. *Bush v. Breinig*, 113 Pa. 310, 57 Am. Rep. 469, 6 Atl. 86.

When such intemperance produces a deprivation of reason and understanding. *Clifton v. Davia*, 1 Para. Sel. Eq. Cas. 31.

So intoxicated as to be deprived of the exercise of his understanding. *Barrett v. Buxton*, 2 Alk. (Vt.) 167, 16 Am. Dec. 691.

If the party was in such a condition of mind that he could not comprehend what were the terms and conditions of the instrument. *Harmon v. Johnston*, 1 MacArth. 139.

So drunk as to be unable to perceive or assent to its conditions. *Wade v. Colvert*, 2 Mill, Const. 27, 12 Am. Dec. 652.

Intoxicated to such a degree as to render him incapable of assenting. *Longhead v. B. F. Combs & B. Commission Co.* 64 Mo. App. 559.

Bush v. Breitw., 113 Pa. 310, 57 Am. Rep. 469, 6 Atl. 86.

A contract entered into by a person who is so drunk as not to know what he is doing is voidable only, and not void.

Carpenter v. Rodgers, 61 Mich. 384, 28 N. W. 156; *Story, Sales*, § 15; *Benjamin, Sales*, § 43; *Bishop, Contr.* § 304; *Caulkins v. Fry*, 35 Conn. 170; *Van Wyck v. Brasher*, 81 N. Y. 260; *Warnock v. Campbell*, 25 N. J. Eq. 485; *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Noel v. Karper*, 53 Pa. 97; *Dulany v. Green*, 4 Harr. (Del.) 285; *Cummings v. Henry*, 10 Ind. 109; *Reynolds v. Waller*, 1 Wash. (Va.) 164; *Menkins v. Lightner*, 18 Ill. 282; *Taylor v. Patrick*, 1 Bibb, 168; *Broadwater v. Darne*, 10 Mo. 277; *Hutchinson v. Brown*, Clarke, Ch. 408; *Story, Contr.* 27, 28; *Chitty, Contr.* 153, 164.

Absence of capacity for any deliberate consent. *Clifton v. Davis*, 1 Para. Sel. Eq. Cas. 31.

To such an extent as to be incapacitated to contract. *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120.

From habitual intoxication and being almost incessantly under the influence of liquor, or from debility of body and mind arising from a long fit of intoxication from which he was then just recovering, and incapable of transacting business with discretion. *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519.

So debilitated by intoxication as to be unable to sit up in bed and to hold a pen or make a mark unless the pen and hand are held for him. *Wilson v. Bigger*, 7 Watts & S. 111.

After a party has been on a prolonged drunk, and at a time when he was beginning to recover therefrom, and while he was still in bed, fevered and feeble in body, and his mind clouded, dimmed, and unsettled. *Franks v. Jones*, 39 Kan. 236, 17 Pac. 663.

Under the influence of liquor, and while in that condition was induced by the plaintiff to purchase goods, and that defendant has no recollection of having purchased the same. *Sour Mash Distilling Co. v. Cavanagh*, 4 Pa. Co. Ct. 373.

Both minds must meet in order to make a deed valid, and if one is so weak, unsound, and diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness, or from accident, or from debauchery, or from habitual and protracted intemperance. *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271.

In *Conant v. Jackson*, 16 Vt. 335, the court held: "The principles on which courts of equity, as well as courts of law, proceed in relation to the effect of intoxication in affecting contracts, have evidently undergone a considerable alteration. In the time of Lord Coke a party could not set up intoxication in avoidance of his contract. Afterwards it was considered that it could not be set up unless it was procured by the other party; but now it seems to be determined that, if a person was so intoxicated as to be incapable of the exercise of his understanding, he may avoid a contract made while in that state. Equity will not lend its aid to enforce a deed, or contract, obtained from a man when intoxicated; and, in relation to persons whose minds are prostrated by a course of intoxication, and who have become stupefied from previous inebriation, so as to be incapable of 54 L. R. A.

To render the transaction voidable he who sets up intoxication as a defense should have been so drunk as to have drowned reason, memory, and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being,—especially where there is no pretense that any person connected with the transaction aided in or procured his drunkenness.

11 Am. & Eng. Enc. Law, p. 775; *Bates v. Bates*, 72 Ill. 108; *Birdsong v. Birdsong*, 2 Head, 289.

At the time of making the contract the party seeking to avoid it must have been in such a state of drunkenness as not to know what he was doing.

Johns v. Fritchey, 39 Md. 258.

The proof must show insanity.

Schramm v. O'Connor, 98 Ill. 541; *Miller*

judging upon the propriety of what they do, a court of equity will make a strict examination as to whether the instrument does not contain evidence that advantage was taken of those habits."

The rule at civil law is stated by 1 Pothier, *Obligations on Contracts*, 49: "It is evident that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent."

In *Burroughs v. Richman*, 18 N. J. L. 233, 23 Am. Dec. 717, the court said: "There are respectable authorities on both sides of this question. Lord Coke observes that, although he who is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act or offense, nor turn to his avail; but it is a great offense in itself, and therefore aggravates his offense, and doth not derogate from the act which he did at that time; and that as well in cases touching his life, his lands, his goods, or anything that concerns him. *Beverley's Case*, 4 Coke, 124."

Under Henry VI. this way of reasoning (that a party shall not be allowed to disable himself by pleading his own incapacity because he cannot know what he did under such a situation) was seriously adopted by the judges in argument, upon a question whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason, the maxim that a man shall not stultify himself hath been handed down as settled law; though later opinions, feeling the inconvenience of the rule, have in many points endeavored to restrain it. 2 Bl. Com. 292.

In some cases relief, claimed on the ground of intoxication, was denied where the degree of intoxication was not sufficient to show a want of capacity to contract. The degree required in such cases is stated in various ways as follows:

Drunkenness to such a degree as to deprive a party of the power of distinctly perceiving and assenting to a contract. *Lee v. Ware*, 1 Hill, L. 313.

Drunkenness, to afford a ground for avoiding a contract, must be so excessive as to render the person incapable of consent, or, for the time, to incapacitate him from exercising his judgment. *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101.

He must show such a state of drunkenness as not to know what he was doing. *Johns v.*

v. *Finley*, 26 Mich. 249, 12 Am. Rep. 306; 1 Chitty, Contr. 11th ed. p. 192; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Henry v. Ritenour*, 31 Ind. 136.

Messrs. William H. Thomas and C. O. L. Samford for appellee.

McClellan, Ch. J., delivered the opinion of the court:

This is an action by Wright against Waller on a contract in writing signed by the latter to pay rent. Defendant sought to avoid the contract on the ground that he was intoxicated when he signed it. There was evidence tending to show that defendant was in a state "of complete drunkenness, dethroning reason, when he signed the paper," and, on the other hand, there was evidence tending to show that he was not drunk at the time. There was no evidence that plain-

tiff had anything to do with bringing about defendant's intoxicated condition, if he was intoxicated, nor that defendant's mind was impaired by habitual drunkenness, nor that the contract was in itself unconscionable or unfair. On this state of case, the court, in its general charge, said: "If the defendant was so much under the influence of strong drink or intoxicating liquor that his reason was dethroned to an extent that he could not give that attention to the signing of the note that a reasonably prudent man would be able to give, then the note would be void." And at the request of the defendant the court gave the following charge: "If the jury find from the evidence that the defendant signed the note under such intoxication that he could not give proper attention to it, then the note is not evidence in the case, but void." To each of these instructions

Fritchey, 39 Md. 258; *Houston & T. C. R. Co. v. Tierney*, 72 Tex. 312, 12 S. W. 586.

It is only where one is so completely intoxicated as to be incapable of knowing what he is doing, or of understanding the consequences of his acts, that his contracts, entered into while in that state, are rendered void. *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567.

It must appear that he was so greatly under the influence of liquor as to be incapable of knowing the effect of what he was doing. *Shackleton v. Seebree*, 86 Ill. 616; *Foot v. Tewksbury*, 2 Vt. 97.

It must appear that the party was in such a condition that he was incapable of understanding the nature of the transaction in which he was engaged. *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Rodman v. Zillee*, 1 N. J. Eq. 820.

It must be shown to exist to such extent as to seriously impair the reasoning faculties at the time of the contract. *Pickett v. Sutter*, 5 Cal. 412.

Deprived of his right reason or incapable of managing his affairs and business. *Doughty v. Doughty*, 7 N. J. Eq. 643, Reversing Id. 227.

A drunkard is incompetent to contract only when his understanding is clouded, or reason dethroned, by actual intoxication. *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605.

Intoxication will not relieve a party from a recognition where the drunkenness is not such as to deprive the ball of his reason and understanding. *Com. v. McAnany*, 3 Brewst. (Pa.) 292.

They were bound to prove the drunkenness to have been so great as to produce an absolute privation of understanding for the time, similar to cases of idioy or insanity. *Harblson v. Lemon*, 3 Blackf. 51, 23 Am. Dec. 376.

The law does not visit the follies of drunken men upon innocent parties, nor does it excuse one who voluntarily becomes intoxicated from the performance of his contracts entered into while in that state, unless he can prove that he was at the time in fact *non compos mentis*. *Davidge v. Crandall*, 23 Ill. App. 360.

It should appear that he was so drunk as to have drowned reason, memory, and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being. *Bates v. Ball*, 72 Ill. 108.

It must be shown that drunkenness was so excessive as to utterly deprive the grantor of his reason and understanding. *Belcher v. Belcher*, 10 Yerg. 121.

Such excitement and drunkenness must be excessive and absolute, so as to suspend the reason and create impotence of mind at the time 54 L. R. A.

of entering into the contract. *Cavender v. Waddingham*, 5 Mo. App. 457.

Evidence of general intemperate habits of the grantor about the time the deed was signed is insufficient where the signature to the deed was in a clear, firm hand. *Guckavan v. Kenney*, 4 Kulp, 411 (1887) *Woodward, J.*

Evidence that seven months after the execution of a mortgage the mortgagor was adjudged insane, and that at the time of executing the mortgage he was in the habit of becoming intoxicated and had acted indiscreetly and improperly, is not sufficient to sustain the defense of mental incapacity where his signature to the mortgage is firm and steady. *O'Neill v. Nolan*, 50 N. Y. S. R. 641, 21 N. Y. Supp. 222.

It must be shown that the grantor was incapable of making the deed, either by reason of the weak state of his intellect, or by reason of intoxication. *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001.

A contract to purchase land will not be set aside for insanity, caused by drunkenness of the purchaser, if he was rational and competent to transact ordinary business. *Schramm v. O'Connor*, 98 Ill. 539.

In the following cases the evidence did not establish sufficient intoxication to invalidate the contract:

Considerably in liquor is no reason for the court refusing a decree for specific performance. *Lightfoot v. Heron*, 3 Younge & C. Exch. 536.

Considerably excited by drink, but it did not appear that this amounted to incapacity. *Hutchinson v. Brown, Clarke*, Ch. 408.

The defendant was conscious of his condition, and knew what he was doing at the time. *Duker v. Franz*, 7 Bush, 276, 3 Am. Rep. 314.

The evidence did not show that he was under the immediate influence of liquor when the contract was executed. *Keeler v. Baker*, 1 Helsk. 639.

The fact that one of the parties to an agreement was addicted to drunkenness will not invalidate the agreement where he was sober and in possession of all his faculties at the time it was made. *Keough v. Foreman*, 33 La. Ann. 1434.

A contract will not be set aside where the weight of evidence clearly shows that the party executing the same was not drunk or otherwise incapacitated, and no improper conduct is chargeable to the other party, and the bargain was not unconscionable. *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749.

In *Martin v. Pycroft*, 2 De G. M. & G. 785, 22 L. J. Ch. N. S. 94, 16 Jur. 1.125, which was a bill for specific performance of an agreement

the plaintiff excepted, and their soundness *vel non* is the question presented on this appeal. On this question as to the degree of intoxication necessary to an avoidance of contracts the following are some of the statements of the governing principle, applicable to cases like this, found in the authorities: ". . . Intoxication so deep as to take away the agreeing mind—in other words, to disqualify the mind to comprehend the subject of the contract and its nature and probable consequences—impairs such contract, if made while it lasts, the same as insanity. But mere drunkenness, or being a drunkard, or simply being drunk at the time, where the intoxication does not extend to the degree thus stated, will not impair the contract. To have this effect, it must render the party *non compos mentis* for the occasion." Bishop, Contr. §§ 980,

of lease, the defense of intoxication of the obligor was not established.

A bill of sale made by a party while he was intoxicated, to his father-in-law, will not be set aside where the party making the same was sufficiently sober to know what he was doing, and the bill of sale was made without the fraudulent procurement of the purchaser. *Morris v. Nixon*, 7 Humph. 579. In this case it was said that, as the evidence showed the father-in-law had taken the bill of sale to preserve the property, and had paid the grantor's debts out of the same, it would be held on a proper showing that the conveyance was made upon a trust, and that a decree of accounting and a settlement on the daughter and children would be made if they were before the court.

Where a man of weak intellect and habitual drunkenness, on the day of his marriage conveyed his real estate to his brother and made a bill of sale to him after his marriage, it was held that the deed and bill of sale were made with a secret trust, but without fraud, and they were set aside. *Rutherford v. Ruff*, 4 Desauss. Eq. 365. In this case the court said: "I do not believe he was drunk when he executed this deed, but from many parts of the evidence it is clear there was an understanding between him and his brother, and that the deed was accompanied with a secret trust."

II. Taking advantage of intoxicated person.

A contract made with an intoxicated person is invalid where there is an undue advantage taken of him by reason of the intoxication. This is on the ground that such a contract stands on the same footing as though obtained by fraud. Courts will enforce this rule, even where they decline to follow the cases that hold contracts void that are made with an intoxicated person. The following cases adopt the rule that a contract will be held invalid where advantage is taken of the contracting party by reason of his being intoxicated.

A settlement made where one of the parties was overreached while in such a mental condition from the use of alcoholic spirits as made him an easy victim will not be conclusive upon the party so overreached. *Murray v. Carlin*, 67 Ill. 286. The court said: "The evidence presented a fair question to the jury, whether plaintiff was not overreached by the alleged settlement, whilst in such mental condition from the use of ardent spirits as made him an easy victim."

And equity will set aside a contract to purchase land, made by an intoxicated person, where advantage is taken of his situation by §4 L. R. A.

981. "The contract of a . . . drunken person is voidable, at his option, if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing." Anson, Contr. p. 150. "An express contract, entered into when the obligor is in a state of intoxication, so as to deprive him of the exercise of his understanding, is voidable." 11 Am. & Eng. Enc. Law, p. 773. Drunkenness must "be such as to incapacitate the party from the proper exercise of his judgment, and prevent him from understanding his contract." Story, Contr. p. 15. "A drunkard, when in a state of complete intoxication, so as not to know what he is doing, has no capacity to contract." 1 Benjamin, Sales, § 30. "It is evident that drunkenness, when it goes so far as absolutely to destroy the reason, renders a per-

the vendor, who induces him to purchase the land at an excessive price, and no time for reflection, or to become sober, is allowed until the contract is closed. *Hotchkiss v. Fortson*, 7 Yerg. 67. In this case the purchaser paid more than the land was worth, and took a title bond. His heirs after his death were allowed to defend against a judgment obtained against the administrator of the purchaser.

In *Birdsong v. Birdsong*, 2 Head, 280, the court said: "Contracts made by persons under the influence of liquor, without being completely intoxicated, are governed by the same principles which apply in other cases, where one party is in a position to expose him to the exercise of an improper influence by the other." And again: "If a party has been led into a hard and disadvantageous bargain, while excited by liquor, equity avoids it. And the same rule applies to persons whose minds are enfeebled by habitual intoxication, although not actually intoxicated."

A conveyance obtained from the grantor while weak and sick, and under the influence of opiates and liquor, will be set aside where undue advantage is taken of the grantor's condition and the consideration is inadequate. The grantor will be required to reimburse the defendant for the consideration paid. *Nielson v. Laffin*, 50 N. Y. S. R. 277, 21 N. Y. Supp. 731.

And a contract of lease was held void where advantage was taken of the lessor's habits of intoxication, although he knew what he was doing at the time, but executed the lease for an inadequate rent on coming of age, and the lessee had been in the habit of supplying him with liquor. *Say v. Barwick*, 1 Ves. & B. 195.

A deed procured by undue means, the grantor being addicted to intemperance, will be declared void where the grantor was in a state of mental and physical imbecility, the result of long-continued intemperance, and the grantee from day to day ministered to his passion for strong drink. *Adams v. Ryerson*, 6 N. J. Eq. 328.

And a conveyance will be set aside where the grantor has been grossly intemperate so long that his mind has become greatly enfeebled in consequence thereof, and he is unacquainted with business except of the simplest kind, and the grantee imposes upon his ignorance to obtain the conveyance. *Lavette v. Sage*, 29 Conn. 577.

A deed for an inadequate consideration, obtained from grantors of extreme old age, weakness, and imbecility, while they were influenced by liquor, will be set aside by a decree in equity, and the grantors will be required to restore the consideration. *Harvey v. Pecks*, 1 Munf. 518.

Equity will relieve against a conveyance made

son in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent." 1 Pothier, Obligations on Contracts, 49. "Where a party, when he enters into a contract, is in such a state of drunkenness as not to know what he is doing . . . his contract is wholly void," i. e., if he elects to avoid it. 1 Chitty, Contr. 192. "Drunkenness is a species of insanity, but the law is not quite clear respecting this disability. Perhaps it stands thus: One cannot defend by proving his drunkenness, unless he can show that the drunkenness was known to the payee, and taken advantage of by him, or that it was complete, and superseded all use of the mind at the time." 1 Parsons, Notes & Bills, 151. Intoxication, "to the extent only that he [the party] did not clearly understand the business" in hand, "is not enough, how-

ever, to render his contract voidable or void." *Henry v. Ritenour*, 31 Ind. 136. "It is also urged that the plaintiff in error is not bound by the transaction, because he was drunk at the time he assigned the note. We think the evidence shows that he was at the time drunk. . . . But he was manifestly not so drunk but he knew what he was engaged in at the time. He, on the trial, testified to the circumstances attending the transaction. He says he took out the note and threw it down, and told them to take it, and that they had better take his clothes. Had he been so drunk as to render the assignment void, he could not have known or remembered what he did. To render the transaction voidable, he should have been so drunk as to have drowned reason, memory, and judgment, and impaired his mental faculties to an ex-

without consideration; and when the grantor, through intoxication, was, to the grantee's knowledge, not himself. But, under the circumstances, complainant was not entitled to costs. *Warnock v. Campbell*, 25 N. J. Eq. 485. In this case the court said: "A court of equity will hear a party who seeks relief against his own act, on the ground of intoxication, though formerly such hearing was denied. To avoid a contract on the ground of intoxication, it must be shown, either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation. If a person, while in a state of intoxication, though not induced by the act or procurement of the grantee, execute an absolute conveyance of his property without consideration, equity will relieve against the conveyance."

In *Crane v. Conklin*, 1 N. J. Eq. 346, the court said that at common law the old cases held that relief would not be granted against a contract made by a party who was intoxicated unless intoxication was brought about by the other party, but that the rule has been changed, saying of the court of equity: "It would not favor ebriety, but at the same time would not permit it to be taken advantage of with impunity. The good sense of this principle has commended itself to every court, and especially to the courts of equity. Hence it has become the settled rule of the court that it will not interfere to assist a person on the ground of intoxication merely; but, if any unfair advantage has been taken of his situation, it will render him all proper aid."

But a decree for the specific performance of a contract will not be refused on the ground that the purchaser was intoxicated at the time of the sale, unless it appear that such intoxication was produced or procured by the vendor, or that an undue advantage had been taken of the situation of the purchaser. *Maxwell v. Pittenger*, 3 N. J. Eq. 156. In this case the court said: "These facts, taken together, show that Pittenger, throughout the whole, acted as a sober, rational, and intelligent man would act. And when, in addition to this, it is seen that no evidence is adduced to prove that he gave more for the property than its value, the fair conclusion is that he acted understandingly, and that, even if he had indulged pretty freely in the use of ardent spirits, he was competent for business. . . . Supposing, however, that the conclusion arrived at is incorrect, and that Pittenger was really so much intoxicated on the day of the sale, and at the time of the sale, as not to be able to act understandingly; 54 L. R. A.

then it is incumbent on the defendant to make out, either that such intoxication was produced or induced by the complainant, or that some improper advantage was taken of the defendant while in that situation."

And to avoid a contract on the ground of intoxication it must be shown, either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation. *Hutchinson v. Tindall*, 3 N. J. Eq. 357. In this case the court held: "1. That the court will hear any person who seeks relief on this ground. Formerly such hearing was denied. The party setting up such defense could not be heard. *Johnson v. Medlicott*, 3 P. Wms. 130, note [a]. 2. That the fact of intoxication is not of itself sufficient to avoid a contract. *Cory v. Cory*, 1 Vcs. Sr. 19. 3. That to avoid the contract it must be shown, either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation. *Cooke v. Clayworth*, 18 Ves. Jr. 12; *Wilmurt v. Morgan*, Opinion of Chancellor Williamson, March, 1827 (N. J. Eq.); *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Maxwell v. Pittenger*, 3 N. J. Eq. 156."

And drunkenness is no excuse for an indorser of a note if he was not drawn in by the indorsee for the purpose of taking advantage of him. *Woodson v. Gordon*, Peck (Tenn.) 196, 14 Am. Dec. 743. In this case the court said: "At all events, drunkenness, short of a deprivation of reason or insanity, will not do, for then everyone will counterfeit intoxication to get clear of his contracts, and which will lead to the investigation in every case, first, whether the party was really intoxicated, and what was the degree of intoxication, and whether it should prevail to exonerate the person from his engagement, producing the greatest uncertainty, difficulty, and variety of decision upon cases similarly circumstanced, and subjecting everything to the control and the fluctuating opinions of juries."

Where a party to a contract is voluntarily intoxicated, at the time of making it, to the extent only that he does not clearly understand the business, this does not render his contract void or voidable, where no advantage is gained by dealing with him. *Henry v. Ritenour*, 31 Ind. 136.

And drunkenness alone, without any fraud or imposition being practised, will not avoid a contract. *Campbell v. Ketcham*, 1 Bibb. 406. In this case the court said: "The law seems well settled, that drunkenness *per se* is no substan-

tent that would render him *non compos mentis* for the time being." *Bates v. Ball*, 72 Ill. 108, 111. "Drunkenness, to afford a ground for avoiding a contract, must be so excessive as to render the person incapable of consent, or for the time to incapacitate him from exercising his judgment." *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101. A contract executed by an intoxicated person is valid if he is "aware of what he was doing, and not deceived as to the identity of the paper signed." *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306. "Where a party seeks to avoid an express contract upon the ground that he was intoxicated at the time he entered into it, it is incumbent on him to produce clear and satisfactory proof that he was at the time in such a state of drunkenness as not to know what he was doing or the consequences of

tive cause for men to plead in avoidance of their own acts; for this were to encourage drunkenness. But if any unfair advantage was taken of such a situation, as, if the party seeking to avoid his act was drawn in to drink by the person with whom he contracted, or by his contrivance, and an unreasonable or unconscientious bargain, deed, or instrument was procured from the person in that situation, equity would relieve."

In *Stirling v. Hinckley* (Pa.) 2 Cent. Rep. 824, 4 Atl. 358, the jury were charged that one cannot allege as a reason for not performing his contract that he was drunk when he made it; but they were also told that if the contract was obtained by imposing on a person unable to take care of himself, it would not be obligatory.

In *Cooke v. Clayworth*, 18 Ves. Jr. 12, the rule was laid down that a court of equity will not assist a person who wishes to get rid of an agreement on the mere ground of intoxication; but there is an exception where any contrivance was used to draw him into drink, or any unfair advantage was taken of his situation, or the extreme state of intoxication deprived him of his reason, which even at law would invalidate a deed. As to whether the paper in controversy contained the agreement as it was first written or was altered, would be left for investigation at law.

The fact of having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in that condition, for this were to encourage drunkenness; *scelus*, if through the management or contrivance of him who gained the deed, etc., the party from whom such deed has been gained was drawn into drink. *Johnson v. Medlicott*, 3 P. Wms. 130, note [a].

In *Hall v. Moreman*, 3 McCord, L. 477, it was said that if people will voluntarily incapacitate themselves from doing their ordinary business they must take the consequences of their own imprudence; that they have no right to call upon this court to protect them from all the consequences of intemperance and folly; that if one man takes advantage of another when in a state of intoxication to commit a fraud upon him, he will be entitled to relief from such fraud. But it was held that there is no direct charge of fraud in this case; and the affidavits to that point, as well as those to the intoxication, are so completely rebutted by the counter affidavits as at least to neutralize that charge; and a settlement and confession of judgment was sustained.

In *Berkley v. Cannon*, 4 Rich. L. 136, referring to the case of *Hall v. Moreman*, 3 McCord, L. 477, 4 McCord, L. 283, where it was said: 54 L. R. A.

his own acts." *Johns v. Fritchey*, 35 Md. 258. "A contract made by a person while he is so drunk as to be incapable of understanding its nature and effect is voidable. . . . [but his intoxication] must be so excessive as to render him incapable of knowing what he is doing." *Clark, Contr.* pp. 274, 275.

The foregoing texts and adjudications clearly declare and thoroughly establish the modern doctrine on this subject, departing from the ancient rule, which forbade a party to a contract to stultify himself by setting up his want of mental capacity to enter into it, to the extent, and only to the extent, of allowing him to show in avoidance that from insanity, drunkenness, and the like, he was incapable of exercising judgment, understanding the proposed engage-

"If people will voluntarily incapacitate themselves from doing their ordinary business, they must take the consequences of their imprudence,"—and they have no right to call upon the court to protect them "from all the consequences of intemperance and folly,"—commenting on this, the court says that this language "could scarcely have been intended to mean that no degree of drunkenness could invalidate a contract, provided the debauchery were voluntary, for that would not at all comport with the doctrine of *Wade v. Colvert*, 2 Mill. Const. 27, 12 Am. Dec. 652, nor with *Cooke v. Clayworth* (decided in 1811; *vide* 18 Ves. Jr. 15), where it is manifest that, assuming the voluntary drunkenness of Cooke, the only question, on an application to rescind a contract, was as to the degree of intoxication."

It seems that a contract will not be set aside on the ground of undue influence, apart from fraud, where proper in itself, and for the advantage of the party who seeks to avoid it; as, for instance, a conveyance by a man habitually intemperate—but not actually drunk—of all his property, in trust, for his wife and children. *Birdsong v. Birdsong*, 2 Head, 280.

In *Cory v. Cory*, 1 Ves. Sr. 19, it was held that an agreement, if reasonable and to settle family disputes, and if no unfair advantage is taken, will not be set aside because the party was drunk.

In *Stockley v. Stockley*, 1 Ves. & B. 23, it was said that family compromises should be favored if reasonable and upon a doubtful right, even if one party was drunk at the time.

III. Fraud.

Where the intoxicated person is induced by the fraud of the other party to enter into a contract it will be invalid.

An obligation granted by a person while he is in a state of absolute and total drunkenness is ineffectual, because the grantor is incapable of consent; for the law has thought it equitable to protect those who have not the use of their reason (even though they should have lost it by their own folly) from the fraud or circumvention of others. *Erskine, Inst.* 814, 815; *Pitt v. Smith*, 3 Campb. 35, note.

And where possession of personal property was obtained by means of a contract made with one who, by reason of his intoxication, was without capacity to enter into a valid agreement, and the person obtaining the property knew of the other's incapacity when the contract was made, the transaction is fraudulent. *Baird v. Howard*, 51 Ohio St. 57, 22 L. R. A. 846, 36 N. E. 732.

ment, and of knowing what he was about when he entered into the contract sought to be avoided. It is plain that the rule given in charge to the jury by the trial court in this case is a radical departure from the established and true rule obtaining in all such cases. One may well be unable, from intoxication, to give "proper attention" to a transaction, and yet know what the transaction involves, and be capable of understanding the terms and effect of a contract issuing out of it, so as to be as fully bound by it as if he was under no degree of intox-

ication. The charge given at defendant's request should therefore have been refused.

The instruction given by the court *ex mero motu* is even more patently erroneous. Many perfectly sane and sober men could not bind themselves by contract at all, if the rule laid down there is a sound one. The law does not gauge contractual competency by the standard of mental capacity possessed by reasonably prudent men. A man is not incapacitated because of intellectual limitations arising from intoxication or what not, which prevent him from giving

A deed, fraudulently and improperly obtained from the grantor at a time when he was, by reason of intoxication, wholly incompetent to execute a valid conveyance, will be set aside. *Prentice v. Achorn*, 2 Paige, 30.

So, if, when a man is so drunk as to render him an easy prey to the fraudulent designs of another, an unfair advantage is taken of his situation to procure from him an unreasonable bargain, a court of equity will interfere and rescind the contract, on the ground, not of his drunkenness, but of the fraud. *Calloway v. Witherspoon*, 40 N. C. (5 Ired. Eq.) 128. In this case it was not pretended that the party was, at the time of making the contract, drunk to that extreme point which would, of itself, invalidate the act, but that he was so drunk as to render him an easy prey to the fraudulent designs of the defendant.

And the settlement of a groundless action, procured by fraud and duress, made with a party who was in such a condition as to be incompetent to make a valid agreement, is voidable and may be avoided; and it is not necessary to return the discharge of the action in order to avoid the contract. *Foss v. Hildreth*, 10 Allen, 76.

Where a party when he enters into a contract is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this is known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. *Gore v. Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140. In this case it was said: "The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication, and total drunkenness is now held to be a defense."

And if one whose mental condition, occasioned by excessive drinking, is such that he is unable to protect himself is induced to enter into a contract by means of false statements made by one cognizant of all the facts he is not bound by the contract. *Stirling v. Hinckley* (Pa.) 2 Cent. Rep. 824, 4 Atl. 358.

In *Kling v. Bryant*, 3 N. C. (2 Hayw.) 394, it was held that if a party was so drunk at the time that he did not know what he was about, and if in that situation he was induced to sign a paper for a debt which he did not owe, that was a fraud; and a fraud practised upon a man, whether drunk or sober, will vitiate the instrument signed by him.

A lease obtained by fraud and circumvention, from a person in a state of intoxication, is void in equity. *Butler v. Mulvihill*, 1 Bligh, 137.

And a transfer of shares in a corporation, procured from the owner while so intoxicated as to be incapable of transacting business, by fraud, with knowledge of his condition, and for a grossly inadequate consideration, will be set aside in equity; and if, without any fault of his, he is unable to restore the consideration, provision for its repayment may be made in 64 L. R. A.

the final decree. *Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 480, 7 Sup. Ct. Rep. 311.

A presumption of fraud arises which must be countervalled by proof of a fair consideration and fair and honest dealing on the part of him who seeks to enforce the payment of the note, when a promissory note based upon an insufficient consideration has been obtained from a person under the influence of liquor at the time of its execution, and enfeebled in mind and body by long and continued disease and drunkenness. *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595.

And where the agent of a creditor knew that a member of a firm was intoxicated when he executed a preferential assignment for the firm it was held that, while the degree of intoxication was not sufficient to set aside the assignment, yet the imputation of fraud was such that the creditor would not be favored in a court of equity. *Bowen v. Clark*, 1 Biss. 128, Fed. Cas. No. 1,721.

But where a bill is filed to avoid a conveyance on the ground of incapacity by reason of extreme intoxication at the time of making, and charging that a deed, note, and warrant of attorney were procured by fraud, covin, and misrepresentation, and the charges are fully, distinctly, and unequivocally denied by the answer, the rule of law requires that they should be clearly proved, and not left to presumption or conjecture. *Freeman v. Staats*, 9 N. J. Eq. 818. In this case the court held: "The decided weight of evidence, as it appears before this court, is that the complainant was not, at the time of the execution of the deed, incapable, by reason of intoxication or otherwise, of comprehending its contents and effect."

In an action on a bond it was held that evidence that a co-obligor directed his distiller to let the defendant have as much whiskey as he wanted, and that he could lead the obligor like a child, was incompetent, where it was not shown that the payee had an agency in the fraud practised. *Jenners v. Howard*, 6 Blackf. 240. In this case the court said: "Mental incapacity at the time of contracting, produced by drunkenness or any other cause, is a good defense against a contract, whether that contract be evidenced by deed or parol. If the mind be capable of assenting, the law pronounces the contract void. Drunkenness of itself merely, unless fraud be practised, will not avoid a contract; but if the party be in such a state of intoxication that he is for the time deprived of reason, the contract is void."

IV. Intoxication produced by the other party.

It is a general rule that contracts procured from an intoxicated person where such intoxication is caused or aggravated by the other party will be held void. These cases stand on the same footing as those where an undue advantage is taken, or where a fraud is practised.

If any advantage is taken of a man when drunk, or if he is brought into that situation by the contrivance or management of the person

to a proposed contract all the consideration that a reasonably prudent man would be able to give it. Indeed, that test has no relation to mental capacity. Competency to contract may well exist in as high a degree in a reckless, careless man as in one of the highest prudence and care, and the inability of the former to give a certain degree of attention to a business matter results, not from mental incapacity to know and understand the matter in hand, but from indifference as to it, or his habit or disposition to drunkenness. And one may sufficiently understand a contract, and the na-

ture and effect of his entering into it, to be fully bound by it, though he be capable of only a very much less consideration of it than would be bestowed by a man of ordinary prudence. The cases of *Hale v. Brown*, 11 Ala. 87, and *Holland v. Barnes*, 53 Ala. 88, 25 Am. Rep. 595, relied upon for appellee, involved other considerations than the drunkenness of the party seeking to avoid a contract,—overreaching by the other party, unfair and unconscionable contracts, etc.,—and they have no application to the present case.

Reversed and remanded.

who obtains the contract, it is fraudulent, and the contract or advantage thus gained shall be taken from him. *White v. Cox*, 3 Hayw. (Tenn.) 79. In this case the court said: "Here is an unreasonable contract obtained from one in drink. Here is a contract obtained from one drawn into drink by the person who deals with him."

In *Brandon v. Old*, 8 Car. & P. 440, which was an action by a publican against a man seventy years of age who was in the habit of drinking at the house of the plaintiff, the charge on one day was 86 pints of ale besides spirits, and another day 134 pints of ale. It was held that if a man when in his senses gives beer to others there is no doubt but that he must pay for it, but if he does it while in a state of intoxication he will not be liable because the publican in such case would be taking advantage of an offense which he himself had been instrumental in producing.

And where a party having the power of attorney to sell a valuable farm was encouraged by a purchaser to drink until he became intoxicated and unfit for business, and while in that condition was induced by the purchaser to make a conveyance for \$83 in cash, and a transfer, without recourse, of a contract and mortgage which were of little or no value, it was held that such a conveyance was obtained by fraud, and should be set aside. *Dunn v. Amos*, 14 Wis. 107. In this case the court said: "It is said by the appellants' counsel to be a fatal objection to this action, that the money paid in part consideration was not paid or tendered back before the action was brought, and that the contract and mortgage were not reassigned before the respondent offered to return them. The authorities cited to sustain the objection are inapplicable to this case. They are cases where actions were brought to rescind contracts fairly obtained, on account of some subsequent breach or failure to comply with their conditions. This action was brought to set aside the contract because it was obtained by fraud, and therefore never was the contract or conveyance of the plaintiff."

Intoxication procured by the grantee of a deed to influence its execution makes the deed void unless executed when the grantee was sober, but habitual drunkenness of the grantor of a deed, not procured by the grantee, will not affect it. *Woods v. Pindall*, *Wright* (Ohio) 507. In this case the court said: "You may prove fraud in obtaining the deed, as that would make it void. The general habit of intoxication, unless it is expected to connect it with the plaintiff's lessor, will not avail. We suppose the plaintiff will admit the defendant generally drunk if desired, as that will save time, and then, if there be evidence that he was made so by the lessor of the plaintiff, and executed the deed under such influence, it may avail. Unless it is proposed to do that, it will be useless to proceed, as we must instruct the

jury that under other circumstances the drunkenness will be of no avail."

And a deed made by a person while in the state of intoxication will be set aside if advantage has been taken of his situation, or if his drunkenness was produced by the act or connivance of the person to be benefited by the deed. *O'Conner v. Rempt*, 29 N. J. Eq. 156. The court held: "It is clearly proved that when the complainant went to the house of the defendants his mind was disordered; that the day before the deed was executed he was all day in a state of drunken insensibility, and that when he was rescued from the custody of the defendants he was suffering from delirium tremens. In addition, the circumstances attending the execution of the deed, as shown by the evidence offered by the defendants, were not such as to justify the belief that it was not procured by management and artifice.

So, a purchaser cannot call for the execution of a contract procured from a vendor while in a state of intoxication. *Whitesides v. Greenlee*, 17 N. C. (2 Dev. Eq.) 152. The court said: "But the fact appears to be well established by the depositions taken in the case, that at the time when he signed it he was intoxicated and not capable of making a contract, that the plaintiff, Whitesides, was not only consensual of his situation, but was instrumental in bringing it about."

In *Kuelkamp v. Hidding*, 81 Wis. 503, the court said: "If the defendant, with fraudulent intent, had caused or produced intoxication of the plaintiff, and so had obtained the conveyances on the same terms, no one would doubt that equity would relieve against them."

Where a party procures the intoxication of another for the purpose of securing an unconscionable advantage in a contract, the contract will be held void in an action to enforce it. *Willcox v. Jackson*, 51 Iowa, 208, 1 N. W. 518.

And the signature to a note, obtained while the maker was in a state of extreme drunkenness, the liquor being given by the other party, will be void or voidable as obtained by fraud and artifice, notwithstanding an entry made at that time by the payee crediting the maker of the note with that amount on his account in his ledger. *Lyon v. Phillips*, 106 Pa. 57. In this case the court said, if the obligation was upon a sufficient consideration, and was without other legal defect, the transaction may be a proper subject for ratification.

So, notes and mortgages are void where they are executed to a supposed friend who supplies the maker with liquor, plays on his fears, as to the action of supposed creditors, and threatens and cajoles him into a state of intoxication, so that without realizing what he is doing the victim at various times signs them without a shadow of consideration. They will be void in the hands of a third party not an innocent purchaser. *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632. In this case the court said that these

securities "were conceived in sin and born in iniquity."

It is a good defense to a note that it was given in exchange of horses, and that at the time the defendant was intoxicated and had been made so by the plaintiff, who fraudulently and artfully got him drunk and imposed upon him in that situation. *Curtis v. Hall*, 4 N. J. L. 361.

In *Lacy v. Garard*, 2 Ohio, 7, it was said that the defense that a signature of a surety to a penal bond was obtained while he was intoxicated by the procurement of the principal would be a good bar to an action on the bond, and that had the signature been procured in the manner charged the obligation would have been voidable at least.

But in *Hamilton v. Grainger*, 5 Hurlst. & N. 40, 5 Jur. N. S. 1108, in an action for goods sold where the defendant was allowed to plead never indebted; payment; that the goods were excisable liquors to be sold on plaintiff's premises without a license; that the goods were wine supplied defendant to be consumed in a brothel kept by plaintiff,—the court refused to allow the plea that the defendant was entirely deprived of understanding by intoxication as the plaintiff well knew, and that the goods were liquor supplied to increase his intoxication, and that he derived no benefit from them.

V. Ratification.

The general rule is that a contract, invalid by reason of the intoxication of one of the parties, may be ratified by him when sober, and if so ratified it will be enforced. *English v. Young*, 10 B. Mon. 141; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156; *Lyon v. Phillips*, 106 Pa. 57.

And the intoxication of a party executing a contract under seal will not avoid the same where assent is afterwards given when the party is not disabled by intoxication. *Arnold v. Hickman*, 6 Munt. 15.

And the contract of a man too drunk to know what he is about is voidable only, and not void, and therefore capable of ratification by him when he becomes sober. *Matthews v. Baxter*, L. R. 8 Exch. 182, 42 L. J. Exch. N. S. 73, 28 L. T. N. S. 169, 21 Week. Rep. 389. In this case *Martin, B.*, said: "The judges in *Gore v. Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140, use the word 'void,' it is true, but I cannot think they meant absolutely void. They simply meant to say that a drunken man's contract could not be enforced against his will. But it by no means follows that it is incapable of ratification."

A contract will be enforced "if a man accustomed to strong drink, and even to be intoxicated every day, but, notwithstanding, possessed of reason, and the power of reflection, determines, with all the deliberation he is capable of, to sell his property, offers it repeatedly for sale, at length sells it at the best price he can obtain, to a man against whom there is not proof of his having taken advantage of the hour of intoxication; if afterwards he professes himself satisfied with the bargain, and assigns a good reason for it—when the bargain is clear, explicit and certain; when it has been fully executed on the other side." *Reinicker v. Smith*, 2 Harr. & J. 421.

If a person is so intoxicated as not to understand the nature of a contract, or, if not so drunk, his nervous constitution and mental faculties are so shattered that he is equally incapable of understanding the effect of a business transaction, he will not be bound by a note given in settlement of a breach-of-promise suit, but he will be if after he becomes sober and

sane he ratifies it. *McClure v. Mausell*, 4 Brewst. (Pa.) 119.

A bond may be avoided by the obligor, by proof that he was so drunk, at the time of the execution, as to have been incapable of contracting; but too ready an ear should not be lent to such a defense; and it should never be allowed, where the subsequent conduct of the party is such as to have the appearance of his having confirmed his contract. If, for instance, he does not return what he received as the consideration of his contract the instant he is restored to his senses, the jury may infer that he intends it to be confirmed. *Williams v. Inabnet*, 1 Bail. L. 843. In this case the court said: "It is, perhaps, one of the most difficult questions which can be presented to a jury to decide how far the capacity to contract has been destroyed by the too free use of ardent spirits. But too ready an ear should not be lent to such a defense; and in all cases where the subsequent conduct of the party making it is such as to have the appearance of his having confirmed the contract, the defense should not be allowed; for, even if a man be so much intoxicated as not to know what he is doing, yet he may afterwards confirm the contract by his acts. If he does not intend to be bound by it, he should go the instant he is restored to his senses, and return all that he received as a consideration."

In the case of *Berkley v. Cannon*, 4 Rich. L. 136, the case of *Williams v. Inabnet*, 1 Bail. L. 843, was distinguished, the court saying: "Notwithstanding, we find in *Williams v. Inabnet* the remark: 'For even if a man be so much intoxicated as not to know what he is doing, yet he may afterwards confirm the contract by his acts,' it is apparent, nevertheless, the point ruled was, that the defendant's acts of confirmation, joined to the evidence in the case, left the jury without warrant in saying that he was too drunk to bind himself by the original transaction. Whether, if the reverse had been true, and assumed as fact (to wit, that the contract was originally void, from excessive intoxication), that contract could be rendered valid and become a cause of action by the mere force of presumed ratification from acts in a sober moment, was not the point raised in that particular case, for it had to go back on the question of fact as to the degree of drunkenness; and the court was the better satisfied with that result by the view they had of the other question. It is presumed that the new trial would have been granted in that case, even though the court had taken the rule of law to be, that a contract, void for drunkenness, could not be afterwards confirmed, inferentially by acts of ratification."

Drunkenness does not render a deed made under its influence absolutely void, but only voidable. A deed, made by a person when drunk to such an extent as would authorize him to repudiate it, may be ratified by the maker when sober so as to bind him and his personal representatives. *Raton v. Perry*, 29 Mo. 96.

And in an action upon a note and mortgage, where intoxication was pleaded, it was held that the defendant was fully aware of the nature and effect of the contract when the money was received and disposed of by him, and, therefore, his incompetency (if conceded) at the time of entering into the contract, would not absolve him from the obligations thereof. *Hawley v. Howell*, 60 Iowa, 79, 14 N. W. 199.

If a sober person ratifies an agreement made when drunk, by giving a bond or deed in pursuance thereof, the court will not interfere to relieve him. *Moore v. Reed*, 37 N. C. (2 Ired. Eq.) 580. In this case the court said: "If a person will enter into a hard bargain with his eyes open, equity will not relieve him, unless

he can shew fraud in the party contracting with him, or undue means to draw him into the agreement." The plaintiff bought a stock of goods, paid part with slaves, and when sober gave a bond for the remainder, and sold the stock during three weeks, and then sold out to his son. He made it impossible for a court of equity to place the parties *in statu quo*.

Mental imbecility, not amounting to absolute disqualification, induces a vigilant, strict examination, in chancery, of the contracts made by one laboring under it; and when coupled with gross inadequacy of consideration, they constitute such evidence of fraud as may vacate a contract. *Cruise v. Christopher*, 5 Dana. 181. In this case the mental weakness was induced by long habits of intoxication. The court held that the slight degree of intoxication at the time of the execution of a conveyance would have but little influence on the case where the grantor, when sober, made a second one reiterating the first.

In an action on a mortgage where the maker was so intoxicated as to be incapable of executing it, a recovery cannot be had on the ground that the goods were used, for which the mortgage was given, where the claim is upon the written instrument, and not upon the goods sold. A ratification, to be valid, must be made by the party when sober. *Reinskof v. Rogge*, 37 Ind. 207. In this case this instruction was given: "If the deceased at the time of the execution of the mortgage, as a result of drunkenness or any other diseased condition of the mind, was deprived of his understanding, so that he had not sufficient capacity to act with discretion in the ordinary affairs of life, the plaintiff cannot recover."

In *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271, it was said: "Contracts of the kind are voidable only, not void, and therefore capable of being ratified when the party becomes sober."

But in *Berkley v. Cannon*, 4 Rich. L. 136, it was held that, if a party when drunk purchases a chattel, and gives a sealed note for the price, and afterwards sells the chattel without having offered it back to the plaintiff, such subsequent conduct of the defendant (though it may be used as evidence to show that the note was not, in fact, invalid, or may itself constitute, or even give rise to, a new cause of action), will not amount to a confirmation of the note, if the defendant was, in fact, so utterly drunk when he signed it as to be incapable of contracting. In an action of debt on such a note, as the specific and only cause of action, if the jury find the note to be void, they cannot give the plaintiff the value of the chattel. In this case the court said: "In considering this question we should be misled by assuming that our doctrine, touching a rescission of a contract, applied to the present case. Where the benefit of that doctrine is claimed it is accompanied by the obligation, on the part of him who claims it, to place the adverse party *in statu quo*; and no disability so to do, arising from his own voluntary act, will work a dispensation from that duty, though impossibilities, as the death of a negro, or a horse, or other unavoidable destruction of property, should be enough to excuse from the performance of the condition. The defendant, however, is not properly driven to the position of one who seeks to rescind a contract *in toto*. The defendant says there never was a contract such as that sued on, in existence; that though a promise in form made by him is produced, yet that he executed it mechanically only; and that, by reason of gross intoxication, he was incapable of that assent of mind which is the essence of a valid agreement. In short, he affirms that the note sued upon was wholly void, and not merely voidable. If that

be true (and be it remembered the jury have found the incapacity of intellect alleged) it is but a step of plain reasoning, fortified by common sense, to the conclusion that such a note was not capable of ratification."

And a note executed by a man when so intoxicated as to be incapable of transacting business is not obligatory upon him; much less where the intoxication has been brought about by the contrivance of the other party; and a subsequent promise to pay the note, made when sober, in consideration of forbearance, is equally invalid. *Newell v. Fisher*, 11 Smedes & M. 431, 49 Am. Dec. 66. In this case the note was wholly destitute of consideration.

Where an agreement was entered into when sober, and the contract executed when drunk, it was held valid and enforceable. *Shaw v. Thackray*, 17 Jur. 1045, 1 Smaile & G. 637.

And the same was said to be the rule in *Hutchinson v. Brown*, Clarke, Ch. 408.

VI. Habitual drunkards.

The general rule is that after an inquisition found an habitual drunkard is incompetent to contract, and this is so provided in some statutes. The inquisition is also *prima facie* evidence as to incompetency in regard to prior contracts made during the time that the decree finds that condition has existed. There are some exceptions, as where the decree is never carried into effect, or where necessities are furnished, or where the party works and labors and receives pay therefor. It is also held that a decree that one is an "habitual drunkard" does not prevent him from being an executor.

A contract made by a person who had previously been found by an inquisition to be an habitual drunkard is void. *Devin v. Scott*, 34 Ind. 67. In this case the court said that if this contract was an exception to the rule on the ground of necessities, that fact must be alleged and proved.

So, a party found by inquisition to be an habitual drunkard is not thereafter competent to waive notice of nonpayment and protest; and evidence that at the time of the waiver he was perfectly sober is inadmissible. *Wadsworth v. Sherman*, 14 Barb. 169.

And one found by inquisition to be an habitual drunkard is thereby rendered incompetent subsequently to enter into an antenuptial contract. *Imhoff v. Witmer*, 31 Pa. 243. In this case the court said: "The act of assembly of 1836 relating to 'lunatics and habitual drunkards' places both classes on precisely the same footing as regards the remedy as well as the effect of the proceedings."

And the contracts of an habitual drunkard, made after inquisition found, and before its confirmation, are void under Pennsylvania act 1819, *Purd. Dig.* 1830, 222, providing that drunkard's contracts made after the finding of the inquisition are void. *Clark v. Caldwell*, 6 Watts, 139.

In *Bixler v. Gilleland*, 4 Pa. 156, the case of *Clark v. Caldwell*, 6 Watts, 139, holding that contracts of an habitual drunkard made after inquisition found, and before its confirmation, are void under an act of assembly, was distinguished, and was held not to apply where the inquisition was confirmed in October, 1829, but the commissioners never acted, and the alleged drunkard acted as if no proceedings were ever had, and bought and sold the property in 1831, and saw it levied upon in 1843, and made no objection. And three days before this the inquisition was superseded, and a short time after the sheriff's deed was acknowledged without objection being made.

And a bond and warrant to confess judgment, taken two days after the jury has found on an

inquisition that the maker was an habitual drunkard, is void. *L'Amoureux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655.

A decree of court adjudging a person an habitual drunkard, rendered about a year after the time of entering into a contract, is admissible in evidence, together with other facts, as tending to show what his condition was at the time of the contract. *Stirling v. Hinckley* (Pa.) 2 Cent. Rep. 824, 4 Atl. 358.

A finding of incapacity existing before an inquisition for habitual drunkenness casts the burden upon the party contracting with such drunkard during such time to prove that he was sober when he made a settlement. *Klohs v. Klohs*, 61 Pa. 245.

In *Noel v. Karper*, 53 Pa. 97, the court said: "An inquisition finding a party either a lunatic or habitual drunkard is prima facie evidence of incompetency to make a contract at any time covered or overreached by the finding, and imposes upon the party introducing a contract executed by a lunatic or habitual drunkard the burden of proving him to have been of sound mind at the time of the execution thereof."

Where a contract of a drunkard is in question, and the fact of drunkenness is established by other means than a legal inquisition, it is competent for the party alleging the contract to prove a lucid interval. An inquisition is some evidence of incompetency as to contracts made before the inquest but during the time the incompetency is found to have existed. *Tozer v. Saturlee*, 3 Grant, Cas. 182. In this case the court said: "As to contracts made after the inquisition, our statute contemplates a complete transfer of the property to the custody of the law, and the committee is substituted for the lunatic or drunkard, and a lucid interval can avail nothing, for he has nothing in respect to which to contract. This is always the case where the proceeding is perfected. Where it is suspended or abandoned or suspended in mid-course, as seems to have been the case here, it may be doubted whether any stronger presumption is furnished by an inquisition as to contracts made after it was found, than as to such as were made previously, but within the ascertained period of incompetency. If no stronger, then it is not conclusive, and may be rebutted by such evidence as was offered here."

But, if an habitual drunkard, after inquisition found, carries on his business, does work, and receives pay therefor, his receipt is a valid discharge of the debt. *Black's Estate*, 8 Pa. Co. Ct. 266.

Ohio Rev. Stat. § 6318, providing that from the time of service of notice a sale, gift, or encumbrance made by an intemperate person or habitual drunkard shall not be valid, does not prevent a drunkard from purchasing necessities after the service of notice and before the appointment of a guardian; and a drunkard may become liable for services as nurse, rendered while he was in a drunken fit of sickness. *Brockway v. Jewell*, 52 Ohio St. 187, 39 N. E. 470. In this case it was held that the delivery of a set of harness for services was a payment, and not a sale.

In *Sill v. McKnight*, 7 Watts & S. 244, it was held that a person found by inquisition to be an habitual drunkard is not thereby deprived of his power to perform the office of executor or administrator, and the power to sell property was held to be well executed by the executor though he had been declared an habitual drunkard. This was because Pa. act 1832, § 26, provides for the removal of an executor or administrator who is an habitual drunkard, and it will be assumed that, unless this statute is invoked and the executor is removed for such cause, his official acts are valid. This statute will con-

trol although, under Pa. acts 1819 and 1836, contracts of habitual drunkards in regard to their own property are invalid.

On a proceeding to reopen certain judgments, where the judgment debtor had been adjudged an habitual drunkard for the period of one year before the adjudication, and the notes on which the judgments were entered were given within that year, it was held that the preponderance of the evidence was in the creditor's favor as to sobriety, and overcame the presumption arising from the adjudication that the debtor was an habitual drunkard. *Donehoo's Appeal*, 2 Monaghan, 213, 15 Atl. 924.

And a saloon keeper was allowed to recover against an habitual drunkard for food, cigars, and drink, where the vendor had no notice of the inquisition found, and the decree was not filed until after the sales, and the purchaser appeared to be able to transact business. *Re McGarvey*, 64 How. Pr. 135.

Where a party made a deed the 21st day of June, and on the succeeding 5th of July was judicially declared an habitual drunkard, it was held that the deed would not be set aside on conflict of evidence. *Van Wyck v. Brasher*, 81 N. Y. 262. The court said: "A drunkard is not incompetent, like an idiot or one generally insane. He is simply incompetent upon proof that at the time of the act challenged his understanding was clouded or his reason dethroned by actual intoxication. . . . Here there was no proof of general unsoundness of mind, or of general insanity, and none whatever that the grantee used any artifice, undue influence, or fraud to procure the conveyance."

In some cases the term "habitual drunkard" is used to indicate the condition existing without regard to any inquisition; and in such cases any advantage taken by reason of the party's mental weakness will be ground for setting aside the contract.

In *assumpsit*, where it appeared that the note sued on was taken from a person of weak intellect and an habitual drunkard under suspicious circumstances, it was held to be a strong badge of fraud if the payee does not make out a fair case and good consideration, it being previously shown that the note was given on settlement of accounts, and the presumption was created, either that nothing was due, or a less sum than the note called for. *Hale v. Brown*, 11 Ala. 87.

A court of equity will set aside a contract that is unfair, and shows on its face evidence of imbecility and undue influence, made by an habitual drunkard, although made during his sober moments, where his mind has become impaired and weakened by habits of intoxication. *Conant v. Jackson*, 16 Vt. 335.

And a contract unreasonable in itself, entered into by an habitual drunkard when in a state of excitement from excessive drinking almost amounting to madness, with a person who at the time had him in complete subjection, will be set aside. It is not necessary in such a case to prove actual madness. *Wiltshire v. Marshall*, 14 Week. Rep. 602, 14 L. T. N. S. 396.

A party will be protected against his own acts, while in a state of insanity, even if brought on by drunkenness. Relief may be granted (where the rights of parties may be restored) against acts done by a party who is so inebriated as to be incapable of contracting, or who, from the effects of inebriation, continues incapable. *Menkins v. Lightner*, 18 Ill. 282. In this case the court held: "His habit was that of habitual drunkenness for a course of years, before the first sale. There is no contradiction of the alleged fact that, when drunk

and when drinking, he was a fool and crazy. One so far gone as to bring on the stages of delirium tremens, or mania potu, may hardly be called sane, simply upon becoming sober."

But a promise made while sober, by an habitual drunkard to a physician, that he should pay him \$100, in consideration of which the physician promised and undertook to cure him of his appetite for ardent spirits, may be binding. *Fisk v. Townsend*, 7 Yerg. 146. In this case it was held that it should be left to the jury whether a recurrence was brought on by a fraudulent purpose to defeat plaintiff's claim.

VII. As affecting a bona fide holder of note.

The general rule is that intoxication of the maker of a note is not a defense as against a bona fide holder for value.

The defense of drunkenness of the maker of a negotiable note is not available against the same in the hands of a bona fide holder for value. *State Bank v. McCoy*, 69 Pa. 204, 8 Am. Rep. 246. In this case the court said: "If a man voluntarily deprives himself of the use of his reason by strong drink, why should he not be responsible to an innocent party for the acts which he performs when in that condition? It seems to me that he ought, on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it. As between the contracting parties, where one of them is so drunk as not to know what he is doing, the contract is doubtless void, especially if the other is apprised of his condition, and, if not wilfully or culpably blind, he must know it."

And drunkenness of the maker of a negotiable note is not a defense against an innocent holder of the same. *McSparran v. Neeley*, 91 Pa. 17. In this case the court said that the evidence did not make out the existence of insanity or a state of absolute incapacity.

A person making a note while temporarily deprived of his reason by intoxication will be liable thereon, if the paper is negotiable and has passed into the hands of an indorsee in good faith before maturity, for a valuable consideration. *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. In this case the court said: "It may be said that a person who executes a proposed negotiable paper while deprived of reason by insanity may avoid it in the hands of an innocent indorsee, and that the same rule should apply when the person is deprived of reason by intoxication. The considerations upon which the rules stand are dissimilar. Insanity is involuntary; it is a disease, and is a more permanent state, and usually is not the result of the act of the person imposed upon; while drunkenness is voluntary, and is a temporary state, and is regarded as a vice,—the helpless condition of the drunkard is his own fault."

And where an intoxicated person was aware of what he was doing, and not deceived as to the identity of the note signed by him, it is not void, and any defense to it must rest on fraud. Such a note would be valid in the hands of a bona fide holder for value. *Miller v. Finley*, 20 Mich. 249, 12 Am. Rep. 306.

The fact that defendant may have been intoxicated when plaintiff discounted certain notes for him in the regular course of business is no defense in an action to recover the amount of the notes, unless the plaintiff had knowledge of that fact. *Pittsburgh Nat. Bank v. Palmer*, 22 Phila. Legal Int. 189.

And a person able to sign a note, and to remember the next morning that he had done so, and for what the note was given, cannot defeat an action on the note on the ground of complete intoxication. *Caulkins v. Fry*, 35 Conn. 170. But in this case the court said that com-

plete intoxication, so as to deprive the party of his reason and understanding, would avoid a negotiable note in the hands of an innocent purchaser for value.

A guaranty obtained by fraud from an intoxicated person who is chargeable with negligence may be enforced against him by an innocent party who has acted to his prejudice, upon the faith of the guaranty which was addressed to him. *Page v. Krekey*, 137 N. Y. 307, 21 L. R. A. 409, 33 N. E. 311. In this case the court said: "While it has been quite uniformly held here that an instrument procured by fraud, trick, or artifice, or executed by a party in such a state of intoxication as to be incapable of consenting or contracting, is invalid as between the parties to the transaction, these facts do not always constitute a defense as against an innocent person, who is himself free from any fraud or negligence, and who has advanced money or property to another upon the credit afforded by an instrument like this." The court places this decision on the same ground as though the contract had been a negotiable note in the hands of a bona fide holder.

VIII. Implied contracts.

It seems that a drunkard may become bound on an implied contract.

Intoxication is no defense to an action on an implied contract for borrowed money. *Haneklau v. Felchlin*, 57 Mo. App. 602. In this case the court said there was a difference between express contracts and implied contracts; that intoxication might be a good defense against an express contract, but would not be against an implied contract.

An habitual drunkard may become liable for necessities. *Brockway v. Jewell*, 52 Ohio St. 187, 39 N. E. 470.

And an habitual drunkard may become bound for necessities by a contract made in his behalf by his brother with an attorney, who made application for the appointment of a guardian for the drunkard. *Darby v. Cabanne*, 1 Mo. App. 126. The court said that the contract may have been authorized by the drunkard at a time when he was sober, and a petition for services rendered was held not demurrable.

In *Gore v. Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140, holding that an indorser on a bill could plead his intoxication as a defense to an action by an indorsee, it was said: "Where the right of action is grounded upon a specific, distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessities may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case, the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title."

In *Devin v. Scott*, 34 Ind. 67, it was said that if a recovery is to be sought on a contract made with an habitual drunkard for necessities, it must be alleged and proved that it was for necessities.

In *Reinskopf v. Rogge*, 37 Ind. 207, it was held that in an action upon a contract, where

the defense was intoxication, the recovery, if any, must be on the contract, and not for the value of the goods sold.

IX. Obtaining relief.

In many cases the claim that the contract was made with an intoxicated person was coupled with the fact that undue advantage was taken, or that fraud was practised. In such cases relief is to be had as in cases of fraud. Where a consideration has passed to the person claimed to have been intoxicated, it is generally held that it is incumbent upon him to attempt a rescission by a tender of the consideration received before he can have the contract set aside, although in some cases where he is unable to return the consideration, and advantage has been taken of him, it has been held that equity will adjust such matters in the final decree. Where tender is not required it is generally held that it is not necessary that the intoxicated party should institute a suit in equity to have the contract set aside before he can plead that it is invalid on account of his intoxication.

In *Pitt v. Smith*, 3 Campb. 33, the court said: "Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise."

And the intoxicated person may rescind the contract. *Cummings v. Henry*, 10 Ind. 109.

And where a contract is made with an intoxicated person, no formal rescission of the invalid contract is necessary before bringing an action to set aside the contract. *Baird v. Howard*, 51 Ohio St. 57, 22 L. R. A. 846, 36 N. E. 732.

So, where a person by reason of intoxication was incapable of comprehending what he was doing, and he executed an assignment of an insurance policy, he may maintain an action to recover the policy or the value, without first instituting an action in equity to set aside the assignment. *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290. In this case the court held that the plaintiff had received nothing on the sale of the policies, and his demand for the return of them was all that was necessary to a rescission of the contract of sale.

But in *Mattair v. Card*, 18 Fla. 761, it was held that where a married woman had been induced by artifice to purchase property at a price far beyond its value, and her husband joined her in giving a note and a mortgage, the husband being intoxicated and unfit to transact business at the time of executing the securities, the parties cannot, by answer, set up such matters as a defense in a suit to foreclose the mortgage. The remedy of such mortgagors is to file a bill, or a cross bill, to rescind the entire agreement, after tendering a reconveyance and placing the other party *in statu quo*. This was because the defendants were in possession, and had paid the six months' interest, and had not tendered a reconveyance, and a dismissal of the bill would have left them in possession of the property.

An action of *assumpsit* may be brought by a drunken purchaser to recover the money paid. *Bush v. Breinig*, 113 Pa. 310, 57 Am. Dec. 469, 6 Atl. 86.

And equity will set aside a contract made with an intoxicated person. *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441.

So, equity will set aside a contract to purchase land, made by an intoxicated purchaser. *Hotchkiss v. Fortson*, 7 Yerg. 87.

A court of equity will decree rescission. (*Calhoun v. Witherspoon*, 40 N. C. [5 Fred. Eq.] 128), and will set aside a sale, where the vendor was intoxicated. *Reynolds v. Waller*, 1 Wash. (Va.) 164.

If a vendor of shares was drunk, and is un-
54 L. R. A.

able to restore the consideration, equity will make provision for its repayment in the final decree. *Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486, 7 Sup. Ct. Rep. 311.

And will set aside a deed made by a drunken grantor. *Johnson v. Phifer*, 6 Neb. 401; *Donelson v. Posey*, 13 Ala. 752; *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Lavette v. Sage*, 29 Conn. 577.

And will set aside a voluntary deed. *Clifton v. Davis*, 1 Pars. Sel. Eq. Cas. 81.

Equity will set aside a conveyance made without consideration by a drunken grantor. *Warneck v. Campbell*, 25 N. J. Eq. 485.

A conveyance will be set aside where the grantor was drunk, and the grantor will be required to refund the consideration paid. *Harvey v. Peck*, 1 Munf. 518; *Nielson v. Laffin*, 50 N. Y. S. R. 277, 21 N. Y. Supp. 731.

And a conveyance obtained from a drunken grantor by fraud will be set aside. *Dunn v. Amos*, 14 Wis. 107. In this case it was held that a tender back of the money paid was not necessary.

And an injunction against waste was allowed where the grantor of a deed was intoxicated. *Staats v. Freeman*, 6 N. J. Eq. 490.

It was held not necessary to return the discharge in order to avoid a settlement of a groundless action. *Foss v. Hildreth*, 10 Allen, 76.

The purchaser of a note from a person who at the time is mentally incapacitated on account of intoxication is not void, but voidable, and the owner of such note, having tendered the consideration received, may maintain an action of conversion against such party. *Harlan v. Brown*, 4 Ind. App. 319, 30 N. E. 928.

If a bill of sale is voidable, either on the ground of fraud or drunkenness, the plaintiff, before he can avoid it and maintain an action for the value of the property thus transferred, must place the defendant *in statu quo*, by refunding to him what he has advanced in pursuance of the contract. *McGuire v. Callahan*, 19 Ind. 128.

So, in order to defend against a contract as void on the ground of intoxication at the time of its execution, the party complaining must have restored what was received by him on the contract, before he will be relieved from its obligations. *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377. In this case it was said, as to whether or not the maker of the note was so much intoxicated as to be incapable of binding himself, there is much doubt.

And the failure of a party, when sober, to restore the consideration and rescind the contract alleged to have been executed when intoxicated will prevent him from avoiding the contract. *Mansfield v. Watson*, 2 Iowa, 111. In this case the court held that the weight of evidence showed, also, that the party was not so intoxicated as not to be able to understand what he was doing.

In *Berkley v. Cannon*, 4 Rich. L. 136, it was held that in an action for debt on a note as the specific and only cause of action, such note being given for a chattel purchased by a drunkard, if the jury find the note to be void, they cannot give the plaintiff the value of the chattel. The court held that the doctrine of rescission of contracts did not apply to a case where the note was wholly void, and not merely voidable.

A recognizance cannot be impeached collaterally for the want of capacity, occasioned by drunkenness, of the person by whom it was acknowledged. *Doe ex dem. Cooper v. Harter*, 1 Ind. 427, 2 Ind. 252. In this case the court held: "But the statute gives it the same force and effect as a judgment confessed in a court of record, and it stands upon higher ground than if it had been an agreement *in pais*. It is

to be inferred that the judges, or other proper officers of the court, would not have permitted a recognizance to be entered by a person absolutely deprived of his understanding by drunkenness. If, by any means, a recognizance entered into by a person in such condition should get upon the records of a court, it would, no doubt, be set aside on proper proceedings for that purpose; but, while standing in full force, a recognizance cannot be impeached collaterally for the want of capacity of the person by whom it was acknowledged."

X. Who may show intoxication of party.

The old rule that a party to a contract could not plead his intoxication or stultify himself was changed at an early date, and it is generally held that a party may show that he was intoxicated so as to avoid a contract. This rule extends to his personal representatives and heirs. But other parties cannot take advantage of this, for the general rule is that such contracts are only voidable, and may be ratified. Third parties cannot claim that it was invalid if the real party affected does not repudiate the same.

In *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441, it was said that a contract made in such a state of intoxication as to deprive the party of his discretion and ordinary judgment will be set aside in equity, at the instance of his heirs, although the other party had no agency in producing the intoxication. In this case the court said: "It was once supposed to be the law that a deed obtained from a drunken man could not for that cause be avoided. But a more rational rule now prevails; and the law, now regarding the fact of intoxication, and not the cause or author of it, and regarding that fact as affording proof of a want of capacity to contract, which is one of the elements of every agreement, will interfere to relieve. Thus, if a deed is obtained by the exercise of an undue influence over a man whose mind is incapable of acting freely and voluntarily, such deed will be decreed to be canceled."

And the personal representatives of a party to a contract may avoid it on the ground that he was drunk when he executed it, although such drunkenness was not occasioned by the procurement of the other party to the contract. *Wiggiesworth v. Steers*, 1 Hen. & M. 70, 3 Am. Dec. 602. In this case the drunkard gave a bond for a deed in exchange for other land, and the grantee obtained possession, but never gave the grantor any deed, although he offered to exchange deeds.

A bill in equity by the heirs at law to set aside a conveyance, charging that it was fraudulently and unconsciously obtained without any, or, if any, a totally inadequate, consideration from their ancestor, who, from habitual intoxication and being almost incessantly under the influence of liquor, or from debility of body and mind arising from a long fit of intoxication from which he was then just recovering, was incapable of transacting business with discretion; and that while he was legally incompetent to make any disposition of his property the defendants, for a totally inadequate consideration, procured from him a conveyance, was held good on demurrer. *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 510.

And heirs at law may, on the ground of intoxication of their ancestor, attack a contract made by their ancestor with another party. *Hotchkiss v. Fortson*, 7 Yerg. 67.

In *Lazell v. Pinnick*, 1 Tyler (Vt.) 247, 4 Am. Dec. 722, the court said: "It has been ruled by this court, that even where a person was made drunken, and enticed to sign a promissory note, he was afterwards permitted to give evi-

dence of the fact, and thus avoided it. The English authorities go no further than to estop a person from stultifying himself. The rule is never extended to the heirs, executors, or administrators."

But a defendant in replevin cannot show that a bill of sale of another party to the plaintiff was made while such party was drunk, as a contract made by a drunken man is not void, but voidable only by the party or his representatives. *Broadwater v. Darne*, 10 Mo. 277.

And drunkenness does not render a deed made under its influence absolutely void, but only voidable, so long as the grantor in the deed acquiesces in it; and it cannot be impeached by third persons on the ground that it was executed by him when drunk. *Eaton v. Perry*, 29 Mo. 96.

Voluntary intoxication short of deprivation of reason, unless the opposite party has contributed to produce it, will not disable a person to waive a right to bind himself by a contract, in the absence of fraud or imposition; and his bail, knowing his condition at the time of executing a bail bond, cannot exonerate themselves for that reason. *Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128. In this case the court said: "He was competent to waive his right to be legally tried by the magistrate, and to enter into a binding contract for his appearance at the superior court. It is not pretended that the state, or any of its officers, had any agency in producing his drunkenness. Code, § 2737. His condition, whatever it was, was known to his bail when they united with him in executing the bond. Had his intoxication been such as to disable him to contract, they, as his sureties, being aware of his disability, would have been bound. Code, § 2149. The contract was as beneficial to him as it would have been if he had been sober. By entering into it, the bail procured his discharge from imprisonment, and established a friendly custody of him in themselves. He is not urging the invalidity of the bond, and they cannot urge it for any disability on his part of which they had knowledge."

XI. Summary.

What degree of drunkenness will invalidate a contract made by such party seems a little uncertain, but it may be said that, as a general rule, where the party is so intoxicated as not to know what he is doing, his contract is invalid. Especially when a contract is obtained by taking advantage of an intoxicated person, or by perpetrating a fraud upon him while in that condition, or by reason of intoxication produced by the other party, it will be held invalid. But a contract that is invalid by reason of intoxication may be ratified by the drunkard on becoming sober, and then it will be binding. After an inquisition finding that a person is an habitual drunkard he is incapable of making a valid contract until the judgment has been revoked. Intoxication of the maker of a negotiable note is not any defense as against a bona fide holder for value. A drunkard may become liable on an implied contract for necessities. Where the intoxication of the contracting party was complete, and he has not ratified the contract, the general rule is that he may plead that the contract is void because made when he was in such a condition that he did not know what he was doing. He may also rescind the contract, or may institute a suit in equity to have it set aside. The general rule is that he must return the consideration received, before he can maintain that the contract is void. A party may plead his intoxication in order to invalidate a contract, and so may his heirs and representatives; but this cannot be done by a third party.

MICHIGAN SUPREME COURT.

John NORTHWOOD *et al.*
v.
 BARBER ASPHALT PAVING COMPANY,
Appt.

(.....Mich.....)

Compliance with the specific directions for the abatement of the nuisance, in a decree enjoining the conducting of a business in such a way that the dust and fumes therefrom constitute a nuisance, will not absolve defendant from liability to punishment for contempt in failing to obey the general clause of the decree, in case such directions prove insufficient.

(April 16, 1901.)

APPEAL by defendant from an order of the Circuit Court for Wayne County finding it guilty of contempt in failing to obey a decree of court, and imposing a fine therefor. *Affirmed.*

Statement by Grant, J.:

Thirty complainants, residents or property owners in the vicinity of the works of the defendant company, filed a bill July 16, 1898, to enjoin the defendant's business as a nuisance, injurious to the health, on account of noxious vapors, odors, stench, dust, and gases emitted from its works. The case was heard before Judge Carpenter, of the Wayne circuit court, and on August 13, 1898, he filed an opinion in which he said: "The complainants have suffered much (more, I think, than from the odor) from the dust arising from the handling of crushed stone in the defendant's works. In my judgment, this suffering could have been avoided, had defendant used proper appliances and due care. It is to be hoped that the improvements decided upon by the defendant will abate the dust nuisance. If they do not, additions or changes will be made in the manner hereafter directed, which will abate it." He then ordered a reference to an expert, Mr. Charles F. Burton, to take proofs, and determine and report the most practicable method of abating the dust nuisance and of diminishing the odor. Mr. Burton took proofs, made his report, and on February 1, 1900, a decree was entered declaring defendant's works, as operated, to be a nuisance, creating offensive and injurious fumes, stench, gases, and dust, and reciting that it satisfactorily appeared that by the use of certain measures and appliances the defendant could effectually subdue and confine to its own premises the offensive and injurious qualities of such fumes, etc. The decree then states: "There-

fore it is ordered, adjudged, and decreed that said defendant shall immediately cover the vats in which the asphalt is boiled with a substantial metal cover, and shall cause the steam and other matter arising from said boiling asphalt to be conducted to and passed through the fires in the furnace of said works, to destroy such fumes, stench, gases, and dust complained of in the bill of complaint filed in this cause, and shall cover the settling chamber or dust collector, to which the bulk of the dust complained of shall be carried and stored, with two or more thicknesses of cloth, so as to prevent the emission of dust as complained of in said bill. It is further ordered that said defendant company shall be forever restrained from permitting to be emitted from its said works, fumes, stench, gases, and dust offensive and injurious as aforesaid in such quantities as to materially injure the health of said complainants, or either of them, or to in any way interfere with the comfortable enjoyment of their homes." On July 18, 1900, one of the complainants presented a petition setting forth no abatement of the nuisance, and charging a wilful disobedience of the decree, and asked that the defendant be punished for contempt. The answer is as follows: "This defendant, answering, says: That it has fully complied with the decree of this court. That it has caused its vats to be covered, and has caused all steam and other matters arising from the melting asphalt to be passed through the fires of a furnace, and has caused the dust collector to be covered with cloth, as directed in said decree. A more particular description of the work done to insure the carrying out of the terms of said decree, and of the directions given to its employees in relation thereto, are set forth in the exhibits hereto annexed. That this defendant in good faith has endeavored to carry out the provisions of said decree. It caused its vats and dust collectors to be covered as directed; and the vapors and dust to be collected and carried by fans and taken care of as directed; but, the apparatus not proving efficient in practice, this defendant has recently caused the entire apparatus to be reconstructed, at a cost of upward of \$2,000, and this defendant avers that the same is a full compliance with the provisions of said decree. Said apparatus was constructed and put in operation within the present month, and about ten days before the filing of said petition, and the employees have had, necessarily, to become familiar with its operation, to secure the best results. This defendant avers that it is its intention if the present apparatus, after a fair trial of its

NOTE.—For contempt in violating decree for abatement of nuisance, see, in this series, *Silvers v. Traverse* (Iowa) 11 L. R. A. 804.

As to abatement of public nuisance consisting of smoke, soot, noxious odors, and gases, see *People v. Detroit White Lead Works* (Mich.) 9 L. R. A. 722.

As to municipal power over smoke as a public nuisance, see *St. Louis v. Edward Hertzeberg Pkg. & Provision Co.* (Mo.) 39 L. R. A. 551, and *note*.

As to municipal power over nuisances affecting safety, health, and personal comfort, see *note to Harrington v. Providence* (R. I.) 38 L. R. A. 305

As to municipal power over smoke as a public nuisance, see *St. Louis v. Edward Hertzeberg Pkg. & Provision Co.* (Mo.) 39 L. R. A. 551, and *note*.

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efficiency, should not prove entirely satisfactory in practice, to further improve the same so far as it may be practicable to do so. This defendant further says that, from the nature of the business, it is not practicable to remove all odors of asphalt. If asphalt paving is to be laid at all in the city, it is essential that the plant be located on or near to the line of a railroad, because the great weight and bulk of the material used, and the great cost of such transportation by wagons for a great distance, make it impracticable to locate the plant at a great distance from a line of railroad, and, further, that the fact that the material must be laid upon the street while heated to a temperature of upward of 300 degrees, as well as the great cost of hauling, renders it indispensable that the works be located near to the streets to be paved; that in loading and hauling the heated asphalt from the works to the street being paved, and during the progress of paving, the odors of heated asphalt will necessarily be given off, and there is no practicable means of preventing it; that the wagons engaged in hauling the material to the streets now in course of paving pass near to petitioner's dwelling, and this defendant believes and avers that any odors which may be smelled by petitioner or his family emanate from the material which is being loaded or while being hauled near to said dwelling, and are not given off during the process of preparation or manufacture. This defendant avers that the odor of asphalt so given off during the loading and hauling is not unhealthful, nor does it produce any said discomfort as gives a right to petitioners to complain." Issue was joined, and a large amount of testimony was taken before Judge Hosmer, who, by the consent of the parties, visited the defendant's works and saw them in operation. He found the defendant guilty, and imposed a fine of \$150. After referring to his examination of the works and to the testimony, and stating that the fumes are not noxious to him, his opinion proceeds: "Under these circumstances, I cannot but find that the defendant has been guilty of the violation of the injunction. A finding of this character, I think, probably will preclude any annoyance in the future. Of course, there is no one before the court except the defendant itself, which is a corporation; but if there was a subsequent violation the officers of the corporation might be easily joined, or those in charge of the building, in an application for contempt proceedings. As it is now, in view of the fact that the repairs or the alterations were made under the express direction of the court, I cannot but believe there is a certain element of good faith about it, but at the same time I have no doubt that it did continue with the operation of the works after it must have become apparent to them that there was a violation of the injunction."

Mr. Robert T. Speed, with Mr. John J. Speed, for appellant:

A decree is a statute as to the immediate parties to the cause, and general law 54 L. R. A.

guage in a statute will be controlled by particular provisions.

Endlich, Interpretation of Statutes, §§ 295, 399.

The meaning of decrees as well as statutes is to be ascertained from the manifest intention of those who make them, and a decree will not be construed to operate against the manifest intention of the court making it.

Doscher v. Blackiston, 7 Or. 403.

We may look to the opinion of the court for an explanation of the extent and operation of the decree.

Third Reformed Dutch Church v. Fox, 12 Phila. 296.

To a stipulation filed.

Thayer v. McGee, 20 Mich. 195.

And to the pleadings and other proceedings.

Clay v. Hildebrand Bros. 34 Kan. 694, 9 Pac. 466; *Freeman*, Judgm. § 45; *Graham v. Chamberlain*, 3 Wall. 704, 18 L. ed. 247; *Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 1; 30 L. ed. 1128; 7 Sup. Ct. Rep. 1043.

When the principles of a decree seem to be opposed to it, the literal interpretation ought not to be enforced.

The highest possible fine was imposed, the same as though the violation of the literal terms of the decree had been wilful.

People ex rel. Davis v. Compton, 1 Duer, 512.

Mr. John H. Powell, for appellees:

It is of no consequence that the business is useful and necessary.

People v. Detroit White Lead Works, 82 Mich. 478, 9 L. R. A. 722, 46 N. W. 735.

The condition of the defendant works since the untiring efforts of the corporation to prevent any nuisance from being created have been studiously employed has been such that the doctrine of "proper management," as claimed in *McMorran v. Fitzgerald*, 106 Mich. 649, 64 N. W. 569, can never apply.

The plant is a nuisance; and the testimony offered in the contempt proceedings fully proves that statement.

16 Am. & Eng. Enc. Law, pp. 950-954.

Grant, J., delivered the opinion of the court:

It is evident from reading the opinion of Judge Carpenter that in entering this decree he followed the case of *Ballentine v. Webb*, 84 Mich. 39, 13 L. R. A. 321, 47 N. W. 485, and made a reference to ascertain what could be done to prevent the escape of the dust and the noxious vapors. He recognized the business of the defendant as a legitimate one, which could not be restrained by the injunction of the court until all proper means had been tried to prevent the escape of dust, noxious vapors, etc. Upon the filing of the report he decreed certain specific things to be done, and to this added the general clause. It is a fair inference from Judge Hosmer's opinion that he finds that defendant complied with this order, as to the preventives directed by the court, but that they failed to accomplish the object; that this failure was known to the defend-

ant, and yet it continued the nuisance. The result of Judge Hosmer's findings is either that the defendant can, by proper precautions, avoid the dust and fumes which are injurious, or that it must and will close its works entirely, for he states that his finding "probably will preclude any annoyance in the future." In what manner it will preclude the annoyance does not clearly appear. The testimony on the part of the complainants is that the dust and vapors are worse than they were before the original decree was entered, and the devices and means therein provided carried out. If this be so, and their testimony as to the effect upon the inhabitants is true, and no means can be devised to prevent it, clearly the defendant's business should be enjoined *in toto*. The case would then clearly fall within *Robinson v. Baugh*, 31 Mich. 290; *McMorran v. Fitzgerald*, 106 Mich. 642, 64 N. W. 569; and *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735.

It is the contention of the defendant that the specific precautions decreed to be taken by it control; that it complied with those precautions, and, if they failed to produce the desired result, it cannot be held guilty of contempt for proceeding to carry on its business contrary to the general clause of the decree; and that complainants must proceed against it by filing a supplemental petition in the original case. Its counsel claim that these particular provisions control the general language of the decree, invoking the rule that is applied in the construction of statutes, and citing *Endlich, Interpretation of Statutes*, §§ 399, 295. It is also urged that we should look to the opinion of Judge Carpenter, citing *Third Reformed Dutch Church v. Fox*, 12 Phila. 296. None of the issues in the original case can be retried in this proceeding. They are *res judicata*. The decree prescribed certain things to be done, which, in the opinion of the court, might effect a remedy. The court, however, saw fit to add a clause in unmistakable language prohibiting the carrying on of the business to the injury of the health of the complainants, or to the interference with the comfortable enjoyment of their homes. The plain purpose of this clause was to prohibit the business unless the injurious effects upon the complainants and their families could be obviated by the use of the means proposed, or by other means. The defendant, under the finding of the court, found these specific provisions a failure, and yet that the defendant continued to carry on its business in a manner which it knew was in violation of the injunction. The complainants in the chancery suit were not required to investigate the defendant's plant, determine what it had done, and virtually commence another proceeding. The facts were peculiarly within the knowledge of the defendant. Complainants could only be expected to know that the nuisance continued, and had the right to proceed upon the theory that its continuance was in violation of the decree. When the defendant ascertained that these provisions were ineffectual, it could 54 L. R. A.

have tried other means without any violation of the injunction; or it could have applied to the court for leave to provide other means, if it was advised that it could not proceed without the direction of the court. Its answer shows that it was contemplating other means if the ones adopted should prove ineffectual.

Under the findings of the court, we think that the order adjudging the defendant guilty of contempt should be sustained, and it is affirmed, with costs.

Long, J., did not sit. The other Justices concur.

William B. NOBLE

v.

BESSEMER STEAMSHIP COMPANY,
Plff. in Err.

(.....Mich.....)

1. The master's liability for injury to a servant by a defective tool furnished for his use is not defeated by the fact that the defective condition was known to a fellow servant who procured the tool for use by himself and the injured one, and who was therefore negligent with regard to such use.
2. A judgment will not be reversed for failure of the trial court to expressly state that certain requested instructions are given, where it states that counsel have handed it some requests as stating propositions of law by which the jury should be guided in determining their verdict, and proceeds to read them to the jury.

(June 17, 1901.)

ERROR to the Circuit Court for Bay County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by defendant's negligence. *Affirmed*.

The facts are stated in the opinion.

Messrs. T. A. E. Weadock and J. O. Weadock, for plaintiff in error:

In work of the character that plaintiff was doing, pieces of steel and iron will fly, when and where no one can foretell. The eye is the vital part of the anatomy that the force of the blow is usually sufficient to injure, and the risk of the employment is well understood, and, as a matter of law, is assumed by the employee.

Upon the theory of plaintiff's own testimony, he was negligent; and upon the theory of Lapan's testimony, Lapan was negligent; and upon either theory the accident was either the ordinary risk of the employment, or was the result of the negligence of Noble or his fellow servant Lapan.

Heffern v. Northern P. R. Co. 45 Minn.

NOTE.—As to liability of master where his negligence, combined with that of a fellow servant, causes an injury, see, in this series, *Hunn v. Michigan C. R. Co.* (Mich.) 7 L. R. A. 500, and *note*; *Sherman v. Menomonee River Lumber Co.* (Wis.) 1 L. R. A. 173; *Lutz v. Atlantic & P. R. Co.* (N. M.) 10 L. R. A. 819, and *note*; and *Pullman's Palace Car Co. v. Laack* (Ill.) 18 L. R. A. 215.

471, 48 N. W. 1; *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Wachsmuth v. Shatt Electric Crane Co.* 118 Mich. 275, 76 N. W. 497; *Miller v. Erie R. Co.* 21 App. Div. 45, 47 N. Y. Supp. 285.

Messrs. Pierce & Kinnane, for defendant in error:

Lepan used the defective tool only after he had exhausted every effort to get a better one, and he says he had to work. Concede that Lepan was negligent. The defendant was guilty of negligence also, and when, as in this case, although Lepan and Noble were fellow servants, the negligence of defendant contributes to the injury, the law says plaintiff can recover.

Hunn v. Michigan C. R. Co. 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502; *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 380, 18 L. R. A. 154, 53 N. W. 556; *McDonald v. Michigan C. R. Co.* 108 Mich. 7, 65 N. W. 597.

Moore, J., delivered the opinion of the court:

This is an action on the case for the recovery of damages on account of the loss of an eye. From a judgment of \$4,000, obtained by plaintiff, defendant has brought the case here by writ of error.

Plaintiff was employed as calker upon a vessel being constructed at F. W. Wheeler & Co.'s yard in West Bay City by defendant. Wheeler & Co. had commenced the work, but, failing in the performance of its contract, the defendant took the yard and crew, and proceeded to finish it. Plaintiff commenced working for Wheeler & Co., and continued when defendant took over the operation of the yard. Plaintiff and his witnesses testified that on July 26, 1899, plaintiff was engaged in striking with a riveting hammer a soft-head held against a rivet then being put in on the bulkhead bar of a vessel by one John Lepan. A piece of steel flew from the soft-head, and struck him in the eye, putting it out. The soft-head in question was made from a riveting hammer, and it is claimed that the head which was to be struck with the riveting hammer was not properly tempered. Plaintiff had been a riveter for four years and upward, and claims he knew nothing about the condition the soft-head in question was in. The defendant furnished the tools used by its employees. There were between 50 and 60 riveting gangs then at work for defendant in the yard, each gang consisting of four men—a head riveter, an assistant riveter, a heater, and a holderon. John Lepan was head riveter of the gang in which plaintiff was working. A tool storeroom was maintained by the defendant, in charge of a keeper named Gereoux, whose duty was to give out and furnish tools to the workmen. It is the claim of the plaintiff that Lepan went to the storeroom for a soft-head, and Gereoux gave out one to him, but before using it at all Lepan returned it to Gereoux, and complained of its defective condition. Lepan testified as follows: "I did not pick out the tool myself. Gereoux gave it to me. 54 L. R. A.

He was the man in charge of the storeroom where the employees were accustomed to go for tools to do their work. The soft-head which he gave me was made from a broken riveting hammer, the hammer end being cut off. It was too hard, because it had been tempered as a riveting hammer, and the temper had not been taken out so to make it a soft-head. I took it back to the storeroom the same day I received it, and wanted to get another one. Mr. Gereoux told me, if I could find a better one, to take it; but he said that was the best one he had in the storeroom. I looked over the rest of the soft-heads in the storeroom, and they were all worn out, and not fit for use. He had them thrown in one pile of cull tools. I told Mr. Gereoux that I did not want to use the tool. He said 'I will give you an order to go to the blacksmith and get it fixed.' He gave me an order to go to the blacksmith, and the blacksmith told me he could not fix any more tools unless I would get an order from Mr. Gilkey, who was foreman of all the riveters on all the boats. The blacksmith referred to was the man employed by the company to repair tools for the machine shop and the riveters. That was his business. I then went to Mr. Gilkey for an order, and told him what was the matter with the tool. He said: 'John, I cannot give you an order. I have got to finish those boats with the tools we have got. I was told by the company not to make any more expense on these boats. They would have to be done with the tools we had. To do the best we could.' I then went right down, and went to work. That was the day before Noble started to work with me. After Noble came, we used the soft-head on three rivets. We hadn't finished the third one; just two and a half. We were finishing the third one, when this piece broke, and Noble was injured. We had not used it before he was injured, and the soft-head had remained without use from the time I took it to the shop until the time Noble was hurt. It was kept in a keg, with other tools, except when we had to shift from one boat to another. I did not tell Noble that I did not think it was a safe tool to work with, because, if I told him, he would have quit, the same as the other one quit before, and I would be out of work." Plaintiff also claimed that at the time of the injury he was striking the soft-head as riveters usually do, and Lepan was holding it against the rivet in the usual way, and that he did not know the dangerous condition of the soft-head. The defendant denied that the tool was not reasonably safe for use, and also denied Lepan's version of his obtaining the tool.

In his charge to the jury, after stating the claims of the parties, the trial judge said: "The claim of the plaintiff—and I say to you the only ground in this case on which the plaintiff can recover—is the claim that the soft-head which he struck with that hammer was not a safe tool, was not reasonably safe to be used by men engaged in riveting as these men were at that time.

Now, a hammer or soft-head might be safe when given out to workmen, and it might become unsafe by reason of its use by them; but I say to you as a matter of law in this case, and I wish you to distinctly remember that part of it, that the defendant in this case is not liable in case you find that the defect in this soft-head, if you find it was defective, was caused by the use that it had had. The plaintiff claims that at the time Lapan got it from the storehouse, or at the time he first commenced to use it, he discovered that it was not a safe tool to use, and if you find that to be the fact,—if you find that at the time Lapan got this soft-head from the storehouse it was not then a reasonably safe tool with which to do the class of work which it was expected by the defendant Lapan and those associated with him would do,—then the company is negligent. The law imposes the duty upon those who employ laborers and who furnish them with tools to use to see to it that those tools are reasonably safe and fit for the use for which they are intended; and when Lapan went to the storehouse, if he was given this tool by the person whose duty it was to keep those tools and deliver them out to the men, that was a representation by the defendant itself that that tool was reasonably safe and fit for use. Now, it appears from the testimony that Lapan, before he used it, discovered that it was not so, as he claims. That would not be any defense to this defendant in this case unless you find that it became so from use. If this tool was reasonably safe and fit for use at the time Lapan got it, then the company has done all that their duty called upon them to do; but when Lapan took it back, and asked for another, the company, while they should have given him another, or should have put this in proper order as a matter of mere right, were not under any legal obligation to do it. He knew that the tool was unsafe, and it was his option either to work with it or to quit. If he continued to work with it after he knew it was unsafe, he was guilty of just as much negligence as the company was, and you haven't any right to award a verdict against the defendant in this case by reason of the fact that they refused to repair this tool for Lapan. That is not in the case at all, as far as your consideration of it is concerned. The first question for you to determine, and the important question, is, What was the condition of this soft-head at the time it was furnished to Lapan to work with? It seems that he was the boss or the head of the gang of riveters. He had charge of that particular gang, and this soft-head was furnished to him for the use of that gang. Now, the question is, What was the condition of it at that time? The plaintiff claims it was unsafe to use; that it was a broken riveting hammer; and that the temper had not been abstracted from the head of it that had been broken. Now, from the testimony of the witnesses in this case you must determine what you believe the fact to be. If you find that the hammer at that time was in a reasonably

safe and fit condition for use, then the plaintiff in this case cannot recover, no matter what you may find the other facts to be. On the other hand, if you find that that hammer at that time was not a reasonably safe tool with which to perform the work that the company designed for it, then the next question for you to determine is, Had the plaintiff, Noble, himself knowledge of the fact that it was unsafe? If he had, and he continued to use it after he had that knowledge, then he cannot recover in this case. After a man discovers that a tool is unsafe, if he continues to use it under the circumstances detailed by the witnesses in this case, without protest to his employer, and he did not protest, and I might add further, without a promise to fix it up, and ask him to use it a little while, until they could get a chance to fix it, those are the only circumstances under which he would be relieved of the knowledge that he had, if you find he did have it, that the tool was unsafe. As bearing upon that question whether or not Noble had knowledge that his tool was unsafe, if you find it was unsafe, you have a right to consider the manner in which the work was being carried on. You have a right to consider the fact as to whether it required a careful examination of the tool itself to determine its condition, or whether one could tell by a casual glance at it. You have heard the testimony of the witnesses. And, even though you may find that Noble's attention was not particularly called to the defect in this tool by Lapan, if you find as a fact from the evidence, exercising your common sense as applied to the fact, that Noble did know as to what the condition of this soft-head was at the time it was used that day, and that he knew it was unsafe, then I say to you, as a matter of law, that he cannot recover in this suit. I think I have already said to you that if this soft-head was in a reasonably safe condition for use at the time Lapan got it, and if during the time that he was using it, by use or otherwise, it became in a defective condition, and unsafe and unfit for use, that the plaintiff could not recover in this case. In that case the negligence of his fellow servant, Lapan, in working with the tool, would be counted as the negligence of the plaintiff, and it would prevent his recovery. To make that plain to you, perhaps, I should say further, if two men are working together for a common employer, at the same class of work, and one is injured through the negligence of the other, of course the employer himself is not responsible to the one who is injured. He does not guarantee to a man, when he sets him to work, that all the other workmen with whom he is engaged will exercise care and caution. A man, when he goes to work among a number of others, must in law be held to realize that he accepts all the dangers which are naturally incident to the business; and, if the injury in this case was caused by the negligence of his fellow servant, Lapan, then he cannot recover. I desire to make that particularly clear to

you, and I say to you again, if you find that this soft-head was in proper condition, and fit for use, at the time Lapan got it, then the company had done their full duty to Lapan and the plaintiff. They had furnished him a reasonably safe tool for use, and, if Lapan afterward discovered that by use it became unfit for use, and continued to use it, he could not recover had he been injured; and, if he could not recover, the plaintiff could not recover, because his injury is caused by the negligence of Lapan in using this tool. If, however, it was not reasonably safe and fit for use at the time Lapan got it from the shop, then I say to you, as a matter of law, that, no matter if Lapan did use it after he knew it was unfit for use, the company were negligent themselves in failing to provide their workmen with an article or tool that was reasonably safe and fit for use, and the plaintiff can recover. You have a right, in determining these questions, to consider the nature of the tool. It is not an intricate piece of machinery. It had been exhibited before you, and your common sense may be applied to the question as to whether or not men who had had experience such as the plaintiff claims he had in the use of such tools would, by ordinary observation, have been able to determine whether or not this tool was safe or not. If you find that he knew it was not safe, and still continued to use it, he cannot recover in this case. Counsel have handed me some requests, as stating propositions of law by which you should be guided in determining your verdict. 'It is the duty of the plaintiff to satisfy you by a preponderance of evidence that all the material allegations of the plaintiff are true, and, unless he has done so, you must find a verdict for the defendant.' 'The defendant is not an insurer of his employees against accidents, and the fact that plaintiff has lost an eye by an accident in and of itself does not entitle the plaintiff to a verdict.' 'Before you can find a verdict for the plaintiff, you must be satisfied that the defendant failed to supply the plaintiff with a reasonably fit safe tool with which to work, and that the plaintiff, on account of such failure, and wholly without negligence on his part, was injured.' 'If you find that the tool in question was a reasonably safe one, and that the accident was such a one as might happen by the ordinary use of tools reasonably safe, then it was a risk of the employment, which the plaintiff assumes, and he cannot recover.' Defendant's counsel has also suggested that I should say something to you in the way of instruction relative to their omission to produce Gereoux, the man who kept the shop, as a witness. That omission upon their part has been strongly commented upon by the attorney for the plaintiff, and it is not, perhaps, out of place that I should say something to you about it. Mr. Gereoux might, of course, have been called by either party. The plaintiff would have a right to call him, or the defendant would have that right. It appears by the statement of counsel that he is outside of the jurisdiction of this court,—

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that he is in New York state, where he could not be reached by a subpoena of the court; and I say to you that, unless you find as a fact in this case that the defendant had some reason for not procuring Gereoux as a witness, and, even if they had, that the plaintiff had just as much right to call him as the defense, and you shall not infer anything against the defense in this case by reason of their omission to call him as a witness. He is not a party to the case, and the plaintiff had the same right to call him as the defendant."

Upon the trial the judge was requested to direct a verdict in favor of defendant. It is insisted that, as Lapan knew the hammer was a defective one, it was negligence for him to use it; that he was a fellow servant of plaintiff; and that one of the ordinary risks incident to the employment of the plaintiff was the negligence of his fellow servants, and for that reason the plaintiff cannot recover,—citing *Hefferen v. Northern P. R. Co.* 45 Minn. 471, 48 N. W. 1; *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350; *Wachsmuth v. Shaw Electric Crane Co.* 118 Mich. 275, 76 N. W. 497. We do not think those authorities are conclusive of this case. In the *Hefferen Case* the court said that the condition of the tool was the ordinary result of use, "and if a workman should, of his own choice, and unnecessarily, use a tool thus plainly defective, when others were provided for his use, he is not absolved from the consequences of his own choice. . . . He [the servant] may . . . in general, assume without particular inspection that the instruments which he is thus required to use are reasonably safe; but when, from use, they have become obviously defective and unfit, and the master has provided others, so that the servant knows that he is not required to use the former, the reason of the law holding the master to responsibility is inapplicable. . . . According to the evidence, it must be taken as a fact that the servants used this particular tool because they did not choose to get another." In *Rawley v. Colliau* it was said: "The hammer which caused the injury had been in use for a long time, and its condition had been brought about by such use. . . . We cannot assume as a matter of law that the defendants were negligent because this sledge hammer was lying about the shop with its face cracked or battered, when there were others that were sound, and in fit and safe condition for use, and when neither the plaintiff nor any of his fellow employees were obliged or directed by defendants to use this particular hammer in their work, and when they could have used a hammer not defective." The court further says: "If this hammer had been the only one in the shop, or the only one that could be used, or defendants had directed it to be used knowing its condition, another case would be presented." In *Wachsmuth v. Shaw Electric Crane Co.* the court said: "The record shows defendant furnished an excellent quality of steel from which to make the

tool. It was made by a competent blacksmith. There is no claim that when made it was not a proper tool with which to do the work required. . . . The men were not required or expected to use a tool after it became unsafe because of use or for any other cause. They were at liberty to take a defective tool at once to the blacksmith, and have it repaired or get a new one in its place. . . . The only testimony to the contrary is given by the plaintiff, who never saw the tool, but was of the opinion, judging from the appearance of the small piece of steel taken from his eye, the tool was not a proper one to use." In none of these cases was it shown that the master, the *alter ego*, knew the tool was defective, and, after such knowledge, directed its continued use, the injured person not knowing of the defect. In the *Hefferen Case* it was also said: "The responsibility of the master for injuries resulting from unsafe instruments or machinery may be said to rest upon the ground that these are the means by which the servant is expected and required to do his work. The master furnishes them for that purpose, and expects and intends that the servant shall use them. The servant knows that this is expected of him. He may, therefore, in general, assume, without particular inspection, that the instruments which he is thus required to use are reasonably safe. But when, from use, they have become obviously defective and unfit, and the master has provided others, so that the servant knows that he is not required to use the former, the reason of the law holding the master to responsibility is inapplicable. If the master provides the proper tools for the use of his servants, responsibility for neglect to remove from the premises such as have become obviously unfit for use, if such responsibility exists, must rest, not on the ground that it is the duty of the master to furnish reasonably safe means for the prosecution of the work which his servants are required to do, but upon the ground that he is chargeable with negligence in suffering dangerous things to be where his servants may be injured by them. This principle is applicable under many circumstances, — as in respect to concealed dangers, like a pitfall. It cannot be applied under the circumstances here stated without ignoring the duty of the servant to exercise ordinary care in respect to matters concerning, which he has no right to assume that there is no danger. If he knows that safe tools are provided for his use, he cannot be expected to use those which have become so defective that the defects could not be overlooked." In the case of *Paulmier v. Erie R. Co.* 34 N. J. L. 155, an engine broke through a trestle, killing a fireman. It was claimed the engineer knew of the insecurity of the trestle-work, and had been directed not to go upon it. It was claimed in that case, as it is claimed here, that, because the negligence of the fellow servant contributed to the injury, there could be no recovery; but it was held the company was liable. In *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L. R. A. 54 L. R. A.

500, 44 N. W. 502, Justice Champlin had occasion to refer to this case, and used the following language: "The defendant requested a charge to the effect that, although the jury might find the defendant guilty of negligence, yet, if the fellow servant of deceased contributed to produce his death, the plaintiff could not recover. This request was rightly refused. The correct rule, and the reason for it is stated in *Paulmier v. Erie R. Co.* 34 N. J. L. 155, as follows: 'The servant does not agree to take the chance of any negligence on the part of his employer, and no case has gone so far as to hold that where such negligence contributes to the injury, the servant may not recover. It would be both unjust and innolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence, to defeat a right of action, must be that of the party injured.' *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266. 1 Sup. Ct. Rep. 493; *Keegan v. Western R. Corp.* 8 N. Y. 175, 59 Am. Dec. 476; *Chicago & N. W. R. Co. v. Sirett*, 45 Ill. 197, 92 Am. Dec. 200; 2 Thomp. Neg. 98; *Perry v. Lansing*, 17 Hun, 34; *Busch v. Buffalo Creek R. Co.* 29 Hun, 112; *Gray v. Philadelphia R. Co.* 24 Fed. 168." See also *Sclleck v. Lake Shore & M. S. R. Co.* 93 Mich. 380, 18 L. R. A. 154, 53 N. W. 556.

Exception is taken to the manner in which the trial judge gave defendant's request to charge. Counsel state their contention as follows: "It will be observed that the circuit judge failed to say that he gave the request so read by him, or that the propositions of law therein were correct. During the argument of the law questions, the jury was excused from attendance upon the court, and it had no means of knowing that the particular requests were only part of those made, and therefore considered by the court to be correct. The court simply stated that counsel had handed them up as stating the law. Upon information, we will say that parties who heard the charge did not understand that the requests read were given. We wish to say that we understood them to be given, and were somewhat chagrined when informed that the jury did not; but, upon reading the charge, we see the force of the claim, and it is apparent that the jury was not given to understand that the requests as handed up embodied the law upon the subjects mentioned therein, and should control them in arriving at their verdict. This is made more apparent when attention is given to the court's action in relation to the oral requests, for in that case he stated the oral requests, and then proceeded to state his view. We were entitled to have these requests given, and, had we been impressed with the true situation at the time the charge was delivered, we should have called the court's attention to it; but the error cannot now be remedied except upon a new trial." If the record was in a condition to raise the question, we do not think the point is well taken. A reading of the charge in connection with what occurred

satisfies us the jury must have understood the requests were given.

Complaint is also made of that part of the charge referring to the oral request to charge the jury that they have no right to consider the failure of the defendant to procure the attendance of Mr. Gereoux as a witness. It is said the court told the jury that it might find the defendant had some reason for not procuring Gereoux as a witness, and, if so, then that should be considered. We do not so understand the charge. The request to charge was not in writing, but was oral, and evidently the court did not have much time to consider it. While the language used by the court at first is somewhat involved, it calls the attention of the jury to the statement of counsel as to why Mr. Gereoux was not present, and concludes by saying to the jury: "You shall not infer anything against the defense in this case by reason of their omission to call him as a witness. He is not a party to the case, and the plaintiff had the same right to call him as the defendant." We do not think the jury could have failed to understand this plain language.

Other questions are discussed by counsel. We have examined them carefully, but do not deem it necessary to refer to them further in this opinion. Many questions of fact were in dispute. We think they were properly submitted to the jury.

Judgment is affirmed.

The other Justices concur.

James DOYLE, *Plff. in Err.*,

v.

TOLEDO, SAGINAW, & MUSKEGON
RAILWAY COMPANY.

(.....Mich.....)

A shed of a third person under which a railroad company runs a spar track is within the rule that the working place furnished by the master must be reasonably safe, to the extent that the company is bound to see that the roof does not fall upon brakemen who are required to go there for cars.

(June 17, 1901.)

ERROR to the Circuit Court for Gratiot County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Reversed.*

The facts are stated in the opinion.

Messrs. Watson & Chapman for plaintiff in error.

Mr. E. W. Meddaugh, with *Messrs. Geer & Williams*, for defendant in error.

There is a fatal variance between the pleadings and the proof.

NOTE.—As to liability of railroad company to employee for injuries received in the line of his duty from defective track not owned by the master, see *Engel v. New York, P. & B. R. Co.* (Mass.) 22 L. R. A. 283, and *note*.
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The defendant owns the track that runs into the shed, but it had nothing to do with the erection of the building, and has never had anything to do with keeping it in repair.

Batterson v. Chicago & G. T. R. Co. 49 Mich. 184, 13 N. W. 508; *Klanowski v. Grand Trunk R. Co.* 64 Mich. 279, 31 N. W. 275; *Schindler v. Milwaukee, L. S. & W. R. Co.* 77 Mich. 136, 43 N. W. 911.

If A owns a building, or is the lessee of it, then the duty of inspection is upon him; but if he neither owns nor controls it, then no duty of inspection is imposed upon him, even though he may occasionally send his servant upon the premises to do work, as was done in the case at bar.

Foley v. Chicago & N. W. R. Co. 48 Mich. 622, 42 Am. Rep. 481, 12 N. W. 879; *Dixon v. Western U. Tele. Co.* 71 Fed. 143; *Carper v. Kimball*, 35 L. R. A. 135, 23 C. C. A. 689, 42 U. S. App. 282, 78 Fed. 94; *Carolan v. Southern P. Co.* 84 Fed. 84; *Chisholm v. New England Teleph. & Tele. Co.* 176 Mass. 125, 67 N. E. 393; *Trask v. Old Colony R. Co.* 156 Mass. 298, 31 N. E. 6; *Dunlap v. Richmond & D. R. Co.* 81 Ga. 136, 7 S. E. 283.

Plaintiff was guilty of contributory negligence as a matter of law.

Pilucki v. Detroit Steel & Spring Works, 117 Mich. 112, 75 N. W. 295; *Johnson v. Oakes*, 70 Fed. 566; *Dube v. Gay*, 69 N. H. 670, 46 Atl. 1049; *Lamotte v. Boyce*, 105 Mich. 545, 63 N. W. 517; *Soderstrom v. Holland-Emery Lumber Co.* 114 Mich. 83, 72 N. W. 13; *Juchatz v. Michigan Alkali Co.* 120 Mich. 654, 79 N. W. 907.

The plaintiff was an experienced brakeman, and was fully aware of the way the business was conducted on the defendant's road. The condition of the building was open and obvious, and if there was any apparent danger the plaintiff could see and guard against it just as well as the defendant could; and under such circumstances there is no case that holds the master liable.

Lamotte v. Boyce, 105 Mich. 545, 63 N. W. 517; *Pilucki v. Detroit Steel & Spring Works*, 117 Mich. 111, 75 N. W. 295; *Soderstrom v. Holland-Emery Lumber Co.* 114 Mich. 83, 72 N. W. 13; *Juchatz v. Michigan Alkali Co.* 120 Mich. 654, 79 N. W. 907; *Pahlan v. Detroit, G. H. & M. R. Co.* 122 Mich. 232, 81 N. W. 103.

Where the servant sees and knows that the master does not regularly inspect the structure in question, or has not had opportunity to inspect it, then the servant must inspect for himself and at his own risk, if he makes use of it.

Texas & P. R. Co. v. Patton, 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259; *Texas & P. R. Co. v. Minnick*, 10 C. C. A. 1, 23 U. S. App. 310, 61 Fed. 637; *Flood v. Western U. Tele. Co.* 131 N. Y. 603, 30 N. E. 196.

The plaintiff was performing work upon a side track, where the defendant owed him a different duty from that which it would have owed him if he had been performing work upon its main track. He himself

was required to be on the lookout, and he assumed any and all risks that were incident to doing switching upon a side track.

Batterson v. Chicago & G. T. R. Co. 53 Mich. 127, 18 N. W. 584; *Ilick v. Flint & P. M. R. Co.* 67 Mich. 639, 35 N. W. 708; *O'Donnell v. Duluth, S. S. & A. R. Co.* 89 Mich. 174, 50 N. W. 801; *Phelps v. Chicago & W. M. R. Co.* 122 Mich. 171, 81 N. W. 101, 84 N. W. 66.

The company had the right to rely upon the owners of the building performing their duty, and it was not negligent in assuming that they would do it.

Foley v. Chicago & N. W. R. Co. 48 Mich. 622, 42 Am. Rep. 481, 12 N. W. 879; *Daniel v. Metropolitan R. Co.* L. R. 5 H. L. 45.

Moore, J., delivered the opinion of the court:

The plaintiff sued the defendant to recover for personal injuries received by him while in the employ of the defendant. The trial judge directed a verdict in favor of defendant. The case is brought here by writ of error.

The Sparta Brick & Tile Company is engaged, near Sparta and near the line of the defendant's road, in making bricks and tile. Their kilns are under a center building, upwards of 200 feet long. This building consists of posts set in the ground, and extending above the ground about 16 feet, upon the top of which are plates. The roof boards extend from these plates to the center of the building, the highest point being midway between the rows of posts. On each side of the center of the building, and extending its entire length, is a lean-to, about 13 feet wide. The sides of the building are open. The outside of the lean-to is made of tamarack posts, 6 to 8 inches in diameter, set in the ground at intervals of 12 or 14 feet, and 12 feet high. On the tops of these posts plates are spiked. At frequent intervals rafters lead from the outside plates to the outside plates of the center building. The rafters are connected with each other by strips, some of which are 2 inches by 4 inches, and some 4 inches by 4 inches. Upon the tops of these strips, inch boards, 16 feet long, were nailed, reaching from the plates on top of the 12-foot posts to the plates on the center of the building. The boards on the center building were loose, and when the fires were started in the kilns were removed from the center building, and slipped over on the roof of the lean-to. The defendant company built a siding into the lean-to from its track over the land of the brick and tile company, which company loaded the cars from bricks which had been taken from the kilns, and which were sometimes piled in the lean-to while awaiting shipment. When the cars were loaded, usually when the brakes were loosened, they could easily be run outside of the building, where they were received by the defendant company, but sometimes it was necessary to go into the building for them. The building was erected by the brick and tile company, and, so far as it was kept in repair, was repaired by them; the railroad

company exercising no control over the building. The plaintiff was twenty-five years old. He had been a brakeman nearly three years. He was in the employ of the defendant, and had made four trips over its road in the capacity of a brakeman on a freight train. These trips took him near the building in question. On December 28, 1898, the main part of the train was left near the station, while the locomotive and a box car were backed upon the siding for the purpose of getting two flat cars that were under the lean-to. The plaintiff was instructed to make the coupling. While the train was moving slowly, he was attempting to remove the pin from a Jenney coupler, which was attached to the moving car, for the purpose of making the coupling when he should reach the cars under the shed. He had got but 8 to 18 feet into the shed, when a portion of the roof fell, and he received the injuries which are the cause of this litigation. It is his claim that it was the duty of the defendant to furnish him a reasonably safe place to work, and to keep this building in a reasonably safe condition, and that, not having done it, the company was guilty of negligence which gave him a cause for action. The negligence is stated in the declaration as follows: "Plaintiff alleges that said defendant wholly failed to maintain said building in a reasonably safe condition, or in reasonable repair, but it allowed said building to become old, rotten, and worn out; the roof and rafters thereof become weak, and in such a condition that they would separate from whatever substance or thing they were attached to; that said building had stood so long, and was in such a condition, that it was rickety, and was liable at any minute to fall from its own weight, and it not being of sufficient strength to hold itself together, which condition was apparent to anyone upon any reasonable examination of the same; and this plaintiff alleges that it was the duty of said defendant to have examined said building, and to have ascertained its condition, but that said defendant wholly failed and neglected to make any such examination." The testimony offered by the plaintiff was to the effect that the building was not properly constructed in the first place, that it was old and weak, and that its condition was apparent to anyone who would examine it, and that about two years before the accident occurred a portion of the roof had fallen. On the part of the defendant the testimony was to the effect that the building was well built, and was of the same character of construction usual for buildings erected for the purpose for which this was used. The testimony showed that when the portion of the roof fell, about two years before the accident, its falling was occasioned by a heavy fall of snow, coming upon a portion of the roof which was a part of an extension then in process of construction before the posts and rafters were permanently in place; that the building had been in constant use by the employees of the brick and tile company, and that there was nothing in its appearance to indicate

to anyone there was any danger of its falling. The lean-to was built to keep the rain off the side of the kiln, and from the bricks piled under the lean-to, and to protect the men when loading the cars. The shed was so low the locomotive could not be run under it. If refrigerator or furniture cars were run under it, they would hit against the rafters and boards, and a like result had occurred once or twice from the end of a break rod on a high car hitting the roof. The evidence shows that the roof had been struck a week or two before the accident, but the injury had been repaired, and the roof left in perfect condition. It is not shown how the accident occurred, unless it is disclosed by the answer of Mr. Warner on the cross-examination as to what made the roof tumble, when he said, "I don't know of any reason, unless there had been an excessive weight of snow, or they struck it with their cars when they came in, as they had done before." Or the testimony of the engineer, who gave the signal to stop when the roof fell, that he saw Mr. Doyle coming out of the shed holding his left hand, apparently dazed, and that he was covered with snow.

Counsel for the plaintiff say: "When the servant in Michigan accepts service from a master, there is a contract between him and the master that the master will furnish him a reasonably safe place in which to work, and it is a duty that the master cannot shirk or charge to others than himself by contract, bargain, or any sleight of hand performance; citing *Morton v. Detroit, B. C. & A. R. Co.* 81 Mich. 423, 46 N. W. 111; *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572; *Johnson v. Spear*, 76 Mich. 139, 42 N. W. 1092; *Adams v. Iron Cliffs Co.* 78 Mich. 272, 44 N. W. 270; *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502; *Harrison v. Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Brown v. Gilchrist*, 80 Mich. 56, 45 N. W. 82; *Balhoff v. Michigan C. R. Co.* 106 Mich. 606, 65 N. W. 592." We have no doubt this proposition is fully sustained by the rulings of this court. Counsel say the same doctrine applies when a railroad company is using property belonging to another company or to someone else; citing *Shearm. & Redf. Neg. § 196*; *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534; *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 497, 1 N. W. 112 49 Wis. 609, 6 N. W. 303; and other cases.

It is insisted by defendant that an examination of these cases shows the defects resulting in the injury related to the roadbed itself, or to the train or its equipments, and for that reason do not apply to the case at bar. If the principle determined by these cases is to control, we think it cannot be said that the duty of the company to maintain a safe place for its employees whose duty it is while employed to pass under it. Was it, then, the duty of the company to its employees to see that this place where it built its track, and where it sent its employee to

work, was reasonably safe? In *Ross v. Iona Twp.* 104 Mich. 320, 62 N. W. 401, it was held, in effect, that, in building an approach to a bridge, the township authorities may not ignore surroundings, but are bound to exercise such caution as existing circumstances suggest. If the duty of maintaining this spur was a duty which the company owed to its employees, it will not do to say that this duty was performed by building a track which had no defects in itself, if there was that above the track which endangered the safety of the employee. The rule is established by the weight of authority that, when a railroad company runs its trains over tracks owned by another, the company is bound to see that the tracks are in a safe condition. *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 497, 1 N. W. 112; *Little Rock & Ft. S. R. Co. v. Cagle*, 53 Ark. 347, 14 S. W. 89; *Wisconsin C. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412; *Murray v. Lehigh Valley R. Co.* 66 Conn. 512, 32 L. R. A. 539, 34 Atl. 506. See also *Spaulding v. W. N. Flynt Granite Co.* 159 Mass. 587, 34 N. E. 1135.

It is urged by counsel that, though they have not been able to find a case just like this, applying the principles announced in *Pahlan v. Detroit, G. H. & M. R. Co.* 122 Mich. 232, 81 N. W. 103, to this case, it justified the judge in directing a verdict in favor of defendant; counsel citing also *Carolan v. Southern P. Co.* 84 Fed. 84. The *Pahlan Case* was determined upon the assumption of risk by the employee, who had knowledge of like conditions along the way of the company. The opinion of Justice Hooker recognized that the company was bound to furnish a reasonably safe place to work. Nor is the case of *Carolan v. Southern P. Co.* 84 Fed. 84, in point. In that case the question was whether the company was liable to an employee for injuries received by him because of the improper piling of boxes or freight on a wharf adjacent to defendant's track. The condition which caused the injury to plaintiff arose, not through an unsafe condition of the premises, but because of an improper use made of premises in proper condition, of which the plaintiff had notice. In the present case the plaintiff cannot be said to have assumed the risk that the building into which the company ran its tracks was liable to fall down upon him while in the performance of his duties. It is not a case in which the structure could be avoided, as in the *Pahlan Case*. If in any case an employee has a right to rely upon the performance of the duty to provide a safe place, it would seem that he may do so when he is called upon to pass under a building, to the extent, at least, of assuming that the building will not fall upon him by its own weight. We think the case was one that should have been left to the jury under proper instructions from the court.

Judgment is reversed, and a new trial granted.

Montgomery, Ch. J., and Grant, J., concur. Long, J., concurs in the result. Hooker, J., did not sit.

Rubie FERRIS
v.
Albert D. NEVILLE, Appt.

(.....Mich.....)

1. A paper is a will which is duly executed as such, and reads: This is good to Miss Rubie Ferris for eight hundred dollars for care and attendance rendered by her to me in my last sickness. This eight hundred dollars is to be collected out of my estate after my death, provided, however, I die a bachelor.
2. Parol evidence is admissible to show that a will was properly executed and witnessed according to the requirements of the statute.

(July 10, 1901.)

APPEAL by contestant from an order of the Circuit Court for Bay County admitting to probate an instrument alleged to be the last will and testament of Jacob E. Embody, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. Porter & Haffey and McDonnell & Duffy for appellant.

Mr. James Van Kleeck, with Mr. T. E. Webster, for appellee:

The instrument is a will pure and simple. The manner of making, witnessing, and the right reserved to destroy its effect by marriage,—all tend to show the intent of the maker to treat the instrument as a will.

The intention of the maker is the pivot of the question, and is to be gathered from all parts of the instrument.

Urich's Appeal, 86 Pa. 386, 27 Am. Rep. 707; *Griswold v. Hicks*, 132 Ill. 494, 24 N. E. 63; *Rollins v. Davis*, 96 Ga. 107, 23 S. E. 392; *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395; *Michigan Mut. Ben. Asso. v. Rolfe*, 76 Mich. 146, 42 N. W. 1094.

A will is the disposition of one's property to take effect after death.

Re High, 2 Dougl. (Mich.) 515; *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Bayley v. Bailey*, 5 Cush. 245; *Gage v. Gage*, 12 N. H. 371; *Schouler, Wills*, §§ 276, 2641; 1 Redf. Wills, 170.

Long, J., delivered the opinion of the court:

This is an appeal from an order of the probate court of Bay county admitting to probate a certain writing which is claimed to be the last will and testament of Jacob E. Embody, deceased, who died May 8, 1898. The paper reads as follows:

State of Michigan, }
County of Bay } ss.:

To Whom It may Concern: This is good to Miss Rubie Ferris for eight hundred dollars, as payment for care and attendance rendered by her to me in my last sickness. This eight hundred dollars is to be collected out

of my estate after my death; providing, however, I die a bachelor.

his
Jacob E. X Embody. [L. S.]
mark.

Signed and sealed in presence of

James Petterson.
Edwin U. Hover.

Dated at Lengsville, Bay county, Michigan, this 19th day of February, A. D. 1898.

There is no question but that the deceased died a bachelor.

The cause was tried in the circuit court before a jury on the appeal, and judgment entered on verdict finding the instrument above set forth to be the last will and testament of Jacob E. Embody, deceased. The administrator of the estate has appealed. His counsel says in brief that but two questions are raised, to wit: "(1) Does this paper constitute a will, even if properly executed and witnessed? (2) Did the court err in the admission and exclusion of testimony offered showing that the will was properly executed and witnessed according to the statute, and was that question of fact properly submitted to the jury?"

The proponent of the will called James Petterson as a witness. He testified that he came to the house of one Mr. Ferris, at Lengsville, on February 19, 1898; that he saw the deceased, Jacob E. Embody, upstairs in the house, and talked with him awhile, when deceased tapped on the window and called Edwin Hover, the other witness to the will, who came up; that the paper here claimed to be the will of Mr. Embody was then signed in his presence by Embody, and that he and Hover signed as witnesses to it at Mr. Embody's request; that the witnesses both signed at the request of Embody, and in his presence and in the presence of each other; that Hover wrote the words, "Dated at Lengsville, Bay county, Michigan, this 19th day of February, 1898," at the request of Mr. Embody; that Embody then requested Hover to take the paper and keep it until he (testator) died or got better, and if he died it was to be given to Mr. Ferris, and if he lived it was to be returned to deceased. Edwin U. Hover, the other witness to the paper, was called, and testified that he had known Mr. Embody, the testator, about a year; that it was his signature to the will; and that the date looked like his handwriting, but that he was not positive it was his handwriting. He further testified that he signed the paper at his home, near Unionville, about a year after it was dated (that is, about the 6th or 7th of February, 1899), that Mr. Ferris brought the paper to him and asked him to sign it; that Ferris told him that he wrote the body of it, but that Embody died so suddenly they did not get it quite finished, and that he (Ferris) knew it was all right, and he (witness) supposed it

NOTE.—For other cases in this series as to what is sufficient to constitute a will, see *notes* to *Vroman v. Powers* (Ohio) 8 L. R. A. 39; and *Cawley's Appeal* (Pa.) 10 L. R. A. 93; also *Drehsbach v. Serfass* (Pa.) 3 L. R. A. 836; 54 L. R. A.

Crocker v. Smith (Ala.) 16 L. R. A. 576; and *Love v. Blauw* (Kan.) 48 L. R. A. 257.

For sufficiency of letter to constitute will, see *Re Richardson* (Cal.) 15 L. R. A. 635, and *note*.

was all right, and signed it; that the other witness (Petterson) was not there, and Embody was not there. On his further examination the witness testified that, if he testified on the hearing in the probate court that he signed the paper in the presence of Petterson and at the request of Embody, it was false. He then stated: "I lied in probate court because I was under the influence of liquor. . . . I was somewhat under the influence of liquor when I signed this." The proponent introduced testimony tending to show that, while Mr. Embody was still living, Mr. Hover, the above witness, had this paper in his possession; that he showed it to one Otto Bruce, and at Embody's request read it over to Bruce; and that he showed it to Mr. Ferris's son Fred, and let him read it, and said he was going to give it to Mr. Ferris. The judge of probate of Bay county was called as a witness, and testified that Hover was called as a witness on the allowance of the will, and stated that "he was passing the house where the deceased was at that time, and that the deceased beckoned to him to come up; that he went into the upper room of the house and there were parties present (that is, the two subscribing witnesses and the deceased); that the deceased presented him the paper and asked him to witness it; that the name of the testator had been signed to the will; and that he then and there signed it at the request of the deceased. Other testimony was also given of like character. The witness Hover was recalled, and gave testimony tending to show that he never showed the paper to Fred Ferris or Otto Bruce.

Upon this and other testimony introduced in the case, the court charged the jury: "Now, I charge you explicitly that unless this will was signed at the time that Petterson says he signed it, in the presence of the testator and in the presence of each other, the will is void, it never took effect, it never became a will; and if the testimony of the young man that it was carried down to Tuscola county long after its execution—if what the witness said was true, the will was never completed, because it must be completed during the lifetime of the testator. Now, that brings us to the second question. If the will was signed in the presence of these two witnesses and in the presence of the testator, and at his request, the will is valid and effectual. There is a question of law as to whether the instrument is a will or not, and it is a close question. My first impression was the same as my brother McDonnell's. I thought it was a mere promise or agreement to pay. A subsequent partial examination somewhat changed my views, and I charge you, as a matter of law, that it is a will; that is, if it is proved to be properly executed. If it were a claim against the estate, it would come in for its share of the money with the other creditors, and might consume all the estate, and might be of value to the amount of the whole face of it unless the debts exceed the whole value of the estate. But, as a will, it is subject to all the debts of the estate before the legatee

gets anything, and no injustice would be done if it is allowed as a will or claim, providing it is honest and just. Now, in regard to the proof of this will: You have heard the testimony of Petterson. He was on the stand as a witness. You saw how he behaved, and heard what he had to say, and, no doubt, observed his method of giving his testimony. If you believe Mr. Petterson, you may find in favor of this will. But, before you can find in favor of the will, you must find that both Petterson and Hover signed this will as witnesses at the time that Petterson says he signed it. Now, in support of that view of the case, this may be said: The testimony of this boy was given before the probate court some time ago. There he testified substantially the same as Petterson testified, according to his own testimony and the testimony of Judge Wright. The events about which he spoke were more recent in his recollection than they are now, or will be at any later day than that date. I do not see in the case (it has not leaked out, at least) what inducement or temptation was held out to this boy to commit perjury at that time, or to make a forgery by signing the will as a witness, because it is a forgery to attest a will that is false. Now, you will consider that in regard to his testimony. He was living up there in that neighborhood. He was well acquainted with, and a near neighbor to, the parties interested; and his name appears upon that instrument, and he appeared before the probate court and testified to it. Now, so far, there would seem nothing unusual about him, or the evidence that he gave, or the things that he did. If anybody else had done it, it would be a very natural thing to do; but he says that he swore falsely before the judge of probate; that he never witnessed the will until the day before the 8th of March last,—the 7th of March,—when Mr. Ferris and someone else came to him, down in Fairgrove, and told him that he knew that the will or paper contained the last wishes of Mr. Embody, which he assented to, and thought there was no harm in signing it. It is possible that the boy was innocent in signing that document, and that he was imposed upon or induced to sign it. His testimony in regard to the liquor that he drank you may consider, but it is very dangerous evidence for you to pay much attention to. He details exactly what happened immediately after that same time, and, so far as it casts a dark shadow on this transaction and seems to shed light on the other side, you will consider it with the utmost care, if you give any credence to it whatever. He testifies that he signed it on the 7th of March. Judge Wright comes here and testifies that the paper was filed in his court on the 8th day of March, and that he saw it in the hands of Judge Webster two weeks, and maybe three weeks, before that day; and he says that, while he cannot swear positively it is the same paper, he thinks it was. Now, if it was before Judge Wright two or three weeks before the 8th day of March, it could not have been witnessed by this Hover on

the 7th of March, and his testimony is false if that was so; and still you will consider it. Hover himself, in answer to my questions, stated that the testimony that was given was false, that he was a cousin of one of the attorneys in the case, and that he advised him to keep out of the way of the officer who wanted to serve a subpoena upon him. My friend McDonnell has stated that that was no offense under the law of Michigan,—to keep out of the way of an officer. If he had kept out of the way entirely,—got away before he was served with the subpoena,—it certainly would have left his own reputation a great deal better than it may be after this trial. But he admits that he swore falsely on a former occasion. He plastered himself over many times more by detailing his connection with the forgery of this will, if his version be true. Now, gentlemen, you can believe that testimony if you want to, or you can reject it totally, or you can believe any part of it you are a mind to, and reject the balance. You have the whole matter in your hands, and you ought to apply your best judgment to it. It is a general rule of law that, if a witness deliberately and intentionally and knowingly testifies falsely in regard to one part of a case, that all his evidence in the case may be rejected by the jury, and in many cases ought to be, because the law does not trust even to the jury the task of picking out the truth from the false parts of the perjurer's testimony. In support of the will there is the boy Bruce, who said he saw this man Hover have it along at an early day; that it was given to the deceased; that he read it and gave it back to him. Petterson said it was given to this young man for safe-keeping when the execution of the will was finished. The Ferris boy testified that he worked some days to pay up a debt of his father to Hover, and that he saw the will; that this man told him that when he had worked out the debt he was going to give it to his father. These are confirmatory circumstances that you may consider, always bearing in mind that to sustain this will you have got to find that it was signed at the time Petterson signed it, in the presence of the deceased, at his request, and in the presence of each other. If you do not find that fact, you will find against the will. If you do find it, you will find in favor of the will; and it seems to me that that is the critical point in the

case, and so far as the testimony tends to confirm that view of it, or tends to disaffirm that view, you ought to consider it carefully. If you find a verdict, it will either be that you find in favor of the will, or that you find against the will. Put it in those words, and the court will understand by that that you find that no will was executed or proved, or you will find that this will was executed."

Section 9266, Comp. Laws 1897, provides: "No will made within this state, except such nuncupative wills as are mentioned in the following section, shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same unless it be in writing and signed by the testator or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses." It is the contention of counsel for contestant that this paper does not constitute a will; that, if it was ever executed, it is nothing more than a duebill or acknowledgment of a debt of \$800 owing to Miss Ferris by the deceased. We cannot agree with this construction of the paper. It is a will, and not an acknowledgment of a debt. If it were a duebill or an acknowledgment of a debt, it could not have been defeated by the marriage of the testator. It was to take effect only at the death of the testator. It was said in *Lautenschlager v. Lautenschlager*, 80 Mich. 292, 45 N. W. 147: "The form of any instrument is of little consequence in determining whether it is a will or not. If it be executed with the formalities required by the statute, and if it is to operate only after the death of the maker; it is a will." Many cases are cited in that case in support of the above proposition, to which attention is called. Woerner, *Am. Law of Administration*, *61, and notes. The jury found, under proper instructions, that it was the intention of Jacob E. Embody to will to Rubie Ferris the sum of \$800, to be taken by her at his death, on condition that he died a bachelor; and we think the finding is supported by the evidence.

We find no error in the record, in the admission or rejection of evidence. The cause was fairly submitted to the jury.

The order of the court below must be affirmed.

The other Justices concur.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *Respt.*,
v.
CRESCENT CREAMERY COMPANY, *Appt.*
(.....Minn.....)

*Section 7002, Gen. Stat. 1894, which

*Headnote by START, Ch. J.

prohibits the sale of cream that contains less than 20 per cent of fat, is a valid exercise of the police power, and constitutional.

(May 24, 1901.)

A PPEAL by defendant from a judgment of the Municipal Court of St. Paul con-

NOTE.—For some cases in this series as to ordinances to protect milk supply, see *State v. Dupaquier* (La.) 26 L. R. A. 162; *Deems v. Baltimore* (Md.) 26 L. R. A. 541; *State v. 54 L. R. A.*

Broadbelt (Mo.) 45 L. R. A. 433; *State v. Nelson* (Minn.) 34 L. R. A. 318; and *State v. Schlenker* (Iowa) 51 L. R. A. 348.

victing it of violating a statute fixing the quality of cream which might be lawfully sold in the state. *Affirmed.*

The facts are stated in the opinion.

Mr. F. W. Zollman, with *Messrs. Durement & Moore*, for appellant:

The police power of the state is not without limitations.

State v. Chicago, M. & St. P. R. Co. 68 Minn. 385, 38 L. R. A. 672, 71 N. W. 400; *State v. Donaldson*, 41 Minn. 82, 42 N. W. 781; *State v. Aslesen*, 50 Minn. 7, 52 N. W. 220.

The legislature is not authorized, in the exercise of the police power, to enact a measure in order to protect one person or a dozen persons from disease or fraud.

Cream is a natural product, and when not diseased or impure is not only harmless, but beneficial, as food and for many other purposes, whether it contains 10 per cent of fat or 35 per cent of fat. It is commonly known that there is no practice of adulterating cream, as there is in the case of milk, nor of simulating it, as in the case of butter, and that pure cream is wholesome though it contains less than 20 per cent of fat.

All classification must be based upon substantial distinctions.

State ex rel. Courthouse & City Hall Comrs. v. Cooley, 65 Minn. 550, 58 N. W. 150; *State ex rel. McCue v. Ramsey County Sheriff*, 48 Minn. 239, 51 N. W. 112.

This statute does not prohibit the owner of cows from taking cream of any richness from the milk. Every citizen, having acquired property lawfully, if it is not dangerous to the public, has the right to sell it.

Re Jacobs, 98 N. Y. 102, 50 Am. Rep. 636; *People v. Mara*, 99 N. Y. 385, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 399, 17 N. E. 343; *Kuhn v. Detroit*, 70 Mich. 534, 38 N. W. 470; *Cooley*, Const. Lim. 6th ed. p. 49.

Messrs. T. R. Kane and O. H. O'Neill, for respondent:

That part of the act in question prohibiting the sale of cream containing less than 20 per cent of fat is a valid exercise of the police powers of the state.

Butler v. Chambers, 36 Minn. 71, 30 N. W. 308; *Polinsky v. People*, 73 N. Y. 65; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315; *State v. Campbell*, 64 N. H. 404, 13 Atl. 585; *Kansas City v. Cook*, 38 Mo. App. 660; *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 127 U. S. 679, 32 L. ed. 254, 8 Sup. Ct. Rep. 992, 1257; *State v. Addington*, 12 Mo. App. 214.

The legislature has the power to require that all cream sold shall come up to a certain standard of richness.

State v. Campbell, 64 N. H. 404, 13 Atl. 585; *People v. Cipperly*, 37 Hun. 324; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315.

64 L. R. A.

If the legislature has the power to fix a standard for the protection of the public health or prevention of fraud, its judgment of what this standard shall be is conclusive upon the courts.

State v. Campbell, 64 N. H. 404, 13 Atl. 585; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315; *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 127 U. S. 686, 32 L. ed. 257, 8 Sup. Ct. Rep. 992, 1257; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *Butler v. Chambers*, 36 Minn. 72, 30 N. W. 308.

The fact that the effect of the law is to prevent the sale of a wholesome article of food does not render the law unreasonable and invalid.

Butler v. Chambers, 36 Minn. 71, 30 N. W. 308; *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315; *Com. v. Shirley*, 152 Pa. 170, 25 Atl. 819.

Nothing but a clear usurpation of power prohibited will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void.

Powell v. Com. 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913.

Mr. W. B. Douglas, Attorney General, also for respondent.

Start, Ch. J., delivered the opinion of the court:

This is an appeal from the judgment of the municipal court of the city of St. Paul convicting the defendant of the offense of selling cream containing less than 20 per cent of fat, contrary to the provisions of Gen. Stat. 1894, § 7002. The record contains no settled case or bill of exceptions; but the judgment recites upon its face that before sentence the defendant's counsel moved that the defendant be discharged on the ground that the statute was unconstitutional; hence the facts charged did not constitute a public offense. Some technical objections are here made to the complaint, but so far as appears from the record, they were not made in the court below, and the sole question for our decision is the constitutionality of the statute. It is in these words: "No person shall sell or offer for sale any cream taken from impure or diseased milk, or cream that contains less than 20 per cent of fat. Whoever violates the provisions of this section shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than \$10 nor more than \$100." The defendant claims that this statute, in so far as it prohibits the sale of cream solely because it contains less than 20 per cent of fat, is unconstitutional, because it is unreasonable, and not a proper exercise of the police power, is based upon an arbitrary classification, and is special legislation, and is an unlawful restraint of trade, and illegally restricts the citizen's right to contract and to pursue a lawful calling, and

deprives him of his liberty and property without due process of law. The section of the statute in question is a part of the General Statutes of the state, which were enacted to prevent deception in the sale of dairy products, and its obvious purpose is to fix a standard for cream, and forbid the sale of any cream, as such, which is below the prescribed standard, whereby unsuspecting purchasers may be defrauded. It must be, and is, construed so as to effectuate such purpose. We accordingly hold that the statute in question forbids, and only forbids, the sale of cream, as such, which is below the prescribed standard. So construed, the statute is a proper exercise of the police power of the state, and is valid. Its constitutionality rests upon the same principles as does the validity of statutes prohibiting the sale of milk unless it contains a prescribed percentage of fat and solids, and other similar statutes. The constitutionality of such statutes has been uniformly sustained. *Butler v. Chambers*, 30 Minn. 69, 30 N. W. 308, 1 Am. St. Rep. 644, and notes; *Com. v. Evans*, 132 Mass. 11; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585; *Kansas v. Cook*, 38 Mo. App. 660. Counsel for the defendant, while practically conceding the validity of statutes fixing a standard for milk, and forbidding the sale of milk below such standard, seeks to distinguish such statutes from statutes of the character of the one we are considering, for the reason that "cream is a natural product, and, when not diseased or impure, is not only harmless, but beneficial as food and for many other purposes, whether it contains 10 per cent of fat or 35 per cent of fat. It is commonly known that there is no practice of adulterating cream as there is in the case of milk, nor of simulating it as in the case of butter, and that pure cream is wholesome, though it contains less than 20 per cent of fat." We cannot take judicial knowledge of the supposed facts thus asserted; for, if this is a matter in which we are required to take judicial notice of the facts, we know that it is entirely feasible to mix pure cream with a limited amount of milk, and produce a mixture which may be sold to the inexperienced as pure cream. Undoubtedly there is less necessity for a statute to prevent deception in the sale of cream than there is of one to prevent fraud in the sale of milk, because the latter may be classed as a necessity, and the former as a luxury, and its sale not as general as that of milk; but the distinction is one of degree, not of principle. In either case the legislature is the sole judge of the necessity and propriety of preventing deception in the sale of the article, by appropriate legislation. *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. And the legislature, by this statute, having, in the exercise of the police power, fixed a standard for all cream to be sold as such, the act is valid.

Judgment affirmed.

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STATE of Minnesota, *Resp't.*,

v.

P. G. HANSON, *Appt.*

(.....Minn.....)

- *1. Sections 7028, 7037, Gen. Stat. 1894, relating to the sale of lard substitutes, construed. *Held*, that they forbid the sale of cottolene which is manufactured so as to resemble lard, unless the package containing it is labeled, "Lard Substitute."
2. Evidence in this case justified the conviction of the defendant of the offense of selling cottolene without its being so labeled.

(*Brown and Lewis, JJ., dissent.*)

(June 21, 1901.)

APPEAL by defendant from a judgment of the Municipal Court of Minneapolis convicting him of violating the provisions of a statute against the selling of lard substitutes. *Affirmed.*

The facts are stated in the opinions.

Messrs. Flannery & Cooke and Wendell Hertig, for appellant:

The manifest purpose of the legislature in enacting the law of 1893 was to take cottolene, a compound consisting of a mixture of beef stearine and refined cotton-seed oil, out of the provisions of the law of 1891, and to permit its manufacture and sale in this state without requiring it to be labeled "Lard Substitute," provided, however, that it shall not be "manufactured in imitation of lard."

The fact of resemblance does not of itself establish the fact of imitation.

The mixture called cottolene may be made "in semblance of lard," or "as a substitute for lard," and "designed to take the place of lard," in either case, without being labeled "Lard Substitute."

A natural and inherent resemblance does not constitute an imitation.

People v. Arensburg, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *Plumley v. Massachusetts*, 155 U. S. 462, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *People v. Meyer*, 44 App. Div. 1, 60 N. Y. Supp. 415.

The sale of white cottolene is not a mis-

*Headnotes by START, Ch. J.

NOTE.—For another case in this series discussing statute requiring imitation lard to be labeled, see *State v. Snow* (Iowa) 11 L. R. A. 355.

As to constitutionality of statute forbidding the sale of oleomargarine unless it is colored pink, see *State v. Myers* (W. Va.) 35 L. R. A. 844.

For regulation of sale of oleomargarine generally, see *State v. Marshall* (N. H.) 1 L. R. A. 51, and note; *Com. ex rel. Allegheny County v. Miller* (Pa.) 6 L. R. A. 633, and note; *Com. ex rel. Allegheny County v. Weiss* (Pa.) 11 L. R. A. 530, and note; *Re Gooch* (C. C. D. Minn.) 10 L. R. A. 330; *Com. v. Huntley* (Mass.) 15 L. R. A. 839; *Com. v. Paul* (Pa.) 30 L. R. A. 396; and *Com. ex rel. Philadelphia County v. Schollenberger* (Pa.) 22 L. R. A. 155.

demeanor within the express wording of the law.

Grosvenor v. Duffy, 121 Mich. 220, 80 N. W. 20.

The legislature might prohibit artificial coloring to create a semblance of lard.

People v. Arensberg, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *Plumley v. Massachusetts*, 155 U. S. 475, 39 L. ed. 228, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Schollenberger v. Pennsylvania*, 171 U. S. 18, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

But it could not require artificial coloring to prevent a resemblance.

Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

Messrs. Frank Healy and Edward F. Waite, for respondent:

This legislation has been greatly modified, if not wholly wiped out, by chapter 280, Laws 1901. The clear intention was to conditionally exempt from the requirements of the act the specific substance styled "cottonene," describing it by its distinctive ingredients, and permit it to be sold without other mark than its own name and the name of its maker, so long as it should be made as a "Lard Substitute" merely, and should not be brought within the class of "simulated articles," i. e., articles defined by the legislature as "made in the semblance of lard, or as an imitation of lard," and by this court as articles "which so resemble lard that they are liable to be passed off on the public as lard."

The amendment gave the manufacturers of cottonene the choice between two courses, each with its appropriate obligation; they might market the article under its and their names only, in which case the duty was imposed to continue to make it so that it should not resemble lard closely enough to be "liable to be passed off on the public as lard;" or they might make it "in the semblance of lard, or as an imitation of lard," in which case they must continue to market it under the brand or label "Lard Substitute." If, therefore, this appellant sold cottonene which was made "in the semblance of lard, or as an imitation of lard," and was not marked "Lard Substitute," he can find no protection under the amendment of 1893. The phrase, "manufactured in the imitation of lard," in the amendment, is precisely synonymous with the phrase "made as an imitation of lard," in the original act, and the latter phrase is synonymous with, "made in the semblance of lard," as used in the same act. The amendment therefore permits the sale of cottonene without the brand or label "Lard Substitute" only when so made as not to be "in the semblance of lard," i. e., not to so resemble lard as to simulate it in appearance and be "liable to be sold and passed off on the public as lard."

McAllister v. State, 72 Md. 390, 20 Atl. 143; *State, Bayles, Prosecutor, v. Newton*, 50 N. J. L. 549, 18 Atl. 77; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277.

If an article of food should, under any circumstances, be marked under such a regulative law, it is difficult to see why the 54 L. R. A.

fact that it bears its natural and inherent outward appearance furnishes any reason for omitting such marking.

Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429; *Pierce v. State*, 63 Md. 592; *State v. Snow*, 81 Iowa, 643, 11 L. R. A. 355, 47 N. W. 777; *State, Bayles, Prosecutor, v. Newton*, 50 N. J. L. 549, 18 Atl. 77; *Stols v. Thompson*, 44 Minn. 271, 46 N. W. 410.

The natural color of an article of food may even be required to be artificially changed in order to prevent deception.

State ex rel. Weideman v. Horgan, 55 Minn. 183, 56 N. W. 688; *Armour Packing Co. v. Snyder*, 84 Fed. 136; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Schollenberger v. Pennsylvania*, 171 U. S. 18, 43 L. ed. 55, 18 Sup. Ct. Rep. 757.

Start, Ch. J., delivered the opinion of the court:

The defendant was convicted in the municipal court of the city of Minneapolis of the offense of selling a can of cottonene, manufactured in imitation of lard, and designed to take its place, without labeling the package "Lard Substitute." He was sentenced to pay a fine of \$25 and costs. He appealed from the judgment, and the important question for our decision is whether his conviction was justified by the evidence. The statute upon which the conviction rests is Gen. Stat. 1894, §§ 7028, 7037. So far as here material, § 7028 is to the effect that every person who manufactures or sells any substance made in the semblance of lard, or as an imitation thereof, or a substitute therefor, designed to take the place of lard, shall cause the package containing it to be labeled "Lard Substitute." The original of this section is Laws 1891, chap. 12, § 3, and it has never been directly amended; but § 12 of the same chapter, which originally declared any violation of the provisions of the act to be a misdemeanor and fixed the penalty, was by Laws 1893, chap. 128, amended by adding thereto substantially this: "Provided, however, that the provisions of this act shall not apply to cottonene, a compound consisting of a mixture of beef stearine and refined cotton-seed oil, where the . . . package . . . shall be labeled . . . with the word 'Cottonene,' . . . and provided, further that said cottonene shall not be manufactured in imitation of lard, and shall not contain any substance deleterious to health." Section 12, as so amended, is now § 7037. It is to be observed that the offense is defined by § 7028, and the gist of it is the selling of any substance made in the semblance of lard, or in imitation thereof, or a substitute therefor, designed to take the place of lard, unless the package containing it is labeled as required, while the proviso of § 7037 excepts from the operation of § 7028 cottonene, consisting of the mixture therein designated, if labeled as such, and if it is not manufactured in imitation of lard, and does not contain any substance deleterious to health. This proviso, then, must be construed as an exception to the statute creating the offense, and as impos-

ing the burden upon a defendant charged with the offense, and shown to have sold any substance made in the semblance of lard, or as an imitation thereof or a substitute therefor, designed to take the place of lard, without the label, of proving that the article sold was within the exception. *State v. Corcoran*, 70 Minn. 12, 72 N. W. 732. No testimony was offered on behalf of the defendant, but it is here claimed that the state affirmatively proved that the article sold was within the exception, and that the proviso to § 7037 was fully complied with by the defendant in making the sale. If this be so, it follows that the evidence is not sufficient to sustain the conviction. The evidence, however, was practically conclusive that the article sold was intended as a substitute for lard, and that it resembled in its appearance commercial lard; that is, lard made exclusively from the fat of the hog, and prepared and sold by the large packing houses of the country. But the defendant insists that such resemblance was a natural one, and has no tendency to establish the fact that it was manufactured in imitation of lard, within the meaning of the statute. That is, it is claimed that the selling of cottolene, which is designed to take the place of lard, without labeling it "Lard Substitute," is not within the statute, although it resembles lard made exclusively from the fat of the hog, unless such resemblance is artificially and intentionally created in manufacturing it. This limitation of the meaning of the words of the statute, "manufactured in imitation of lard," is too narrow. The meaning of these words is to be ascertained by reading them in connection with the provisions of § 7028, which were construed and held constitutional in the case of *State v. Aslesen*, 50 Minn. 5, 52 N. W. 220, in which the court said: "It is evident from its language that its provisions are not confined to articles 'made in the semblance of lard, or as an imitation of lard,' or which so resemble lard that they are liable to be sold and passed off on the public as lard, and which, for the sake of brevity, we may call 'simulated articles.' The act applies as well to any substance made as a 'substitute for lard, and which is designed to take the place of lard,' and which consists of any mixture or compound of animal or vegetable oils or fats, other than hog fat, in the form of lard, whether such substance resembles lard in appearance or not." On the trial of the case cited, the defendant offered to show, not only that cottolene was wholesome, but that it did not resemble lard in appearance. At the next session of the legislature after the filing of the decision in that case the proviso in question was enacted, whereby cottolene, labeled as such, was excepted from the provisions of the statute, if not manufactured in imitation of lard. The statute before its amendment required the label "Lard Substitute" on all articles offered for sale which were made in the semblance of lard, or as an imitation thereof, and also upon any substance designed to take the place of lard, whether it resemble lard or not. Now, it

is manifest that the intention of the amendment was to permit any substance designed to take the place of lard, which does not resemble lard, to be sold under its own label, because such a substance cannot be passed off upon the public as lard. It is equally clear that it was not the purpose of the amendment to permit the sale, without the prescribed label, of any article made in semblance of lard, or as an imitation thereof, so that it would be liable to be put off as lard. To give the amendment any other construction would defeat the very purpose of the statute. It follows that the words of the amendment, "manufactured in imitation of lard," are to be given the same effect as the words, "semblance of lard, or as an imitation of lard," in the original section. We therefore hold that §§ 7028 and 7037 forbid the sale of cottolene which is manufactured so as to resemble lard, unless the package containing it is labeled "Lard Substitute," although such resemblance is a necessary result of its manufacture,—an improbable hypothesis. This construction of the statute does not render it unconstitutional, for it does not prohibit the sale of cottolene, but simply requires that when it is designed to take the place of lard, and so resembles lard that it is liable to be passed off upon the public for lard, the package containing it must be marked "Lard Substitute." Or, in other words, the statute, as we have construed it, does not attempt to prohibit the sale of cottolene. It may be manufactured and sold, but if it is designed to take the place of lard, and is manufactured in imitation of lard, it is not within the provisions of the act of 1893, excepting it from the operation of the act of 1891. In such a case the provisions of the latter act only apply, and it must be labeled "Lard Substitute." On the other hand, if it is not so manufactured, it is within the exception, and the provisions of the act of 1891 do not apply, and it may be sold without such label. There is no hardship in this requirement that cottolene manufactured so as to resemble lard shall be labeled "Lard Substitute." If cottolene is just as wholesome, just as good, and cheaper than lard, let it compete with the hog product on fair terms, under a label declaring the truth,—that it is a substitute for lard, and not lard, as it appears to be. It probably is true in this particular case that the package containing the cottolene was so marked that no intelligent purchaser could be deceived into believing that he was buying lard. But it is the province of the legislature to determine what precautions must be observed to prevent deception in the sale of food products, and courts have no power to substitute something else which they may deem to be equally as efficacious. It is only when the specific means prescribed by the legislature to prevent such deception are arbitrary or prohibitive that the courts can interfere. We hold, upon the whole record, that the evidence is sufficient to justify the conviction of the defendant of the offense of selling a substance manufactured in imitation of lard, and designed to take the place

of it, without the prescribed label, within the meaning of the statute as we here construe it, and, further, that the evidence received for that purpose was competent and material.

Judgment affirmed.

Brown, J., dissenting:

Statutes of the character of the one under consideration in this case are constitutional and valid only when enacted in the interests of the public welfare. A statute prohibiting the manufacture or sale of a wholesome article of food could not be upheld for a moment, but the manufacture or sale of unwholesome food products may be prohibited, and statutes enacted for that purpose are sustained by all the courts. But no case can be found sustaining an absolute prohibition of the manufacture or sale of wholesome articles. Such statutes are within the authority of the lawmaking power when their object or purpose is to preserve the public health, or to prevent fraud and deception by the sale of articles manufactured in imitation of other commodities. To preserve the public health and to prevent fraud and deception of this kind, it is perfectly legitimate and proper for the legislature to prohibit the sale of unwholesome articles of food, and to require that all imitations and substitutes be placed on the market and sold under their true names. Oleomargarine statutes are illustrations on this subject. That article or commodity was manufactured, not only as a substitute for butter, but in imitation thereof, and for the purpose and with the intent of placing it on the market to be sold as butter. To prevent fraud and deception, and in the interests of the public good, laws were enacted whose object and aim was to compel oleomargarine to stand or fall on its own merits. No complaint can be made of such statutes, nor of the decisions upholding them. They become clearly within the police power of the government, and are necessary to the proper protection of the public. The statute under which defendant in the case at bar was prosecuted is §§ 7028-7037, Gen. Stat. 1894. The statute was enacted in 1891, and provides generally that no person shall, within this state, manufacture for sale, or have in his possession with the intent to sell or expose for sale, as lard, any substance not the legitimate product of the fat of the hog, unless such article or substitute be plainly marked "Lard Substitute." Penalties are provided for a violation of the statute. Subsequent to the passage of this act the case of *State v. Aslesen*, 50 Minn. 5, 52 N. W. 220, arose, and was there construed and interpreted. The defendant was charged in that case with violating the statute by selling an article for lard without having it marked and labeled as required by the act, and he interposed in defense that the article sold by him was cottolene. He offered to prove that cottolene was a wholesome article of food, but was not permitted to do so, and his conviction was sustained because of the fact that the article was not properly labeled as re-

quired by statute. In 1893 the legislature, acting evidently on the theory that cottolene was a wholesome article of food, and was proper to be manufactured and sold under its own title and upon its own merits, amended the act of 1891 by adding thereto the following proviso: "Provided, however, that the provisions of this act shall not apply to cottolene, a compound consisting of a mixture of beef stearine and refined cotton-seed oil, where the tierce, barrel, tub, pail, or package containing the same shall be distinctly and legibly branded or labeled in letters not less than one-half inch in length, with the word 'Cottolene' and the name and location of the person or firm manufacturing the same, and provided further that said cottolene shall not be manufactured in imitation of lard and shall not contain any substance deleterious to health" [§ 7037]. By this amendment cottolene was expressly taken from the operation of the prior act, and explicitly recognized as not being a substitute for lard, but a proper and wholesome article of food. So that, under the law as it stands to-day, cottolene may be sold if distinctly labeled "Cottolene" on the pail or the package in which it is contained. And the only provision of the statute which can have any bearing upon the case is the second provision contained in the act of 1893, as follows: "Provided further, that said cottolene shall not be manufactured in imitation of lard, and shall not contain any substance deleterious to health." And the only proper and legitimate inquiry is whether the pail of cottolene sold to complainant was manufactured and sold in imitation of lard. That it was not seems to me beyond controversy. The package in which it was contained was plainly marked "Cottolene," as required by the statutes, was sold to complainant as cottolene, and there is no pretense of a claim that he was deceived or defrauded in any way. He asked for cottolene, and was given that article, not as a substitute or an imitation of lard, but for what it purported to be, and what he asked for and desired to purchase. The burden of proof was upon the state to establish a violation of the law by evidence beyond a reasonable doubt. In this the state wholly failed. It was incumbent upon the prosecution to show and prove that the cottolene sold to complainant was manufactured in imitation of lard,—not that it had the semblance of lard in appearance or color, but that it was in fact purposely and intentionally manufactured as an imitation. Clearly, under this statute, in order to show that an article is made in imitation of another, it is necessary to prove an intention and purpose on the part of the manufacturer to do so. If a combination of the natural ingredients of cottolene, namely beef stearine and refined cotton-seed oil, resembles lard in color, it by no means follows that it was manufactured in imitation of that article. It appeared in this case from the evidence introduced by the state itself that the cottolene in question contained nothing but the ingredients specified in the act of 1893. The purpose

and intent necessary to be shown by the prosecution for the violation of a statute like the one here under consideration are very clearly discussed in the case of *People v. Meyer*, 44 App. Div. 1, 60 N. Y. Supp. 415. The case is one involving the statute on the subject of oleomargarine, and is directly in point. The court there said: "The defect in plaintiff's proof was the omission to show that the appearance of oleomargarine in its natural condition differed from that of the substance which the defendant sold as butter, or, in other words, that the oleomargarine had been changed in some manner so as to make it look like butter. It is settled that the legislature cannot constitutionally prohibit the sale of oleomargarine, except so far as the product is made to simulate some other substance and thereby deceive the people. . . . In order, therefore, that the express prohibition against the manufacture and sale of oleomargarine contained in § 26 of the agricultural law . . . shall be deemed constitutional, it is essential to construe that prohibition with the remainder of the section, as forbidding only the manufacture and sale of oleomargarine when it is manufactured in imitation or semblance of natural butter. Adopting this construction, there was, as has already been said, a failure of proof on the part of the plaintiff, in omitting to give evidence of the imitative character of the substance sold by the defendant. It is impossible to say that the appearance of the oleomargarine had been altered so as to make it resemble natural butter, unless we know in the first instance what oleomargarine looks like in its normal condition. There is no testimony in the record on this subject, and it is not a matter of which the courts can take judicial cognizance." The opinion of the majority in the case at bar, it seems to me, goes far beyond the necessities of the occasion, and is evidence of much labor and ingenuity to sustain this prosecution. They expressly hold that the statutes forbid the sale of cottolene unless the package which contains it is labeled "Lard Substitute," although its resemblance to lard is an incidental result of its manufacture. The decision is palpably in the teeth of the statute, and a construction thereof which renders it unconstitutional and void. It is in the teeth of the statute because the amendment of 1893 expressly provides that the provisions of the prior act—that of 1891—shall not apply to cottolene. Notwithstanding this express declaration of the legislature, the majority apply the former statute to the same extent and with the same force and effect as though the act of 1893 had not been passed. The construction given the statute by the majority renders it unconstitutional and void, because it interprets the same as prohibiting the sale of a wholesome article of food. It is conceded that cottolene is wholesome, and the books will be searched in vain for a case upholding legislation prohibiting the sale of such an article simply because it resembles some other article. For these reasons I dissent.

54 L. R. A.

Lewis, J., dissenting:

I concur with Justice Brown. The reasoning of the majority opinion is based upon purely technical grounds, and I feel it my duty to register a protest. Chapter 12, Gen. Laws 1891, contains a plain and direct prohibition against the selling as lard, and as a substitute for lard, or as an imitation of lard, any compound designed to take the place of lard, unless the same shall be provided with a label containing the words "Lard Substitute," and stating the ingredients and the name of the manufacturer. In the *Aslesen Case* the defendant sold cottolene without labeling it, and it was held that cottolene was a lard substitute, and, if sold, must be labeled as provided by the act. The decision rests upon the theory that this compound was designed to take the place of an old and well-known article, and, such products being comparatively new on the market, their qualities and ingredients are not usually a matter of common knowledge. As stated in the opinion in that case: "Many of them, like cottolene, may be entirely wholesome, but, in this day of the common adulteration of articles of food, others may be composed of deleterious ingredients. And what may be wholesome for one person may be unwholesome for another. Moreover, it is also a matter of common knowledge that, whether well founded or not, there is a popular prejudice against certain ingredients as an article of food. This is so, for example, with cotton-seed oil. Many would not purchase or use a lard substitute of which that oil was an ingredient, or any article of food prepared with it. In view of all these facts, the legislature has seen fit to require the seller of these lard substitutes to label the article which he sells with what, for convenience, we may call a quantitative analysis of its ingredients, and to require the seller of any article of food prepared with such lard substitute to give notice of the fact to the purchaser, so that he may know just what he is buying. This certainly does not deprive the seller of his property without due process of law. No man has a constitutional right to keep secret the composition of substance which he sells to the public as articles of food." Upon this theory, it was immaterial whether the compound, cottolene, was wholesome or not, which was the exact point for review in that case. At the very next session the legislature proceeded to remove the effect of that decision by enacting the proviso of chapter 126, Gen. Laws 1893. In the referred-to decision the court had declared that, even if cottolene was a wholesome preparation, it must be labeled "Lard Substitute;" but the legislature, recognizing the wholesomeness of the article and the public demand for it, amended the act of 1891 by providing that it should not apply where cottolene consisted of a mixture of beef stearine and refined cotton-seed oil, and was labeled "Cottolene," containing the name and location of the manufacturer. In other words, by the amendment the legislature enabled manufacturers of cottolene to place the product on the market upon its

own merits. As a precaution against fraud, and to further protect the public against injurious compounds in the form of cottolene, the second proviso was added, which simply means this: That in the manufacture of cottolene nothing shall be added to the ingredients of its composition (beef stearine and refined cotton-seed oil) which will cause it to be an imitation of lard. If, through the manufacturing process of the ingredients recognized by the statute, cottolene comes out to resemble lard, that fact is immaterial, so long as no foreign substance, deleterious to health, is introduced in its composition. It is well known that lard varies in color, running from a grayish tint to a pure white, according to the care taken in its making; and in like manner cottolene may vary in color. Under the evidence in this case before us, it was conclusively shown that the product was a compound of pure beef stearine and refined cotton-seed oil, although it resembled commercial lard. The reasoning of the main opinion leads to the most absurd results. As if, with the label "Cottolene," in large type, encircling the can, a purchaser might be deceived and his innocence imposed upon, because, on opening the can, he found its contents resembling commercial lard,—a clearer white than might be produced by the natural mixing of the ingredients. With equal reason it may be argued that deceit has been practised, and some concoction imposed on innocence, when lard, in its process of making, does not come out a clear white, as is frequently the case, though made of pure hog fat. As the court has construed the law, it would seem to offer a premium on adulteration, to make the article sell upon its merits as cottolene.

P. H. KRAY, Appt.,

v.

Anton MUGGLI et al., Respts.

(84 Minn. 90.)

*Where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time necessary to establish a prescriptive right to perpetually maintain the same, the riparian owners along such stream of water, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed; and the person who placed the obstruction in the stream, or caused the diversion of the waters, and all those claiming under or through him, are estopped upon principles of equity from restoring the waters to their natural channel or state to the injury of such riparian owners.

(Start, Ch. J., dissents.)

(June 28, 1901.)

*Headnote by BROWN, J.

NOTE.—As to prescriptive rights in artificial condition of a body of water, see *Pewaukee v. Savoy* (Wis.) 50 L. R. A. 836, and note. 64 L. R. A.

APPEAL by complainant from an order of the District Court for Stearns County denying a new trial after judgment in favor of defendant in an action to enjoin him from removing a milldam. *Reversed.*

The facts are stated in the opinion.

Messrs. Reynolds & Roeser, for appellant:

The doctrine of the law of the case is not applicable to the present action for the following reasons:

1. When this court filed its final opinion upon the former appeal it clearly indicated to the litigants that it intended that the action should be retried upon the merits.

2. The questions involved in the present appeal are of great public importance.

Where the questions involved are of great importance, and great public interests are involved, courts frequently withhold their assent from their own previous adjudications.

Hammond v. Inloes, 4 Md. 138; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Hamilton v. Marks*, 63 Mo. 167.

3. The doctrine that a prior decision is conclusive upon subsequent appeals, where such prior decision is erroneous, or that it is conclusive whether right or wrong, is one from which many of the states are receding, and which ought not to exist anywhere.

Hastings v. Foxworthy, 45 Neb. 676, 34 L. R. A. 321, 63 N. W. 955.

4. The doctrine of the law of the case does not apply to the present appeal for the reason that the findings of fact in the present record are materially different, and the principles of law announced on the first appeal are not applicable.

A prior decision is not conclusive upon questions presented on the second appeal, where there are material changes in the evidence, pleadings, or findings.

McNamara v. Pengilly, 64 Minn. 543, 67 N. W. 661; *Fellows v. St. Louis Bridge Co.* 45 Ill. App. 599; *Central R. & Bkg. Co. v. Smith*, 80 Ga. 526, 5 S. E. 772; *Hart v. Delaware, L. & W. R. Co.* 76 Hun, 296, 27 N. Y. Supp. 767; *Walker v. Cole* (Tex. Civ. App.) 27 S. W. 882; *Chicago, St. P. M. & O. R. Co. v. Bryant*, 13 C. C. A. 249, 27 U. S. App. 681, 65 Fed. 969; *Ryan v. Tomlinson*, 39 Cal. 639; *McLennon v. Prentice*, 85 Wis. 427, 55 N. W. 764; *Lane v. Starkey*, 20 Neb. 586, 31 N. W. 238; *Ohio & M. R. Co. v. Hill*, 7 Ind. App. 255, 34 N. E. 646; *Frisby v. Parkhurst*, 29 Md. 58, 96 Am. Dec. 503; *Stanton v. Thompson*, 49 N. H. 275; *New York Small Stock Co. v. Third Ave. R. Co.* 16 Misc. 64, 37 N. Y. Supp. 637; *Bloomfield v. Buchanan*, 14 Or. 181, 12 Pac. 238; *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000; *Elston v. Kennicott*, 52 Ill. 272; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300.

Where the facts are different, and the opinion was not intended to be *res judicata*, but remanded the case for a trial *de novo*, the doctrine of the law of the case does not apply.

Johnson v. Bailey, 17 Colo. 59, 28 Pac. 81; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60.

Section 6878, Gen. Stat. 1894, provides:

"No person or persons shall drain or attempt to drain any lake, pond, or body of water in this state, which has been meandered and metes and bounds established by the government of the United States, in the survey of the public lands."

Where an act is prohibited by law, or the doing of it is a criminal offense, no legal right can be predicated upon said act.

Handy v. St. Paul Globe Pub. Co. 41 Minn. 188, 4 L. R. A. 466, 42 N. W. 872; *Buckley v. Humason*, 50 Minn. 195, 16 L. R. A. 423, 52 N. W. 385; *Bishop, Contr.* §§ 471, 547; 1 Pom. Eq. Jur. § 402; *Sandage v. Studabaker Bros. Mfg. Co.* 142 Ind. 148, 34 L. R. A. 303, 41 N. E. 380; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 674; *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884.

The meandered lakes above the dam, being more than 160 acres in extent, and capable of a beneficial public use for fishing, fowling, boating, or furnishing water supplies for domestic, municipal, or agricultural purposes, are public waters the use of which for such purposes cannot be interfered with by individuals, whether riparian owners or not.

Minn. Gen. Laws 1897, chap. 257, § 1; *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670, 53 N. W. 1139; *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89, 44 N. W. 1141; *Minneapolis Mill Co. v. St. Paul Water Comrs.* 56 Minn. 485, 58 N. W. 33.

The appellant, Kray, being a riparian owner on Knaus lake, as well as an operator, in connection with his hotel, of a steamboat upon the navigable waters of the lakes and river, has suffered a special damage not common to the public; and a private action to enjoin the defendants from interfering with such right can be sustained.

Page v. Mille Lacs Lumber Co. 53 Minn. 492, 55 N. W. 608, 1119; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Potter v. Howe*, 141 Mass. 357, 6 N. E. 233; *French v. Connecticut River Lumber Co.* 145 Mass. 261, 14 N. E. 113.

The defendant Muggli and his grantors have obtained, by adverse possession for a period of more than forty years, the right to maintain a dam across the Sauk river, and to flow the water upon the lands of riparian owners above such dam; and such riparian owners have also, through the adverse possession of themselves and their grantors for the same period, obtained the reciprocal right to have the water remain at such high stage; and the defendant Muggli, and the other defendants claiming under him, are estopped from restoring the water of such river to its original state.

Where the natural flow of water has been diverted or collected by a permanent artificial dam into an artificial channel, and such condition has continued for more than twenty years, the riparian owners along such stream of water obtain the prescriptive right to have the water remain at such high stage, and the person who placed the permanent obstruction in the stream, and all other persons claiming by, through, or

under him, are estopped from restoring the water to its original state.

Beeston v. Weate, 5 El. & Bl. 986, 25 L. J. Q. B. N. S. 115; *Sutcliffe v. Booth*, 32 L. J. Q. B. N. S. 136; *Nuttall v. Bracewell*, 4 Hurlst. & C. 714, 36 L. J. Exch. N. S. 1; *Holker v. Porritt*, L. R. 8 Exch. 107, L. R. 10 Exch. 59, 42 L. J. Exch. N. S. 85, 44 L. J. Exch. N. S. 52; *Roberts v. Richards*, 50 L. J. Ch. N. S. 297, 44 L. T. N. S. 271; *Jones, Easements*, §§ 808-810; Washb. Easements, § 47, pp. 411, 419; *Gould, Waters*, §§ 159, 225, 340; *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344; *Ford v. Whitlock*, 27 Vt. 265; *Belknap v. Trimble*, 3 Paige, 577; *Shepardson v. Perkins*, 58 N. H. 354; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879; *Smith v. Youmans*, 96 Wis. 103, 37 L. R. A. 285, 70 N. W. 1115; *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698; *Canton Iron Co. v. Biwabik Bessemer Co.* 63 Minn. 367, 65 N. W. 643; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *Bullen v. Runnels*, 2 N. H. 255, 9 Am. Dec. 55; *Fleming's Appeal*, 65 Pa. 445; *Green v. Carotta*, 72 Cal. 267, 13 Pac. 685; *Freeman v. Weeks*, 45 Mich. 335, 7 N. W. 904; *Adams v. Manning*, 48 Conn. 477; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Middleton v. Gregorie*, 2 Rich. L. 638; *Reading v. Althouse*, 93 Pa. 400.

The erection of a permanent dam in the year 1856 by the grantors of the defendant Muggli, and the maintenance thereof since that date, have created a new channel or level of the waters of the Sauk river and the several lakes through which the same courses, which has become by long lapse of time the natural channel or level thereof; and the removal of such dam, as threatened by the defendants, is an unlawful interference with such new natural channel of level of said river and lakes, and the water therein.

Where a permanent obstruction has been placed in a natural watercourse, and the flow and level of the waters have been diverted and changed, and such change continues for more than twenty years, the same rights may be presumed in favor of the owners of land through which it flows as if such artificial stream had been the natural one.

Magor v. Chadwick, 11 Ad. & El. 571; *Beeston v. Weate*, 5 El. & Bl. 986, 25 L. J. Q. B. N. S. 115; *Sutcliffe v. Booth*, 32 L. J. Q. B. N. S. 136; *Nuttall v. Bracewell*, Hurlst. & C. 714, 36 L. J. Exch. N. S. 1; *Holker v. Porritt*, L. R. 8 Exch. 107, L. R. 10 Exch. 59, 42 L. J. Exch. N. S. 85, 44 L. J. Exch. N. S. 52; *Roberts v. Richards*, 50 L. J. Ch. N. S. 297, 44 L. T. N. S. 271; *Gould, Waters*, § 225; *Adams v. Manning*, 48 Conn. 477; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879; *Belknap v. Trimble*, 3 Paige, 577; *Finley v. Hershey*, 41 Iowa, 389; *Smith v. Youmans*, 96 Wis. 103, 37 L. R. A. 285, 70 N. W. 1115; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697; *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698; *Shepardson v. Perkins*, 58 N. H. 354; *Watkins v. Peck*, 13 N. H. 360, 40 Am.

Dec. 156; *Fleming's Appeal*, 65 Pa. 444; *Canton Iron Co. v. Bicabik Bessemer Co.* 63 Minn. 367, 65 N. W. 643.

The respondent and other riparian owners have, through the adverse possession of themselves and their grantors for a period of forty years, obtained the prescriptive right to have the water remain at the stage created by the dam, and this artificial condition or level of the water having ripened into the natural condition, the defendants cannot justify the commission of the overt act of removing the dam upon the ground that they have a right to abandon their easement.

A person in the quiet and undisturbed possession of real estate can maintain any and all actions necessary to protect the enjoyment of such possession and all easements pertaining thereto.

Wright v. Lewis, 5 Rich. L. 212, 55 Am. Dec. 714; *Ferguson v. Witsell*, 5 Rich. L. 280, 57 Am. Dec. 744; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Nicholson v. Drennan*, 35 S. C. 333, 14 S. E. 719; *Gress Lumber Co. v. Leitner*, 91 Ga. 810, 18 S. E. 62; *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675; *Swift v. Agnes*, 33 Wis. 240.

Injunction is the proper remedy.

High, Inj. § 794; *Lyon v. McLaughlin*, 32 Vt. 423; *Jones, Easements*, § 879; *Angell, Watercourses*, § 444.

Messrs. G. W. Stewart and Stewart & Brewer, for respondents:

The decision of the court upon the former appeal is the law of this case.

Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; *Johnson v. North Western Teleph. Exch. Co.* 54 Minn. 37, 55 N. W. 829; *Piper v. Sawyer*, 78 Minn. 221, 80 N. W. 970; *Vaule v. Miller*, 69 Minn. 440, 72 N. W. 452; *Schleuder v. Corey*, 30 Minn. 501, 16 N. W. 401; *Tillney v. Wolverton*, 54 Minn. 75, 55 N. W. 822; *Ayer v. Stewart*, 16 Minn. 89, Gil. 77; *Lough v. Bragg*, 19 Minn. 357, Gil. 309; *Woodbury v. Dorman*, 15 Minn. 341, Gil. 274; *Stapp v. The Clyde*, 44 Minn. 510, 47 N. W. 160; *Malmgren v. Phinney*, 65 Minn. 25, 67 N. W. 649; *Hutchinson v. Chicago & N. W. R. Co.* 41 Wis. 541; *Bangs v. Strong*, 4 N. Y. 315; *Forgerson v. Smith*, 104 Ind. 246, 3 N. E. 866; *McKinney v. State ex rel. Nixon*, 117 Ind. 26, 19 N. E. 613; *Williams v. Rogers*, 14 Bush. 776; *Pratt v. Boston Heel & Leather Co.* 134 Mass. 300; *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772; *Richardson v. Richardson*, 100 Mich. 364, 59 N. W. 178; *Pollock v. Cohen*, 32 Ohio St. 519; *Amsden v. Atwood*, 68 Vt. 332, 35 Atl. 311; *Plymouth County Bank v. Gilman*, 3 S. D. 170, 52 N. W. 869; *Holcomb v. Dearing*, 8 App. D. C. 298; *Hickox v. Chicago & C. S. R. Co.* 94 Mich. 237, 53 N. W. 1105.

To establish an easement by prescription, there must be an uninterrupted user or enjoyment of the easement claimed, for the full statutory period of fifteen years.

Mueller v. Fruen, 36 Minn. 273, 30 N. W. 866; *Mattheus v. Stillwater Gas & Electric Light Co.* 63 Minn. 493, 65 N. W. 947.

This user must be adverse, under a claim of right, exclusive, continuous, uninter-

rupted, and with the knowledge and acquiescence of the owner of the estate in, over, or out of, which the easement prescribed for is claimed, and while such owner is able in law to assert and enforce his rights and resist such adverse claim if not well founded.

Washb. Easements, p. 150; Gould, Waters, p. 545; Jones, Easements, § 164.

To constitute title by prescription, there must be a thing claimed which may be granted, and a person to whom the grant may be made and who may be a party to such grant.

Washb. Easements, 137; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Staffordshire & W. Canal Nav. v. Birmingham Canal Nav.* L. R. 1 H. L. 254.

A prescription cannot be for a thing which cannot be raised by a grant, for the law allows prescription only to supply the loss of a grant, and therefore presupposes a grant to have existed.

2 Bl. Com. 267.

The character and extent of a prescriptive right is fixed by user. The extent of a usage of water is evidence only of a right commensurate with that use.

Washb. Easements, 135; *Marchand v. Maple Grove*, 48 Minn. 271, 51 N. W. 606; *Mattheus v. Stillwater Gas & Electric Light Co.* 63 Minn. 493, 65 N. W. 947.

A prescriptive right cannot be claimed in what is common to all.

Washb. Easements, p. 163; *Davis v. Brigham*, 29 Me. 391.

No person can claim a prescriptive right to do that which he cannot be prevented from doing.

Felton v. Simpson, 33 N. C. (11 Ired. L.) 84; *Mebane v. Patrick*, 6 N. C. (1 Jones, L.) 23; Washb. Easements, p. 153.

The sufficiency of possession to mature title depends upon the liability of the occupant to an action of trespass. "This is the test."

Osborne v. Johnston, 65 N. C. 26; *Ashman v. Wigton* (Pa.) 9 Cent. Rep. 629, 12 Atl. 74; *State v. Suttle*, 115 N. C. 784, 20 S. E. 725; *Emery v. Raleigh & G. R. Co.* 102 N. C. 232, 9 S. E. 139; *Sivan v. Munch*, 65 Minn. 500, 35 L. R. A. 743, 67 N. W. 1022.

An easement cannot be prescribed for unless the party claiming it has actually used and enjoyed it as well as claimed the right.

Washb. Easements, 161; *Ware v. Brookhouse*, 7 Gray, 454; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503.

The enjoyment of a thing by one cannot be held to be adverse to another who is in no way injured thereby.

Washb. Easements, 155.

No one can prescribe for a privilege which is common to everyone.

Id. 165; *Thomas v. Marshfield*, 13 Pick. 240; *Gloucester v. Beach*, 2 Pick. 60, note.

In case of an easement arising by prescription, the duties imposed on the owner of the servient tenement are passive and negative to suffer the owner of the dominant tenement to enjoy the easement, and to allow him to enter and amend and repair, and also to refrain from doing any act upon his

own premises which would interfere with the enjoyment of the easement.

Goddard, Easements, pp. 2, 17; *Gale, Easements*, 307; *Johnston v. Hyde*, 33 N. J. Eq. 633; *Goodhart v. Hyett*, L. R. 25 Ch. Div. 182; *Perry v. Pennsylvania R. Co.* 55 N. J. L. 178, 26 Atl. 829.

Where courts have applied the doctrine of estoppel to persons who have acquired a right to the use of the waters of a stream, and who have sought to change such use in a way that would do great injury to the property of those who had relied upon the continuance of the previous use, the following conditions have appeared:

1. The riparian owners have acquiesced, from the inception of the acts of the diverter, in what he has done, and, from the inception, the rights of all parties have been adjusted in view of the changed condition and in reliance upon its permanence.

2. The rights of the dominant owner have been asserted and enjoyed for a long period of years; and the owners of the servient estate, or those directly affected by the exercise of the prescriptive rights, have enjoyed rights and exercised privileges wholly at variance with the right to restore the original condition of affairs for substantially the same length of time.

3. There has been a total abandonment of the original right, and acquiescence in such abandonment, the creation of a new right, and the vesting of valuable property interests based on such new right.

4. The owner of the dominant estate was not seeking to abandon his rights; he was seeking to retain them and exercise them in a different manner, and in a manner which would be injurious to others who had relied upon the continuance of another manner of their exercise.

5. The owners of the servient estate did not seek by the injunction to prevent an abandonment of the easement, but to prevent the exercise of it in a way which would be highly injurious to them, and would profit the user but little.

6. In many of the cases it was claimed and established that the contemplated acts of the defendants would be injurious to the public health, and by exposing marshes, bogs, and slimy shores create a nuisance which would seriously interfere with the enjoyment of the plaintiff's property rights.

7. And lastly, the controlling element in all these cases was that the use of the stream as contemplated by the owner of the dominant estate would directly, adversely, affect the valuable property rights and interests of many persons whose rights had been made and become valuable in reliance upon the permanence of existing conditions, which property rights would be injuriously affected by the contemplated change.

Matheuson v. Hoffman, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879; *Belknap v. Trimble*, 3 Paige, 577; *Lampman v. Milks*, 21 N. Y. 505; *Smith v. Youmans*, 96 Wis. 103, 37 L. R. A. 285, 70 N. W. 1115.

This stream is not a navigable stream for steamboats in its natural state.

A stream which can only be made float-

able by artificial means can in no sense be deemed a public highway.

Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Caldwell v. Sacramento County*, 79 Cal. 347, 21 Pac. 763; *Rouge v. Granite Bridge Corp.* 21 Pick. 344; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Haines v. Welch*, 14 Or. 319, 12 Pac. 502; *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609, 20 Pac. 831.

A private person cannot maintain an action to enjoin the maintenance of a public nuisance or prevent the abatement of one, unless such person is specially injured thereby.

Shaubert v. St. Paul & S. C. R. Co. 21 Minn. 502; *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201, 20 N. W. 140; *Barnum v. Minnesota Transfer R. Co.* 33 Minn. 365, 23 N. W. 539; *Shero v. Carey*, 35 Minn. 423, 29 N. W. 58; *Thelan v. Farmer*, 36 Minn. 225, 30 N. W. 670; *Blackwell v. Old Colony R. Co.* 122 Mass. 1.

An easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist upon its continuance, or to claim damages upon its abandonment.

Jones, Easements, § 6; *Mason v. Shrewsbury & H. R. Co.* L. R. 6 Q. B. 578; *Felton v. Simpson*, 33 N. C. (11 Ired. L.) 84; *Peter v. Caswell*, 38 Ohio St. 518; *Arkwright v. Gell*, 5 Mees. & W. 203; *Brace v. Yale*, 99 Mass. 488.

To create an estoppel *in pais*, some act must be done or omitted, or some declaration made or omitted, or there must be constructive fraud or gross neglect on the part of the party so to be estopped, in regard to the subject-matter claimed.

Caldwell v. Auger, 4 Minn. 217, Gil. 156, 77 Am. Dec. 515; *Califf v. Hillhouse*, 3 Minn. 311, Gil. 217; *Combs v. Cooper*, 5 Minn. 254, Gil. 200; *Pence v. Arbuckle*, 22 Minn. 417; *Haackins v. Methodist Episcopal Church*, 23 Minn. 256; *Whitacre v. Culver*, 8 Minn. 133, Gil. 103; *Sutton v. Wood*, 27 Minn. 363, 7 N. W. 365; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Canton Iron Co. v. Biscobik Bessemer Co.* 63 Minn. 367, 65 N. W. 643; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Dickson v. Kittson*, 75 Minn. 168, 77 N. W. 820; *Bowe v. St. Paul*, 70 Minn. 341, 73 N. W. 184; *Ward v. Dean*, 69 Minn. 466, 72 N. W. 710.

The threatened injury, if any, does not tend to the destruction of the manner of the present use of the land. It can be used as well for pasture with the water drained down as with it in its present condition.

Bond v. Woll, 107 N. C. 139, 12 S. E. 281; *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *Woodford v. Alexander*, 35 Fla. 333, 17 So. 658; *Haskell v. Thurston*, 80 Me. 129, 13 Atl. 273; *Ewing v. Rourke*, 14 Or. 514, 13 Pac. 483; *Outcalt v. George W. Helme Co.* 42 N. J. Eq. 665, 9 Atl. 683; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Ohio River R. Co. v. Gib-*

Jens, 35 W. Va. 57, 12 S. E. 1093; *Albens v. Wheeling & H. R. Co.* 33 W. Va. 1, 5 L. R. A. 371, 10 S. E. 14; *Lazzell v. Garlow*, 44 W. Va. 466, 30 S. E. 171.

Brown, J., delivered the opinion of the court:

This was an action to restrain and enjoin defendants from removing or destroying a certain milldam across Sauk river at Cold Springs, in Stearns county. The defendants recovered in the court below, and plaintiff appeals from an order denying a new trial. A former appeal in the case is reported in 77 Minn. 231, 45 L. R. A. 218, 79 N. W. 964, 1026, 1064. The facts are substantially as follows: In 1856 a dam was built and constructed across Sauk river at Cold Springs, Stearns county, by the Cold Springs Mill Company, which has ever since, except during a short period in 1865, when out of repair, been maintained for the purpose of developing water power to propel and operate mill machinery. No authority was obtained to so construct or maintain the dam by application or resort to legal proceedings, but the same was so built and constructed without special or granted right, and subsequently maintained by the mill company and its successors for over forty years, with the acquiescence and consent of the owners of riparian property affected thereby, by reason of which continued maintenance, and the consequent raising of the level of the water, and the adverse, uninterrupted, and exclusive use of the dam for said period of forty years, the mill company and its successors, Muggli and his grantors, acquired the right by prescription to perpetually maintain the same. The effect of the dam was to raise the level of the waters of the river to a height of 7½ feet, cause the same to set back and overflow large tracts of adjacent land to a distance of about 16 miles up the river, and the formation of several lakes and ponds along its course. By the construction of the dam, and the consequent raising of the level of the waters of the river, the greater part of the land described in the complaint has since that time been overflowed and rendered valueless for agricultural purposes. The defendants, other than defendant Muggli, own land abutting upon the river, and are residents and freeholders of the towns through which the river runs and flows. Nearly all of said defendants and their grantors have for more than forty years owned and occupied the lands so adjacent to said river and the lakes, and have cultivated and improved the same with reference to the conditions created and caused by the dam and the increased quantity of water occasioned thereby. Some of the defendants owned and occupied land bordering on the river prior to the construction of the dam, and, so far as the record in the case shows, at no time did they object to the dam or to its maintenance. At the time of the construction of the dam the public domain in this section of the state was unsurveyed. It was subsequently surveyed, and with reference to the conditions existing, with the wa-

ters of the river raised above its natural level 7½ feet, and the lakes formed thereby were meandered in all respects as though natural bodies of water. Some time prior to the commencement of this action defendant Muggli, who owns the mill property, entered into a contract with the other defendants by which he attempted to sell and transfer to them the right to take out and remove the dam; such other defendants paying him for that right and privilege the sum of \$5,000. It is claimed by such defendants that by the removal of the dam large tracts of submerged land will be reclaimed and made valuable for agricultural purposes. Acting under this contract, such defendants threatened to take out and remove the dam, and this action was brought to restrain them from doing so.

The action was tried in connection with that of Friedman against the same defendants, 86 N. W. 1102, the object of which was the same as the object of this action. They were submitted to this court together. Plaintiff in this action is in the actual possession, under claim of title, of land bordering on the river, and has improved the same with reference to the conditions existing subsequent to the construction of the dam. His improvements were made in reliance upon the continuance of such conditions, and that the level of the waters in the lakes would remain as it had existed for years prior thereto, and for purposes of a pleasure resort, and for boating, fishing, and other amusements, in and about which improvements he expended a large sum of money, which will be practically a total loss if the dam is taken out. A portion of the land has been used for the pasture of stock, and the stage of water as made by the dam is necessary to be maintained in order that he may fully enjoy his property. He placed a steamboat in the river at Cold Springs, which boat is used for transporting passengers from that point to a distance of about 20 miles up the river; and, if the waters are lowered to their stage before the erection of the dam, the river will be made non-navigable, and the lakes almost wholly destroyed. In the other case (Friedman against the same defendants, 86 N. W. 1102) the plaintiff therein owns a large tract of land bordering on the river, and has been such owner and in the actual possession for the past thirty years. His land is used exclusively for farming and agricultural purposes. His fences, buildings, and other improvements were erected and made with reference to the artificial stage of the waters, and, if lowered by the removal of the dam, he will be greatly injured and damaged in the enjoyment of his property. The findings of the trial court with reference to the rights of the respective parties in the two actions are very full, and detail the facts with greater particularity than is necessary in this opinion. What we have stated, however, will give a general idea of the situation of the parties and the merits of the controversy. When the action was here on the former appeal, it was determined adversely to plaintiff on the theory

of comparative equities; it being held by the majority of the court at that time that the continued maintenance of the dam would work a greater pecuniary injury and damage to the defendants, who, as we have noted, purchased the right to remove the same, than the removal thereof would result to plaintiff. The reasoning of the opinion on the former appeal we are satisfied, after mature reflection, was erroneous and cannot be followed. The evidence before us at this time is materially different from what it was on the former trial. The trial court expressly finds that there was received on this trial a large mass of new and additional evidence, and the findings of fact are different in one respect, at least, from what they were on the former trial. This being the situation, the doctrine of the law of the case does not apply. None of the cases hold that such doctrine applies on the second appeal of the same case, where the evidence on the second trial was essentially different than on the first. *McNamara v. Pengilly*, 64 Minn. 543, 67 N. W. 661. To follow the reasoning of the former decision would result in confusion and flagrant inconsistencies. Although the defendants may have shown that the continued maintenance of the dam would work a greater injury to their property and rights than the removal thereof would work to the plaintiff's property, in another action brought by a riparian owner desiring the continuance of the dam it might be shown that the injury and damage to him and his rights would be superior and greater than the injury to the same defendants. So that we would have in one action the solemn judgment of the court that, as between the parties to the particular action, the dam should be maintained in its present condition, and in another action, where other interested parties might seek to have the dam maintained, the solemn adjudication of the court that it be removed. If the equities, from a pecuniary standpoint, may be compared and applied at all, they must, in the nature of the surrounding conditions, be applied as between all those riparian owners and interested parties who desire the removal of the dam on the one hand, and all those desiring it maintained on the other. If the equities in favor of those desiring the removal were collectively greater and superior to those who desire its maintenance, the comparison might possibly be given effect. But we are aware of no rule of law under which all such parties could be compelled to join in such an action. It is clear, however, that as between individual owners, contending on the one hand for the maintenance of the dam and on the other for its removal, to apply the doctrine would be to inject into the situation difficulties and conflicting results, from which the court could not extricate itself. It appears from the memorandum of the learned trial judge that his views of the law on this subject were fully in accord with the result we have reached, but he had no alternative but to apply the rule laid down in the former decision of the case. Plaintiff in this action

is in the actual possession of the land described in the complaint, and such possession is sufficient on which to base a right of action. *Witt v. St. Paul & N. P. R. Co.* 38 Minn. 122, 35 N. W. 862.

Passing the question as to comparative equities, we come directly to the main controversy in the case, namely, what right in law or equity has the plaintiff to insist upon the continued maintenance of the dam? The right to maintain it, on the part of the mill company, was acquired by prescription. The mill company, in erecting it, obtained no express grant to do so from the riparian owners; but the erection and maintenance thereof for more than forty years created a prescriptive right to continue its maintenance perpetually. The inquiry is, What right, if any, accrued to the plaintiff and his grantors, and the other owners of property bordering on the river and the lakes formed thereby, as a result from the acts of the mill company and the acquisition by it of the prescriptive right to maintain the dam? The riparian owners improved their property, erected their buildings and fences with reference to the artificial stage of the water as made by the erection of the dam, and acquiesced in its maintenance during the time necessary to create and establish in the mill company and its successors the perpetual right to do so. It is contended on the part of plaintiff that there grew out of the relations between the parties, with respect to the construction and maintenance of the dam, reciprocal rights and privileges, —the right on the part of defendants to maintain it, and the right on the part of plaintiff to insist that it be maintained; while it is contended on the part of defendants that the only rights or privileges resulting from such relations accrued to them, that they may maintain the dam so long as they feel inclined to do so and then destroy it, regardless of the consequences to plaintiff and other riparian owners, and that the only right or benefit which accrued to plaintiff is the very valuable privilege of quietly submitting to the wishes and pleasure of defendants. We adopt the contention of plaintiff as most in consonance with the equity and justice of the case. If plaintiff and his grantors acquired a reciprocal right to have the dam maintained, it is not material that its removal will result in less injury and damage to them than to defendants. Prescriptive rights find no support in pecuniary considerations. It is a right or privilege appurtenant and incident to realty, and passes with the title thereto.

The authorities are numerous that where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time necessary to establish a prescriptive right to perpetually maintain the same, the riparian owners along such stream of water, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed; and the person who placed the

obstruction in the stream, or caused the diversion of the waters, and all those claiming under or through him, are estopped upon principles of equity from restoring the waters to their natural channel or state. *Beeston v. Weate*, 5 El. & Bl. 986; *Roberts v. Richards*, 50 L. J. Ch. N. S. 297; *Jones, Easements*, § 808; *Gould, Waters*, §§ 159, 225; *Arkwright v. Gell*, 5 Mees. & W. 203; *Belknap v. Trimble*, 3 Paige, 577. In the latter case, one involving the question here presented, the court said: "I apprehend, also, that this rule must be reciprocal, and that a proprietor of the head of a stream, who has changed the natural flow of the waters and has continued such change for more than twenty years, cannot afterwards be permitted to restore it to its natural state, when it will have the effect to destroy the mills of other proprietors below which have been erected in reference to such change in the natural flow of the stream." In the case of *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344, a case involving this principle, it appeared that the course of a stream, running across the land of defendant to plaintiff's land, was changed by a sudden and unusual flood, so that it did not thereafter flow over the land of the latter. Defendant permitted the water to run in the new channel for ten years, and it was held that his acquiescence in the new conditions for so long a time gave rise to a right in plaintiff to insist that the new remain as the natural conditions. Other cases supporting this same doctrine are: *Ford v. Whitlock*, 27 Vt. 265; *Shepardson v. Perkins*, 58 N. H. 354; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879. The latter case is very similar to the one at bar, and directly in point. The court there said: "The exclusive enjoyment of water in a particular way for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title against a right in any other person, which might have been, but was not, asserted. This rule must be reciprocal, and one who has taken the water from the original channel, and has continued to divert and enjoy it for a period beyond the statute of limitation as to real actions, cannot afterwards be permitted to restore it to its original state, when it will have the effect to destroy or materially injure the property of those through or by which it formerly flowed." *Smith v. Youmans*, 96 Wis. 103, 37 L. R. A. 285, 70 N. W. 1115; is also directly in point. It is there held that it is but a fair inference that riparian owners, in view of advantages that might or would accrue to them by raising the level of the waters of the lake on which their lands border, were induced to consent and acquiesce therein, and in the use of the dam and waters as raised thereby, in view of which it was held that the relations and interests of the parties thus originated and created became fixed by prescription, and imposed upon each reciprocal rights and duties. The 54 L. R. A.

court said: "It has long been settled that the artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained. The watercourse, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural watercourse prescriptively; and 'when a riparian owner has diverted the water into an artificial channel, and continues such change for more than twenty years, he cannot restore it to its natural channel, to the injury of other proprietors along such channel, who have erected works or cultivated their lands with reference to the changed condition of the stream, or to the injury of those upon the artificial watercourse who have acquired by long user the right to enjoy the water there flowing.'" See also *Canton Iron Co. v. Buwabik Bessemer Co.* 63 Minn. 367, 65 N. W. 643.

The dam in question, having been erected for the purpose of developing power to operate mill machinery, must be taken to be a permanent obstruction; and, it having existed and been maintained as such for so great a length of time, the artificial conditions created thereby must be deemed to have become the natural conditions. There is no suggestion in the evidence that the dam was placed in the river for temporary purposes, and, even though it may at one time have been out of repair, it was nevertheless originally intended as a permanent structure. The authorities all hold, as far as our examination has extended, that in such cases the conditions arising from the permanent obstruction, though artificial to begin with, become by long lapse of time the natural conditions, and interested parties are bound by the rules of law applicable to such conditions. *Magor v. Chadwick*, 11 Adol. & E. 571; *Beeston v. Weate*, 5 El. & Bl. 986; *Roberts v. Richards*, 50 L. J. Ch. N. S. 297; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879; *Finley v. Hershey*, 41 Iowa, 389; *Murphy v. Gates*, 78 Me. 300, 4 Atl. 698. In the case at bar even nature herself became adapted to the new surroundings. A native growth of hard-wood timber sprang up along the shores of the lakes formed by the raise of the river, thus giving a natural effect and appearance to the conditions created by the dam. The government, in the survey of the lands in that vicinity, recognized the artificial as the natural state, and surveyed the public lands with reference to the lakes, meandering them precisely as other natural bodies of water are surveyed and meandered. There can be no difference on principle between cases where the natural channel of a stream is changed and diverted, and those where a permanent obstruction is placed therein. In either case the rights of the parties are essentially the same.

An examination of the books discloses that this same doctrine is applied to public highways and public parks. Where a highway or public park has been laid out by lawful authority, or acquired by dedication or prescription, the owners of property abutting thereon acquire a special right in the continuance of the park, street, or highway, as the case may be, of which they cannot be deprived except by due process of law. The right accrues to them, in cases where the highway or park is acquired by dedication, by the same proceedings and acts that vest the right in the public. Where land is expressly dedicated for a public park, and is improved as such by the public authorities, special rights result and accrue to abutting owners, which vest and are created by the act of dedication. *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286-292, 1 L. R. A. 493, 39 N. W. 629. In the case of *Moose v. Carson*, 104 N. C. 431, 7 L. R. A. 548, 10 S. E. 689, it was held that the owners of lots cannot be deprived of the easement appurtenant in the street adjacent thereto, which is distinct from the public right, nor can the legislature grant power to take it from them. The abutting owners in such cases have the right to insist that the street remain. The case of *Le Clercq v. Gallipolis*, 7 Ohio, pt. 1, p. 218, 28 Am. Dec. 641, was an action by owners of lots adjoining a public park, which had been dedicated to the public use by the owner of the land, to enjoin the public authorities from vacating the park. It was there held that the plaintiffs, though individual owners of lots abutting the public square, could maintain their action to preserve the park for public use. It appeared that they improved their property with reference to the park, and the decision was placed distinctly on the ground that the act of dedication conferred upon them a separate and independent right to have the park maintained. In the case of *Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761, it was held that the owners of lots abutting the public street have a peculiar and distinct interest in the easement, and that such interest is distinguished from the rights of the general public, in that it becomes an interest legally adhering to the contiguous grounds and buildings thereon, by affording more convenient facilities for their use; and, as the owner of the abutting property may have erected his buildings and made his improvements with reference to the street as existing, it is a valuable property right, which is recognized by the law, and cannot be appropriated or taken from him without his consent. *Elliott, Roads & Streets*, §§ 150, 877. The act which gives rise to the public right, the act of dedication, vests a distinct and independent right in abutting property owners, which they may protect by application to a court of equity. The doctrine of these cases is applicable to the case at bar. The mill company acquired its right to maintain the dam by prescription, and during the time such right was maturing a reciprocal right in the

riparian owners to insist that it be maintained, at least that no overt act be taken for its removal, was also maturing, which ripened and became equal to the right of the mill company upon the completion of the prescriptive period. The reciprocal right thus created was not merely a personal one, but a right appurtenant and incident to the lands.

Something was said on the argument with reference to the right of a mill owner to abandon his mill and permit the dam to become out of repair and finally destroyed by the elements, and the question was suggested as to whether he could be compelled to repair the same or be required to maintain the dam after its abandonment; and it is further mooted whether or not the riparian owners would have the right to enter upon the mill owner's property, in the case of his failure or neglect to keep the dam in repair, and put it in order and maintain it at their own expense. These questions are not involved in the case, and we do not decide them. When they are presented in any proper case, they will be taken up and disposed of in the usual way. It may be doubted whether the mill owner could be compelled to maintain the dam in good repair. No principle of law making it his duty to do so now occurs to us. But it is not so clear but that the riparian owners, having acquiesced in the maintenance of the milldam for such a length of time as to create a perpetual right in the mill owner to maintain it, out of which, within the authorities we have cited, grew the reciprocal right to insist that it be not disturbed, and that the water as raised by the dam be maintained at its artificial height, would have the right to enter upon the property and repair any defects in the dam, and keep and maintain it in order and repair at their own expense. But these questions are not before the court, and we do not decide them, nor do we wish to be understood as expressing any opinion with reference thereto. The action is to restrain and enjoin defendants from taking any active or affirmative steps looking to the removal of the dam, and whether they may be compelled by law to keep it in repair is not involved in the determination of the case. We hold that they may be restrained from committing any overt act, and from taking any affirmative steps looking to the removal of the dam. Perhaps the apparent difficulties in the matter of keeping the dam in repair after abandonment by the mill owner may be relieved and obviated by an application of the provisions of chapter 88, Laws 1897. We have not considered the question whether defendants could be restrained from taking out the dam because of the statutes prohibiting the draining of meandered lakes. The disposition of the case on the other question renders it unnecessary.

The order appealed from is reversed.

Start, Ch. J., dissents.

Peter M. WALLIN, *Resp't.*,
v.
EASTERN RAILWAY COMPANY of Min-
nesota, *Appt.*

(.....Minn.....)

*1. The complaint in this action states that appellant operated a railroad in the state of Wisconsin, and engaged a "bridge gang" at West Superior to operate from that point the repair and reconstruction of bridges along its line. As a part of the consideration of the hiring contract, appellant agreed to daily transport the men to and from West Superior to the station nearest the place of their day's labor, by means of its regular trains, and for their transportation from such station to their point of work they were furnished hand cars, to be propelled by themselves. While respondent, who was one of the crew, was riding on a hand car from the place of that day's work to a station where they would board appellant's train back to West Superior, another hand car, propelled by other members of the same gang, overtook the first car, and was negligently propelled against it, derailing it and causing injury to respondent. One of the handles on the front end of the rear car, as it was then approaching, was broken off; and, because of its absence, the other handle on the same end of that car caused the preceding car to be pushed laterally and derailed. Held, that the complaint states a cause of action, in the following particulars: The respondent and other members of the crew were employees of appellant, and at the time of the injury were engaged in their duties as such, within the meaning of chapter 220, Wis. Laws 1898. *Benson v. Chicago, St. P. M. & O. R. Co.* 78 Minn. 808, 80 N. W. 1050, distinguished.

2. Appellant was guilty of contributory negligence in failing to provide suitable rules and regulations for the control and operation of hand cars under such circumstances.

3. The defective handle may, under the circumstances, have been the proximate cause of the injury, and the proper rule in such case is as follows: "A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced person fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow if they had occurred to his mind." *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640, approved.

(Brown and Lovely, JJ., dissent.)

(May 10, 1901.)

*Headnotes by LEWIS, J.

NOTE.—For other cases in this series as to injury to railroad employees on hand cars, see *Steffenson v. Chicago, M. & St. P. R. Co.* (Minn.) 11 L. R. A. 271; *Clarke v. Pennsylvania Co.* (Ind.) 17 L. R. A. 811; and *Howard v. Delaware & H. Canal Co.* (C. C. D. Vt.) 6 L. R. A. 75.

As to duty of master to promulgate rules for the safe conduct of his business, see *Nolan v. New York, N. H. & H. R. Co.* (Conn.) 43 L. R. A. 805, and *note*.

54 L. R. A.

A PPEAL by defendant from an order of the District Court for Hennepin County denying a new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed*.

The facts are stated in the opinions.

Mr. W. E. Dodge, for appellant:

Plaintiff and his companions, members of the bridge gang, were not, within the purpose and meaning of chap. 220, Wis. Laws 1893, at the time of the alleged collision and injury, engaged in the discharge of their duties under their employment.

The law does not require the master to promulgate rules for the protection of its servants where the risks and dangers are obvious or arise from the negligence of co-servants engaged in the common employment.

Berrigan v. New York, L. E. & W. R. Co. 131 N. Y. 582, 30 N. E. 57; *Benson v. Chicago, St. P. M. & O. R. Co.* 78 Minn. 303, 80 N. W. 1050; *Morgan v. Hudson River Ore & I. Co.* 133 N. Y. 666, 31 N. E. 234; *Rutledge v. Missouri P. R. Co.* 110 Mo. 312, 19 S. W. 38; *Voss v. Delaware, L. & W. R. Co.* 62 N. J. L. 59, 41 Atl. 224; *Abel v. Delaware & H. Canal Co.* 103 N. Y. 581, 9 N. E. 325.

The absence of one of the handles from one corner of the hand car following that on which the plaintiff was riding was not the proximate cause of the derailment and consequent injury to the plaintiff; and the derailment was not such a consequence as, under the facts pleaded, could or ought to have been foreseen by the defendant as likely to follow the absence of the handle.

Patterson, Railway Accident Law, pp. 11 *et seq.*; 1 *Bailey, Personal Injuries Relating to Master & Servant*, § 1014; *Weisel v. Eastern R. Co.* 79 Minn. 245, 82 N. W. 576; *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147, 64 N. W. 891; *Steffen v. Chicago & N. W. R. Co.* 46 Wis. 259, 50 N. W. 348; *Cincinnati, N. O. & T. P. R. Co. v. Mealer*, 1 C. C. A. 633, 6 U. S. App. 86, 50 Fed. 725; *Lee v. Central R. & Bkg Co.* 86 Ga. 231, 12 S. E. 307; *Louisville, N. A. & C. R. Co. v. Southwick*, 16 Ind. App. 486, 44 N. E. 263; *Reid v. Evansville & T. H. R. Co.* 10 Ind. App. 385, 35 N. E. 703; *Denver & R. G. R. Co. v. McComas*, 7 Colo. App. 121, 42 Pac. 677; *Sellers v. Richmond & D. R. Co.* 94 N. C. 654.

Messrs. Rome G. Brown and Charles S. Albert also for appellant.

Mr. Ludvig Aretander, for respondent:

Plaintiff and his companions were at the time of the collision engaged in the discharge of their duties as employees of the defendant, within the meaning of chap. 220, Wis. Laws 1893.

Benson v. Chicago, St. P. M. & O. R. Co. 75 Minn. 163, 77 N. W. 798; *Rosenbaum v. St. Paul & D. R. Co.* 38 Minn. 173, 36 N. W. 447.

In an action in tort it is not necessary, in order to make the master liable for the acts of his servant, that the servant should have acted within the scope of his employment;

it is sufficient if the act is in the course of his employment.

Jaggard, Torts, p. 258; *Whatman v. Pearson*, L. R. 3 C. P. 422.

Defendant's failure to establish and promulgate proper and necessary rules for the safe operation of hand cars constitutes actionable negligence.

1 Shearm. & Redf. Neg. § 202; *Wood, Mast. & S.* § 403, p. 794; *Fraker v. St. Paul, M. & M. R. Co.* 32, Minn. 54, 19 N. W. 349; *Steffenson v. Chicago, M. & St. P. R. Co.* 45 Minn. 355, 11 L. R. A. 271, 47 N. W. 1068; *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 95, 69 N. W. 640; *Rosenbaum v. St. Paul & D. R. Co.* 38 Minn. 173, 36 N. W. 447; *McDonough v. Lanpher*, 55 Minn. 501, 57 N. W. 152; *Ewald v. Chicago & N. W. R. Co.* 70 Wis. 421, 36 N. W. 12; *McGregor v. Auld*, 83 Wis. 539, 53 N. W. 845; *Northwestern Union Packet Co. v. McCue*, 17 Wall. 508, 21 L. ed. 705; *Brydon v. Stewart*, 2 Macq. H. L. Cas. 30; *Adams v. Iron Cliffs Co.* 78 Mich. 271, 44 N. W. 270; *Broderick v. Detroit Union R. Station & Depot Co.* 56 Mich. 261, 22 N. W. 802; *Walbert v. Treasurer*, 156 Pa. 112, 27 Atl. 65; *Cleveland, C. O. & St. L. R. Co. v. Martin*, 13 Ind. App. 485, 41 N. E. 1052; *Parkinson Sugar Co. v. Riley*, 50 Kan. 401, 31 Pac. 1090; *Swadley v. Missouri P. R. Co.* 118 Mo. 268, 24 S. W. 140.

The defective condition of the second hand car (one of its front handles being broken off) was a concurring and contributing cause of the accident, and defendant's carelessness in furnishing this defective car constitutes actionable negligence.

Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640.

Lewis, J., delivered the opinion of the court:

The complaint in this action states, in substance: That the defendant is incorporated under the laws of the state of Wisconsin, owning and operating a line of railway between St. Paul, Minnesota, and West Superior, Wisconsin, and that about 22 miles of its tracks extend through the state of Wisconsin. That in the year 1899 defendant was engaged in repairing and reconstructing the wooden bridges and culverts on that division of its line extending from the city of West Superior, Wisconsin, to the village of Sandstone, Minnesota, for which purpose defendant employed a gang of about twelve men, comprising carpenters and helpers, designated as the "bridge gang." The plaintiff was a carpenter by trade, and on May 12, 1899, was employed by defendant to work as a member of the bridge gang, to assist in the repairing and reconstructing of bridges and culverts on the Wisconsin side of defendant's line of railway. That all members of such bridge gang were at the time of their employment by defendant located at West Superior, Wisconsin. That such bridge-repair work was then and there carried on by defendant from West Superior as the starting point, and as a part of the contract of employment of the plaintiff, and in consideration of his agreement to perform

such services, defendant undertook, promised, and agreed with plaintiff to carry him over its line of railway every morning from West Superior to the places along its tracks where he would be required to work during the day, and every evening back again to West Superior, by means of regular trains to the nearest station, and from such point to the place of work by hand cars. It is further alleged: That on October 4, 1899, and during the whole of that day, such bridge gang, including plaintiff, were, in the course of their employment with defendant, engaged in repairing a certain bridge on defendant's line of railway at a point in Wisconsin about 11 miles southwest of West Superior. That at about 5:30 o'clock in the afternoon of that day, while so engaged in such employment, plaintiff, with the other members of the bridge gang, was ordered by defendant to go upon one of defendant's hand cars, so furnished, and to assist in propelling the same over defendant's tracks and railroad line towards Saunders, for the purpose of enabling plaintiff and members of the bridge gang to take defendant's passenger train back to West Superior. That, while plaintiff was engaged in his duty as such employee in propelling such hand car, defendant then and there caused another hand car to be also propelled over such track by other servants of defendant, members of the same bridge gang, in close proximity to and immediately following the hand car propelled by plaintiff. The car in charge of the other members of the bridge gang was defective, in that one of the handles on the front end of the car, as it was then proceeding, was broken off, and the car was so carelessly and negligently handled by the parties in charge of it that, without fault on plaintiff's part, and without any warning or notice, it ran into and collided with the preceding car, upon which plaintiff was riding, and by reason of the absence of the handle the preceding car was pushed off the track and derailed, thereby injuring plaintiff. It is then charged that defendant was guilty of negligence by its failure to provide reasonable rules and regulations to control the running of hand cars upon its tracks. The complaint then sets forth chap. 220, Wis. Laws 1893, which provides that a railway company shall be liable for damages sustained within that state by any employee of such company, without contributory negligence on his part, when injuries are occasioned by any defective apparatus, etc., or while engaged in operating trains, and while engaged in the performance of his duty as such employee, which injuries shall have been caused by carelessness or negligence of any other employee. This complaint was demurred to upon the ground that it does not state facts sufficient to constitute a cause of action, and, the demurrer being overruled, defendant appeals. Defendant attacks the complaint upon three independent grounds: First, that plaintiff and his fellow workers were not, at the time of plaintiff's injury, employees, engaged in their duties as such, within the purpose and meaning of the Wisconsin act;

second, that, under the circumstances alleged in the complaint, defendant was not required to furnish rules regulating the use and operation of hand cars; third, that the absence of one of the handles from the following car was not the proximate cause of plaintiff's injury, and that the derailment of the car was not such a consequence, under the facts pleaded, as could or ought to have been foreseen by defendant as likely to follow the absence of the handle.

1. In support of the first proposition appellant relies upon the case of *Benson v. Chicago, St. P. M. & O. R. Co.* 78 Minn. 303, 80 N. W. 1050. In that case the railway company were engaged in repairing and resurfacing its track, and, for convenience, kept and maintained, on a side track near where the repairs were being made, a number of cars for the boarding and lodging of the men. When the necessities of the work required the men to be separated some distance from these cars, the railway company furnished hand cars for the convenience of the men, on which to transport themselves to and from their occupation; and, while plaintiff in that action was riding upon a hand car between the place of his employment and the boarding cars, another hand car, carrying other employees, engaged in similar work, overtook and collided with it, whereby the injury was occasioned. It was held that at the time of the injury the men in charge of the hand cars were not engaged in the discharge of their duties under their employment, within the meaning of the Wisconsin act. The decision rests upon the ground that defendant had no control over the men at that time, was not boarding them, had not undertaken to transport them to and from their work, and that the hand cars were furnished merely for the convenience of the employees, who were in no sense acting in the performance of their regular duties. The facts stated in the complaint we are now considering are entirely different. While there is an apparent lack of candor and fullness in the allegations of the complaint upon the question whether or not the wages of the men covered the entire time of their absence from West Superior, yet we think it must be inferred from the statements therein contained that the employment for each day commenced at the time they left West Superior, and ended at the time of their return. It is stated that the men were employed at West Superior; that the work of repairing and reconstructing was conducted from that point; that, as a part of the consideration of their employment, the defendant agreed to transport them to and from the places of work by the means specified; and that during the whole of the day of the occurrence of the injury they were engaged in the performance of their duties as such employees. We, therefore, consider the complaint sufficient in this respect,—that it shows with reasonable certainty that at the time of the injury not only respondent, but the other members of the bridge gang in charge of the other car, were employees of

appellant, and engaged in the performance of their duties as such.

2. Conceding, then, that respondent and the other men in charge of the hand cars were employees of appellant, and as such engaged in the performance of their duties at the time of the injury, we now consider whether or not the company was required to have in force suitable rules and regulations to govern and control the operation of hand cars under such circumstances. It is well known that the operation of hand cars by men engaged in repairing a railway track is attended with considerable danger. Men frequently go in separate gangs on two cars to some point upon a railroad, and are obliged to run rapidly to avoid passing trains, and accidents are not infrequent as a result of collisions of hand cars thus operated; and it would seem that such business is of so dangerous and hazardous a character that ordinary men who are called upon to take charge of hand cars under such circumstances should be guided by reasonable rules and regulations. In the case of *Steffenson v. Chicago, M. & St. P. R. Co.* 45 Minn. 355, 11 L. R. A. 271, 47 N. W. 1066, reference is made to the danger of operating hand cars; and in the case of *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640, it appears that a rule of that company was in force which required hand cars to be kept apart for a distance of 540 feet. It is true these men were not engaged in the same capacity as section men are, who remain constantly at work along the track for the purpose of repairing it, and are usually in charge of some manager or section boss, but that fact would not lessen the duty of the master to impose rules and regulations for the operation of hand cars. It would, rather, tend to increase that duty; for there would be more necessity of reasonable regulations with respect to inexperienced men for such purposes than where a section crew is operating under the control of a manager. This requirement should not be regarded as a hardship upon a railway company, as it tends to the safety of the public as well as employees, and certainly inures to the protection of the company itself. Our conclusion is that, under such circumstances, it was negligence on the part of appellant to place its employees in charge of such defective car, and permit them to operate it in the manner stated, in the absence of reasonable rules and regulations for their guidance.

3. If the members of the bridge gang riding on the rear car were employees of defendant, and engaged in their duties as such, it follows, under the Wisconsin act, that appellant is responsible for the injury resulting by reason of the collision of the cars, provided such collision was caused by the negligence of those in control of the rear car, and without contributory negligence on respondent's part. It is charged in the complaint that the injury was occasioned in that manner, and it therefore, in that respect, states a cause of action. But the complaint also charges that the derailment of the first car was occasioned by the absence

of a handle which had been broken off from the second car, and we have to consider if in this respect a cause of action is stated. Conceding that the rear car was negligently operated, and that it might have so collided with the forward car as to cause its derailment, even though the handle were not broken off, yet it is possible that the car might have been so operated that derailment would not have occurred except for the absence of the handle. The act in question provides as follows: "When such injury is caused by a defect in any locomotive, engine, car, rail, track, machinery, or appliance required by said company to be used by its employees in and about the business in their employment, if such defect could have been discovered by such company by reasonable and proper care, tests, or inspection, and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company." As heretofore stated, the complaint sufficiently charges that the car in question was being used by employees of appellant in and about the business of their employment. It also appears that the defect is one that could have been discovered by reasonable and proper care or inspection; and the complaint alleges that appellant, under its contract with respondent, was required to furnish him and the other men with hand cars for the purpose of conveying them between the stations where they were required to take a train to the places where they were at work. Assuming, therefore, that there was no negligence on the part of the employees in charge of the rear car which would have derailed the front one, had the handle been in place, was the absence of the handle the proximate cause of the injury? It will be noticed, from the above-quoted section, that proof of defect in a car or appliance so furnished shall be presumptive evidence of knowledge on the part of the company that such defect existed. Objection is made to this portion of the complaint upon the ground that the missing handle was not the proximate cause of the injury, and that the derailment of the car, and resulting injury, was not such a consequence as could have been foreseen by appellant as likely to follow the absence of the handle. Handles are placed on hand cars for the purpose of lifting them off and on the track. In case it should become necessary to hastily remove a car from a track, the absence of a handle might be the cause of delay, and, hence, consequent injury; and, if an injury were occasioned under such circumstances, it might reasonably have been anticipated. Under the circumstances of this case, it may be conceded that it could not have been reasonably anticipated that the mere absence of a handle from a car would occasion the derailment of another with which it might happen to collide. But, after knowing how it happened, and being told it was occasioned because the handles were so situated that those on the rear would strike evenly upon a preceding car, and push it evenly, we can readily understand how, if one of the handles was broken off, the other handle

might, under such circumstances, tend to push the car to one side, and thus derail it. The question is, Is it the proper rule of law that an injured person cannot recover, under such circumstances, unless the master, at the time cars were furnished to a servant and his collaborators, could reasonably have anticipated that an injury was liable to happen in that particular manner? Or is this the proper rule: that the master would be liable if it could have been reasonably foreseen that injury in some form was likely to result, even though the precise nature of it could not be anticipated? In the case of *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640, the workmen in charge of a rear hand car were running at such rapid speed, contiguous to the preceding one, that they were unable to stop their car, and ran over a person who fell from the first car. In that case the question was raised as to what was the proximate cause of the injury; and it was contended that plaintiff therein could not recover, because under such circumstances such a result could not reasonably have been foreseen. In the opinion attention is called directly to the confusion in the use of the word "negligence" and the term "proximate cause," and it is there stated that the correct rule is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated as likely to result in injury, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did occur. To the same effect the rule is stated in *Hill v. Winsor*, 118 Mass. 251. In discussing this question, Shearman & Redfield in their work on Negligence, 5th ed., § 28, state that the weight of authority seems to be against holding a defendant liable for all actual consequences of his wrongful acts, when they are such that no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur, and, again, that the best authorities seem to be quite opposed to the theory that a defendant should be held liable only for such consequences as he ought himself to have foreseen; and they lay down as a proper rule the following: "A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would at the time of the negligent act have thought reasonably possibly to follow if they had occurred to his mind." This statement somewhat extends the definition announced in the *Christianson Case*, is more comprehensive, and probably as perfect as it is possible to formulate an abstract proposition upon the subject. Upon first impression, such a rule might not seem applicable to the facts in this case, but the safety of all persons engaged in so hazardous a business as railroading requires that the company be held strictly to account in regard to its cars, implements, and appliances. If the handle had been in place on

this car, the preceding one might have been pushed along evenly, although forcibly, without damage; and, while appellant could not reasonably have anticipated that an accident would happen in the manner it did, it would occur to any reasoning person, after being put in possession of the facts, that such a result might follow. Other cases within this rule, substantially as stated in *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640, are *Alabama G. S. R. Co. v. Chapman*, 80 Ala. 615, 2 So. 738; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Western & A. R. Co. v. Bailey*, 105 Ga. 100, 31 S. E. 547. Counsel for appellant cites the case of *Weissel v. Eastern R. Co.* 79 Minn. 245, 82 N. W. 576, in support of the rule of law which he contends should apply to this case. Special reference is made to a sentence quoted from the opinion in that case, as follows: "The defendant ought not to be required to anticipate that so unusual and peculiar combination of circumstances would occur as to occasion so extraordinary and unexpected an accident." It is claimed this language implies that this court has abandoned the doctrine announced in *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640, and intends to adhere to the rule that the defendant in such case can be held liable only when it appears that the manner in which the injury took place could reasonably have been anticipated. The sentence quoted must be read in connection with what follows, and with regard to the facts in that case. The decision is based upon the ground that the original piling of the coal in the manner stated was not in itself a negligent act, and hence it followed that such fact was not the proximate cause of the injury, and upon the further ground that, if the lump of coal causing the injury was displaced by the act of plaintiff's coservant, then, under the prior decisions of this court, the plaintiff could not recover, for the reason that such servants were not engaged in the operation of the railroad, and were not exposed to the peculiar dangers attending that business.

Order affirmed.

Brown, J., dissenting:

There is no substantial difference between the case at bar and the *Benson Case* with respect to whether the employees in question were at the time of the accident engaged in the discharge of their duties as such, and the latter case should be followed and applied. There is no doubt but that plaintiff and his associates were employees of the company, but they were no more in the discharge of the duties of their employment at the time complained of than were the employees in the *Benson Case*. In that case it appeared that the men were permitted to take and use the hand cars to transport themselves to and from their work, while in the case in hand the cars were furnished for the same purpose under an agreement upon the part of the company to do so. In response to this agreement the company furnished the cars, and the workmen operated

and controlled them. No one was placed in charge by the company, so far as the complaint informs us, nor did it operate the cars. This the men did for themselves. The attempt of the majority to distinguish the cases is rather strained, and without substantial elements. They say that the complaint does not candidly and fully allege whether the "wages of the men covered the entire time of their absence from West Superior; yet it must be inferred from the statements therein contained that the employment for each day commenced at the time they left West Superior, and ended at the time of their return." The relevancy of this fact, conceding it to be a fact, is not apparent. It has no tendency to show that the men were engaged in repairing or building bridges (the work for which they were employed) during the time they were returning from the active discharge of their duties to their homes in West Superior. But, whether relevant or not, the complaint will be searched in vain for any statements or suggestions that the men were engaged by the day, by the month, or by the hour. If they were engaged by the month, their wages would cover the entire time from the commencement to the end of their employment; and, if I understand the contention and theory of the court, they would be employees actually engaged in the discharge of their duties as such during all that time. It would be much better to overrule the *Benson Case* than to indulge in a distinction inclosed within such narrow limits. It seems very clear that, if plaintiff can recover at all in this action, it must be upon the theory that defendant negligently failed to keep and perform the agreement alleged to have been made by it to carry and transport the plaintiff, with his collaborators, to and from their work. If this agreement was made and entered into, and in the performance thereof defendant was guilty of negligence with respect to the manner of performance, or the means provided therefor, in consequence of which plaintiff was injured, he should recover. Upon this branch of the case, plaintiff alleges two specific acts of negligence, viz.: (1) That defendant was negligent in failing to adopt and promulgate suitable rules for the operation of the hand cars; and (2) that one of the hand cars furnished the men was defective and out of repair. If the complaint can be sustained on either theory, and the alleged negligent act or omission be the proximate cause of the injury to plaintiff, he certainly has a right of action. If defendant agreed to transport the men to and from their work, it was bound to the exercise of reasonable care and prudence in the performance of the agreement. *McDonough v. Lanpher*, 55 Minn. 501, 57 N. W. 152. The court sustained the complaint in both respects.

1. The principle of law requiring a person engaged in a complicated or complex business to establish rules and regulations for its conduct is clearly and plainly stated in *Wood, Mast. & S.* 794, as follows: "If a master is engaged in a complex business,

that requires definite regulations for the safety and protection of his employees, a failure to adopt proper rules, as well as laxity in their enforcement, is negligence *per se*." And by Shearman & Redfield, in their work on Negligence (vol. 1, § 202), as follows: "A master who employs servants in a dangerous and complicated business is personally bound to prescribe rules sufficient for its orderly and safe management." There is nothing complicated in or about the operation of a hand car, and, although the complaint alleges that it was necessary that rules be adopted by defendant, there are no allegations that the ordinary operation of such car is at all complicated or difficult to understand or comprehend; nor are there any special facts alleged showing any necessity for such rules. In addition to the absence of such allegations of facts showing the necessity for rules, the complaint further alleges and shows that the accident in question was the result of the careless and negligent conduct of plaintiff's coemployees. Although the allegations are that the employees operating the car following the one on which plaintiff was riding were negligent and careless in the operation of the same, a fair construction of the complaint shows that their conduct was wilful and intentional as well. They deliberately ran down the car on which plaintiff was riding. I do not understand that the rule of law requiring the adoption of regulations for the conduct of a complicated business is intended to protect workmen from their own negligence. Such regulations and rules are required solely for the purpose of enabling the employees to understand and comprehend the operation and management of instrumentalities and services of a complex nature which may result in injury to them if not understood, and not to guard or protect them from their own negligent misconduct, nor shield them from dangers and risks which are apparent and obvious to a person of ordinary intelligence. *Morgan v. Hudson River Ore & I. Co.* 133 N. Y. 666, 31 N. E. 234; *Voss v. Delaware, L. & W. R. Co.* 62 N. J. L. 50, 41 Atl. 224; *Berrigan v. New York, L. E. & W. R. Co.* 131 N. Y. 582, 30 N. E. 57. The complaint clearly takes the case without the rule, by alleging that the injury to plaintiff was caused by the negligence of his coemployees.

2. The other ground on which plaintiff seeks to recover is that the hand car furnished by defendant to plaintiff and his co-laborers was defective and out of repair, and it is claimed that this defect was the proximate cause of the accident. The defect consists in the fact that one of the handles on the end of the car had prior to that time been broken off, and was in that condition when delivered to the employees for the purposes stated. The handles are made use of solely in lifting the cars on and off the track. They are not employed in the operation of the car. A car might be used in the ordinary and usual manner until worn out, and no accident or injury of any kind ever result from the absence of the handles. The po-

sition of the court in its attempt to connect the absence of the handles with the accident is unsound. It is said that it might become necessary to hastily remove the car from the track; that the absence of the handle might cause delay in doing so, and result in some injury; and that, if the injury might be caused or occasioned under such circumstances, the accident in question is one that might reasonably have been anticipated, and one for which it is liable in damages. It is very far from clear just how the mere absence of this handle could, in any essential degree, delay the men in removing the car from the track. But conceding that it might, it does not follow that the company was bound to know and to anticipate that it might come in collision with another car, and force the car collided with off the track in the manner set out in the complaint. The rule of proximate cause is stated very clearly in *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640, as follows: "If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not." It cannot be said, in reason and good sense, that permitting the hand car in question to remain without a handle was an act of negligence. The handle had no connection with the ordinary operation of the car. All four handles might have been absent, and the management of the car or its operation in no way interfered with. The court in that case further says: "Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. The consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow." But for the wilful, careless, and negligent conduct of the men in charge of the car following the one on which the plaintiff was riding, no accident to plaintiff's car would have happened at all. It was their wilful and intentional running down of plaintiff's car which was the direct and proximate cause of his injury. Conceding that the car was defective because of the absence of the handle, the negligent and careless conduct of plaintiff's coemployees in so running down his car, and thus causing the derailment, was an intervening, efficient cause of the accident, and the absence of the handle only a remote agency. The defendant was not bound to contemplate such a result. It appears to me, clearly, that plaintiff has no cause of

action because of the alleged defective condition of the hand car. The case is very much, in so far as this branch of it is concerned, like that of *Weisel v. Eastern R. Co.* 79 Minn. 245, 82 N. W. 576. What is there said on this subject is applicable to the case at bar: "The defendant ought not to be required to anticipate that so unusual and peculiar a combination of circumstances would occur as to occasion so extraordinary and unexpected an accident from such a commonplace and ordinarily simple cause."

For these reasons, I dissent, and am authorized to state that Mr. Justice **Lovely** concurs therein.

STATE of Minnesota, *Respt.*,

v.

M. J. LARSON *et al.*, *Appts.*

(.....Minn.....)

"The bond to be executed by a person making application for a license to sell intoxicating liquors, in accordance with Gen. Stat. 1894, § 2026, is one of indemnity, given to protect the state, as well as such private parties as are authorized to maintain actions under the provisions of § 1992. The amount thereof, fixed by statute at \$2,000, is a penalty, and not in the nature of liquidated damages, to be recovered as an entire sum in case any of the conditions of the bond are violated.

(*Start, Ch. J., and Brown, J., dissent.*)

(May 3, 1901.)

A PPEAL by defendants from an order of the District Court for Renville County overruling a demurrer to a complaint filed to recover the penalty of a bond given to obtain a liquor license. *Reversed.*

The facts are stated in the opinion.

Messrs. A. J. Volstead, E. L. Winje, Robert Jamison, and Cobb & Wheelwright, for appellants:

This bond is to indemnify the state against damage sustained by the commission of one or more of the prohibited offenses; which damage necessarily consists in the failure by the offender to pay some fine or judgment for costs imposed upon him in a criminal prosecution. In other words, the measure of damages for its breach is the amount of any unpaid fine and costs.

13 Am. & Eng. Enc. Law, pp. 852, 853; 18 Am. & Eng. Enc. Law, p. 270; *Minneapolis v. Olson*, 76 Minn. 1, 78 N. W. 877.

In nearly every case where it has been decided that the full amount specified in li-

quor bonds of this character becomes a debt as soon as there is a breach, and can be recovered as such, the court had under consideration a statute which in express terms so provided, and therefore permitted of no other construction.

Lightner v. Com. 31 Pa. 341.

Nor can it be said that the damages sustained by reason of a breach of the bond are not easily ascertainable.

State v. Estabrook, 29 Kan. 739; *Jenkins v. Danville*, 79 Ill. App. 339.

The infliction of a penalty of \$2,000 for a single breach of this bond is out of all proportion to the gravity of the offense committed.

17 Am. & Eng. Enc. Law, 2d ed. p. 335.

To impose a penalty of \$2,100 for the commission of such an offense as is specified in this bond contravenes the letter and spirit of the Constitution, where it is prescribed that "excessive bail shall not be required, nor shall excessive fines be imposed, nor unusual punishment be inflicted."

Robison v. Miner, 68 Mich. 549, 37 N. W. 21.

Mr. W. A. McDowell, with **Mr. A. V. Rieke**, for respondent:

The penalty named in the bond may be recovered for a single breach, without reference to the actual damages sustained.

11 Am. & Eng. Enc. Law, p. 682; *Quintard v. Corcoran*, 50 Conn. 34; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Mason v. Callender*, 2 Minn. 350, Gil. 302, 72 Am. Dec. 102; *The S. Oteri*, 14 C. C. A. 344, 30 U. S. App. 10, 67 Fed. 146; *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *Story*, Eq. Jur. § 1326; *Peachy v. Somerset*, 1 Strange, 447; *United States v. Montell*, Taney, 47, Fed. Cas. No. 15,798; *State use of San Saba County v. Williams*, 10 Tex. Civ. App. 346, 30 S. W. 478; *People ex rel. Meakin v. Eckman*, 63 Hun, 209, 18 N. Y. Supp. 654; *People v. Stevens*, 13 Wend. 341; *Blatchley v. Moses*, 15 Wend. 215; *Lyman v. Shenandoah Social Club*, 39 App. Div. 459, 57 N. Y. Supp. 372; *Daniels v. Grayson College*, 20 Tex. Civ. App. 562, 50 S. W. 205; *Tripp v. Norton*, 10 R. I. 125; *Treasurer v. Patten*, 1 Root, 260.

Collins, J., delivered the opinion of the court:

This is a civil action brought by the state against Martin J. Larson as principal, and the other defendants as sureties, upon a liquor bond given pursuant to § 2026, Gen. Stat. 1894. A general demurrer to the complaint was overruled by the court below, and the case is here upon an appeal from the overruling order.

The complaint alleges the application of the principal for a license; the execution of

*Headnote by COLLINS, J.

NOTE.—For other cases in this series as to when stipulation for certain sum as damages will be construed as a penalty, see *Carey v. Mackey* (Me.) 9 L. R. A. 118 (stipulation in bond); *Condon v. Kemper* (Kan.) 13 L. R. A. 671, and *note* as to distinction between liquidated damages and penalty; *Wilhelm v. Eaves* (Or.) 14 L. R. A. 297; *Wilkinson v. Colley* 54 L. R. A.

(Pa.) 26 L. R. A. 114; *Krutz v. Robbins* (Wash.) 28 L. R. A. 676; *Meyer v. Estes* (Mass.) 32 L. R. A. 283; *Chicago House-Wrecking Co. v. United States* (C. C. App. 7th C.) 53 L. R. A. 122; and cases in *notes* to *Hathaway v. Lynn* (Wis.) 6 L. R. A. 551; and *King Iron Bridge & Mfg. Co. v. St. Louis* (C. C. E. D. Mo.) 10 L. R. A. 826.

the bond in the sum of \$2,000; the issuance of a license; that on a day certain, in violation of the laws of the state and of the ordinances of the village, he sold certain malt liquors to one Kinsberg, who was then a minor person, under the age of twenty-one years; that he was duly arrested under a warrant issued out of a justice's court for the violation aforesaid, was arraigned in said court, and, in proceedings thereafter had, was duly convicted of the offense of which he was charged, was ordered to pay a fine of \$25 and costs of prosecution, and in default thereof to be imprisoned in the common jail of Renville county for a term not exceeding thirty days, or until said fine and costs were paid; that he paid said fine and costs, and was duly discharged from custody. The question is, Was a cause of action stated upon this bond when it appeared that the offender had paid the fine and costs imposed upon him by the court as a penalty for a violation of the law which prohibits the sale of malt liquors to a person under the age of twenty-one years, there being no special damages alleged in the complaint? Or, stated in another form, the question is whether the sum of \$2,000, the amount specified in the bond, shall be treated as a penalty, the amount recoverable to be measured by the actual damages; or is the amount to be treated as liquidated damages, the whole thereof to be recovered in a single action brought by the state, whenever the condition of the bond has been violated? It is a question of statutory construction, and must be decided by taking into consideration the entire statute regulating the sale of intoxicating liquors, in our endeavor to ascertain the legislative intent. A majority of the court are of the opinion that the amount specified in the bond must be treated as a penalty, to be enforced to the amount of actual damages and no further, and that the whole sum of \$2,000 cannot be considered as liquidated damages; the whole to be collected in case of any infraction of the law, technical or otherwise, intentional or unintentional. While the question is not without perplexity, we are somewhat influenced by the belief that, in the absence of any express provision, such an instrument, executed in compliance with a law which recognizes traffic in intoxicating liquors as a legitimate business, should not be rigidly construed when the result will inevitably be oppressive and unjust. The law is that the authority to impose penalties, and especially excessive penalties, must be strictly construed. *Minneapolis v. Olson*, 76 Minn. 1, 78 N. W. 877. The legislature may see fit, in the future, by express enactment and in positive language, to exact the pound of flesh; but for many years, at least since Shylock demanded strict compliance with the condition of his bond only to meet with disaster, such exactions have not met with favor in or out of judicial tribunals.

It is evident that the statutes of this state bearing upon intoxicating liquors are in a very complicated condition. This is undoubtedly the result of enactments at nearly every legislative session since we became 54 L. R. A.

a state, without regard to existing statutes, and oftentimes producing absolute conflict. As early as 1858 a bond was required from licensees, with conditions similar to those now found in § 2026, the amount thereof to be \$1,000. In the year 1862 the amount of the bond was decreased to \$500, the conditions being those that had theretofore prevailed. In 1887 the license fee was greatly increased, and also the amount of the bond, the latter being fixed at \$2,000. The conditions to be contained therein were not materially altered. The law of 1858 provided for a revocation of licenses in case conditions of the bond were violated, and the further provision making the obligors liable for all damages done by persons intoxicated by liquors obtained from the principal was a feature of the law, and it still remains a part of § 1992. In 1872 the last clause now found in said section was added, whereby the sureties upon the bond were made "jointly and severally liable with the principal for the payment of said damages, to be recovered in a civil action." For more than twenty-eight years this clause, which gives a right of action upon the bond to a private person in case he sustains damages at the hands of an intoxicated person, has been in force. It is still in force unless it is abolished by this court, as it would be, practically, should we sustain the position of counsel for the state.

It is evident that the legislators who enacted these provisions as to the right of the injured persons to recover in civil actions on account of all damages done by intoxicated persons to them were of the opinion that the amount fixed in the bond was simply a penalty, to be recovered, as occasion might require, by different plaintiffs, and to the amount each might be injured. We believe it to be a rule of general application that the amount of a bond of this character—nothing but a contract—must be treated as a penalty, rather than as liquidated damages. In any event, when the intent of the parties appears, as it does here, to be doubtful and uncertain, no good reason exists why such an instrument should be rigidly and narrowly construed. Such a construction is not at all necessary for the enforcement of the laws regulating the sale of intoxicating liquors; for other and adequate remedies are provided.

It seems to us, aside from that section of the law hereinbefore quoted, and to which further reference will be made, that the legislature could not have intended that the entire amount of the bond should be recovered for a single offense on the part of the principal obligor. The bond may be violated, as may be the liquor laws of this state, unintentionally, and without a purpose to disregard the statute. Take the case now before us: The sale made by Larson was to a minor person. It was, under the law, made at the risk of the former; for it was incumbent upon him to know whether the purchaser was a minor or an adult. In this respect, the sale was at his peril. If he sold to a minor person in the belief, and having every reason to believe, that the latter was

over the age of twenty-one years, his want of knowledge as to the real fact was no defense. Intent or knowledge is not an essential element in the commission of the offense. Every person violating the law in this particular way is declared guilty of a misdemeanor, and may be punished by a fine of not less than \$25, nor more than \$100, or be imprisoned in the county jail for not less than thirty nor more than ninety days. If the construction placed upon the bond by the counsel for the state is correct, the fine, including costs of prosecution, may be in excess of \$100. In addition to this, the license, for which the violator must have paid \$500 or \$1,000, possibly more, depending upon the population and the ordinances in his municipality, is revoked without further action (§§ 1993, 2001), and this may occur on the very day on which he has paid for the license. The result might be that for an unintentional violation of the law, made a misdemeanor by statute, with a minimum fine of \$25, and a maximum of \$100 and costs, the offender would be compelled to pay over for a single offense, not knowingly committed, over \$2,100, and lose the amount of his license fee (\$1,000) in addition. In no case could he escape with a loss of less than \$2,025, and \$500 more, the amount of his license fee.

It may be argued that under our construction conviction of a violation, in a court of competent jurisdiction, must precede an action upon the bond, and for this reason such construction is radically wrong. Probably conviction before a civil action can be instituted will be necessary; but power to revoke the license, and to deprive the licensee of his occupation as well as the sum he has paid for such license, in no case less than \$500, is with the municipal authorities, intervention by the courts not being required. § 2020. This, in itself, seems quite a severe penalty. We are not defending the saloon keeper who violates the law, nor are we upholding the business of selling intoxicating liquors, lawfully or unlawfully, when we say that such a result would be strikingly unjust, and smack strongly of persecution. While it may not violate the constitutional provisions forbidding the imposition of excessive fines, or the infliction of unusual punishments, this penalty would be exceedingly excessive, and of a character to shock our sense of justice and right. It would remind us of the days when trivial offenses were punished by absolute and wholesale confiscation of the offenders' estates. In practice, that would frequently be the result should the amount of the bond be declared liquidated damages. We cannot believe that the legislature intended any such drastic measure; for, had that been the design, the law would have so stated. This has been done in several states; it being expressly provided in some that judgment may be entered on such a bond against the principal and sureties for the full penalty thereof. In support of our views, we cite *State v. Estabrook*, 29 Kan. 739; *Jenkins v. Danville*, 79 Ill. App. 339. It is not to be understood that there are no cases to the contrary, for several

have been referred to, notably *Quintard v. Corcoran*, 50 Conn. 34, in which two Rhode Island cases are cited as authority; the court saying that the question in issue was there decided in the same way. A glance at these cases (*Tripp v. Norton*, 10 R. I. 125; *Providence v. Bligh*, 10 R. I. 208) will show that no such question was presented or decided. We are also referred to some cases arising under the Federal revenue law. The courts in which revenue cases are litigated have always construed the conditions found in revenue bonds with great strictness and excessive severity, and we are not inclined to accept their rules on this subject. But, as before intimated, our conclusion is largely influenced by our sense of right and justice, and also by the provision found in the latter part of § 1992, and heretofore quoted, to the effect that the principal and his sureties shall be jointly and severally liable for the payment of damages caused by an intoxicated person, to be recovered in a civil action brought by the person injured. This clearly indicates that the amount of the bond must be declared a penalty, and must be recovered as such. If the construction contended for is to be given the bond, this provision of the statute is entirely without force or effect. It is rendered nugatory, for the amount of the bond is either a penalty, or it is liquidated damages. It cannot be both. The amount cannot be declared a penalty when a civil action is brought under § 1992, by a person injured, to recover damages done by an intoxicated person, and then held to be liquidated damages in an action brought upon a complaint drawn as was the one we have before us. It cannot be one kind of a bond, for one purpose, to-day, and another kind of a bond, for another purpose, to-morrow. The statute just referred to cannot be construed as authority for the collection of the whole amount named, by a private party, unless he has been injured in the full sum. That is, he is not authorized to enforce the obligation except to the amount of his damages. It may be suggested that an injured party might intervene in an action instituted by the state to recover the stipulated amount, but this presupposes that he is fully informed as to the facts upon which his action can be maintained, and, further, that he has knowledge of the pendency of the action brought by the state. He has a statutory right to proceed in a civil action to recover his damages, and should not be placed in a position where he must either enter into a race with the state to determine which of the two can first commence an action, or suffer a loss. Nor should he be compelled to keep watch upon all proceedings in the courts in order to protect himself by intervention when the state moves. It may be also suggested that the right to recover may be unavailing because other parties have forestalled, by similar actions, one who has the right. This suggestion would be equally as potent in any other case where the amount of a bond is in the nature of a penalty, and damages in excess thereof occur. But, in any event, we do not decide

that this is not a continuing bond. It is impossible to harmonize this particular section of the statute with the contention of counsel for the state, and for this reason, if there be no other, we are compelled to hold that the purpose of the bond was to indemnify the state as well as private parties against all damages that may actually result from any breach thereof, and not to authorize a recovery of the full amount as liquidated damages. It follows that the complaint failed to state a cause of action.

Order reversed.

Brown, J., dissenting:

I dissent. The court in this case has fallen into the error of construing the bond on which the action is founded on the rule of law applicable between individuals as to bonds given to secure the performance of some collateral agreement by the obligor. It is not such a bond. It is a bond given as the condition for the issuance of a license for the sale of intoxicating liquors pursuant to the statutes of the state, and as security for the observance of the liquor laws.

The act of August 12, 1858, found in Comp. Stat. 1849-58, is the first expression of the legislature of this state on the subject of the sale of intoxicating liquors. A prior act of the territorial legislature contained most of the features of the act of 1858, especially with reference to the bond, and the prosecution of an action thereon, in the event of a violation of any of its conditions. By the act of 1858, a bond is required as a condition precedent to the granting of a license to deal in such liquors,—a bond in the sum of \$1,000 for a general dealer, and a bond of \$500 for a license to deal in malt liquors only. The act prohibits certain sales, and provides fixed penalties for a violation of any of its provisions. There is no express declaration in that act, nor in any of the subsequent legislative enactments, as to whether the bond is to be treated as one to secure an observance of the liquor laws, or as security for the payment of such actual damages as the state may suffer by reason of a violation thereof. No statute has ever spoken directly on that subject, and whether a liquor dealer's bond be one or the other must be determined from a consideration of all the provisions of the statutes, the evident and apparent object to be subserved by its requirement, and the general rules of law applicable to such obligations.

It may be stated as a general rule of law, supported by an overwhelming weight of the authorities both in England and this country, that where a statute requires the execution of a bond to the state for a fixed and specific penalty, to be conditioned for a compliance with the laws of the state in the respects named therein, the effect is to constitute the bond a covenant for liquidated damages, or a penalty imposed by the sovereign power as a punishment for a violation of such law, unless a different intent appears. The rule is stated thus in 4 Am. & Eng. Enc. Law, 2d ed. p. 700: "The designation by statute of a specific sum as a penalty has the

effect of constituting a bond given in compliance therewith, a covenant for liquidated damages, or a penalty imposed by the sovereign power, . . . unless a different intent appears." A distinction is made by all the authorities, where this question has been considered, between bonds executed by one individual to another to secure the performance of some collateral agreement, and a bond given, as in the case at bar, to the state, and conditioned for an observance of the law. *United States v. Montell*, Taney, 47, Fed. Cas. No. 15,798; *Keating v. Sparrow*, 1 Ball & B. 367; *Benson v. Gibson*, 3 Atk. 395; *Peachy v. Somerset*, 1 Strange, 447; *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *Murfree*, Official Bonds, 452; *People ex rel. Meakin v. Eckman*, 63 Hun, 209, 18 N. Y. Supp. 654; *Granger v. Hayden*, 17 R. I. 179, 20 Atl. 833; *Coggeshall v. Pollitt*, 15 R. I. 168, 1 Atl. 413; *Quintard v. Corcoran*, 50 Conn. 34; *Daniels v. Grayson College*, 20 Tex. Civ. App. 562, 50 S. W. 205; *Tripp v. Norton*, 10 R. I. 125. The only case cited holding to the contrary is *State v. Estabrook*, 29 Kan. 739. The case of *Jenkins v. Danville*, 79 Ill. App. 339, is not in point; for the bond in that case was conditioned for the payment of all fines and costs which might be imposed against the obligor for a violation of the law. The obligor was there convicted of such violation, fined, he paid his fine, and the court very properly held that by the payment of his fine the express obligation of the bond was complied with, and double recovery could not be had. The bond involved in the case at bar is not so conditioned. Its conditions are that the obligor will not sell, or otherwise dispose of, any intoxicating liquors on the Sabbath day, nor on any general or special election day, and will not sell, barter, give away, or otherwise furnish or dispose of such liquor to any minor person, or to any pupil or student in any public school, nor to any habitual drunkard; "and, if the said obligor shall faithfully observe and perform all the terms and provisions of any and all ordinances of the village of Sacred Heart" relating to the sale of intoxicating liquors, then the obligation shall be void; otherwise to remain in full force and effect.

In the absence of some expression of the legislature to the contrary, the bond in question must be construed in harmony with this general rule of law. Our statutes will be searched in vain for any such expression. But, on the contrary, an intent to follow and apply the rule is clearly shown. It is found in two very prominent provisions of the act of 1858 (p. 341, § 7), that are entirely ignored by the majority opinion. One is the provision requiring county attorneys, sheriffs, constables, and justices of the peace having knowledge of any violation of the law with respect to the sale of intoxicating liquors to make complaint thereof, and prosecute the offender. The other provision is contained in the same section, and reads as follows: "It shall also be the duty of the district attorney to prosecute the bond

given by such applicant, as is required by the second section of this act." These two provisions have been brought down from 1858, and the substance of them is now found in the General Statutes of 1894. Clearly, the legislature intended by that act an offending saloon keeper to be prosecuted criminally for a violation of the statutes, and, in addition thereto, that he should forfeit the penalty of the bond as further punishment. Every sheriff, constable, or county attorney having knowledge of such a violation is expressly required to prosecute the same criminally, and in addition thereto the county attorney is expressly required to bring a civil action on the bond for a breach of any of its conditions. This shows almost conclusively that the intention was to make the penalty of the bond a forfeiture, or liquidated damages for a breach of its conditions, in addition to the penalty provided for in the case of criminal conviction. Had the legislature intended the bond as security for the payment of damages, it would have required the prosecution of the suit thereon only in case of the failure of the saloon keeper or obligor to pay and discharge any fine imposed against him, and would not have made it the unconditional duty of the county attorney to prosecute the bond to judgment in addition to the criminal prosecution. So it must be conceded that the legislature, by the enactment of 1858, intended the penalty of the bond as a fixed and further punishment for a violation of the statutes. It is not for the courts to say whether a statute which is constitutional is fair or just, or whether the legislature intended "to exact the pound of flesh" referred to by the majority of the court. The suggestions in their opinion on this subject would be very pertinent for the consideration of the legislature, but are not germane to a judicial construction or interpretation of the statute. The question whether a given statute is fair or just is one exclusively for legislative cognizance. Courts have nothing to do with those questions, but are limited, in interpreting or construing statutes, to ascertaining the intention of the legislature, and have no right to declare a statute invalid on the assumption that it is unjust. To do so would be a flagrant and rank usurpation of power. It is conceded by the majority that the statute, construed as contended for by the respondent, is not unconstitutional as imposing a cruel and unusual punishment, yet they proceed to say that the punishment imposed thereby is unfair and unjust. On this subject, I quote from the case of *People ex rel. Meakim v. Eckman*, 63 Hun, 209, 18 N. Y. Supp. 654: "It is contended, further, that because a specific penalty is prescribed for the violation of the law of selling liquors to a minor, that a recovery cannot be had on the bond. Our answer is that the legislature, having the power to regulate the sale of intoxicating liquors, could impose dual penalties for the same offense. When this statute fixes both the offense and the penalty, and declares it a misdemeanor for doing any act, such as selling liquor without a license, they are en-

tirely independent of each other, and the conviction for the misdemeanor is no bar to an action for the penalty."

Such being the undoubted intention of the act of 1858, the provisions of which, so far as here pertinent, are a part of the statutes to-day, what amendments have been made since that time to indicate an intention on the part of the lawmaking power to change the law on this subject? The majority say the amendment of 1872 had such effect, but, as repeals or modifications of statutes by implication are not favored, the amendment of 1872 cannot possibly be so construed. It is true that the act of 1858 contained the provision that the saloon keeper should be liable for "damages done by persons intoxicated by liquors obtained from him," but the act did not provide that he should be so liable on his bond. There was no liability on the bond in this respect until the addition of a clause in 1872, which is as follows: "And the sureties on said bonds shall be jointly and severally liable with the principal for the payment of said damages, to be recovered in a civil action." Can this simple amendment have effect to change the whole scope and purpose of the statute? It seems to me clearly not. The mere fact that the legislature by this amendment relinquished the rights of the state under the bond in favor of injured parties can have no such operation as contended for by the majority. Suppose no person is injured at all; the bond is of no force or effect, and its execution and delivery mere idle ceremony. The suggestion that the state may sue thereon to recover damages suffered by it is begging the question. The state suffers no damage in a pecuniary sense from the violation of its laws. In the case of such violation, its peace is disturbed, its dignity offended, and its majesty outraged. It asks for no pecuniary recompense in liquidation of such violations, but demands the swift and certain punishment of the offender. The remarks of Chief Justice Taney on this subject are very pertinent, and I quote what he says in a case where the precise question was under consideration: "It certainly is not to be regarded as a bond with a collateral condition in which the jury are to assess the damages which the United States shall prove that they have sustained; for, according to that construction, the amount of damages would not depend upon the amount of the penalty prescribed in the section, which is graduated according to the size of the vessel, but would depend upon the discretion of different juries, and larger damages might be given where the penalty was only \$400 than in a case where the penalty was \$2,000. This obviously is not the intention of the law, and the United States are entitled to recover the whole sum for which the party is bound if any of the conditions are broken. Besides, how could the United States prove any particular amount of damages to have been sustained by them in a suit on this bond? . . . It would be difficult, I think, by any course of proof, or any process of reasoning, to show that the United States has

sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury, or be liquidated by agreement between the parties. The sum for which the parties are to become bound is manifestly a penalty or forfeiture inflicted by the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offense." [*United States v. Montell*, Taney, 47, Fed. Cas. No. 15,798.]

No difficulty is to be apprehended from an application of the provision of 1872. If a saloon keeper becomes liable to an individual for an assault committed by a person by him made intoxicated, the injured party may proceed with his action on the bond to judgment. If no such cause of action accrues, the state may proceed, or it may proceed in any event, and the individual can make application to intervene, the same as is done in all cases where several rival claimants seek a particular fund to satisfy demands against the owner of the fund. The case of *Minneapolis v. Olson*, 76 Minn. 1, 78 N. W. 877, has no application to this case whatever.

In that case the court was construing a statute conferring authority upon municipal authorities to impose a penalty for a violation of the liquor laws. No such question is presented in this case. The penalty here involved is fixed by statute, and the legislature has not delegated the power to impose it to any inferior tribunal, as in the *Olson Case*. If the opinion of the court in this case is adhered to as the law of this state, the liquor dealer's bond, heretofore regarded as a forfeiture fixed and certain for a violation of the law, will amount to but very little. In order that the state may bring suit thereon, if their theory be correct, there must be a prosecution of the obligor, and a failure on his part to pay the fine imposed against him. If the court should see fit and proper to sentence him to imprisonment only, as punishment for his offense, the bond is a nullity, and the state has no remedy. If the court impose both a fine and imprisonment, the state can recover only the fine, and no proportion of the penalty for the imprisonment.

I am authorized to state that Chief Justice Start concurs in this dissent.

MISSOURI SUPREME COURT.

BARBER ASPHALT PAVING COMPANY,
Respt.,
v.

Margaret FRENCH et al., Appts.

(158 Mo. 534.)

1. Assessments for paving, made, according to the provisions of a city charter, by apportioning the total cost of the work to the abutting lands according to frontage, do not constitute a taking of property for public use, or a violation of U. S. Const. 14th Amend., as a taking of property without due process of law.
2. The admission of incompetent evidence does not constitute reversible error when without the evidence the decision must have been the same.
3. A requirement of a guaranty to

maintain and repair a street on which paving is done for five years thereafter is not *ultra vires* on the part of a city contracting for such pavement.

(November 13, 1900.)

APPEAL by defendants from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to enforce a street-paving assessment. *Affirmed*.

Statement by Gantt, Ch. J.:

This suit was instituted in the circuit court of Jackson county, returnable to the October, 1899, term thereof, for the purpose of enforcing the lien of a tax bill issued by Kansas City in part payment of the cost of paving Forest avenue from Independence

NOTE.—The above case was affirmed in 181 U. S. 324, 45 L. ed. 879.

It is entirely clear that this decision substantially overrules that in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, though it is not overruled by express declaration. The court repudiates the doctrine explicitly and most clearly laid down in the *Norwood Case*, to the effect that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation," and holds in its latest decision that the apportionment of the entire cost of the improvement upon abutting lots according to their frontage is constitutional, though this is done without regard to the amount of benefits received by the property.

For earlier cases in this series as to neces-
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sity of special benefits to sustain local assessments, see *Asberry v. Roanoke* (Va.) 42 L. R. A. 636, and note; *Detroit v. Chapin* (Mich.) 42 L. R. A. 638; *Weed v. Boston* (Mass.) 42 L. R. A. 642; *Rolph v. Fargo* (N. D.) 42 L. R. A. 646; *Hutcheson v. Storrie* (Tex.) 45 L. R. A. 289; *Schroder v. Overman* (Ohio) 47 L. R. A. 156; *Kersten v. Milwaukee* (Wis.) 43 L. R. A. 851; *Adams v. Shelbyville* (Ind.) 49 L. R. A. 797; and *Ramey County v. Robert P. Lewis Co.* (Minn.) 53 L. R. A. 421.

As to provision for repairs in contract for street improvement, see note to *Portland v. Portland Bituminous Paving & Improv. Co.* (Or.) 44 L. R. A. 527; also *Robertson v. Omaha* (Neb.) 44 L. R. A. 534; *State ex rel. Wilson v. Trenton* (N. J. L.) 44 L. R. A. 540; *Seaboard Nat. Bank v. Woesten* (Mo.) 48 L. R. A. 279; and *Barber Asphalt Pav. Co. v. Hesel* (Mo.) 48 L. R. A. 285.

avenue to Twelfth street with an asphalt pavement. The petition is in the usual form. The defenses relied upon by the defendants, although stated in several different forms, may be resolved into two contentions: First, that the requirement of the ordinance and contract providing for the work, in respect to the guaranty thereof for five years, is *ultra vires* on the part of the city, and void; and, second, that the method of apportioning and charging the cost of the pavement violates the limitation of the Federal Constitution that no state shall deprive any person of his property without due process of law.

The work done consisted of paving with asphaltum the roadway of Forest avenue, in the said city, 36 feet in width, from Independence avenue to Twelfth street, a distance of $\frac{1}{2}$ of a mile. Forest avenue is one of the oldest and best improved residence streets in Kansas City, and all of the lots abutting thereon front the street, and extend back therefrom uniformly, to the depth of an ordinary city lot, to an alley. The lots are all improved, and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in character and quality. There is no showing that there is any difference in the value of any of the lots abutting upon the improvement. The evidence of four witnesses was taken, each of whom testified that each and every lot fronting on that part of the street improved was specially benefited to an amount exceeding the cost of the pavement, and that each of the several lots abutting upon the improvement shared the total benefit sustained by all such lots in the proportion of the frontage of each lot thereon to the total frontage on the improvement of all such lots. This paving procedure was inaugurated conformably to the requirements of the Kansas City charter, by the adoption of a resolution by the common council of this city declaring the work of paving the street to a stated extent, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for ten days in the newspaper doing the city printing. Thereafter the resident owners of the city, owning a majority of front feet of lands belonging to such residents and fronting on that part of the street to be improved, had the right, within thirty days after the first day of the publication of the resolution, to file a remonstrance with the city clerk against the proposed improvement, and thereby to deplete the common council of the power to make the improvement; and such property owners had the right, by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution. In this proceeding neither such a remonstrance nor petition was filed, and the com-

mon council, upon the recommendation of the board of public works, enacted an ordinance numbered 5,891, requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and, the plaintiff being the lowest and best bidder therefor, a contract was, on the 31st day of July, 1894, entered into between Kansas City and the plaintiff for the construction of said pavement. The contract expressly provides that the work shall be paid for by the issuance of special tax bills, according to the provisions of the Kansas City charter, and that the city shall not, in any event, be liable for or on account of the work. The cost of the pavement was apportioned and charged against the lots fronting thereon according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and charged against the lands abutting thereon according to the frontage of the several lots or tracts of lands abutting upon the improvement. The charge against each tract of land is evidenced by a tax bill. The tax bill representing the assessment against each lot is, by the charter, made a lien upon the tract of land against which it is issued, and is prima facie evidence of the validity of the charge represented by it. Such lien can be enforced only by suit in a court of competent jurisdiction against the owners of the land charged. No personal judgment is authorized to be rendered against the owner of the land. The right is expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or error in the amount of the bill, or that the work was not done in a good and workmanlike manner. The judgment was for the plaintiff for the amount due on the bill and for the enforcement of his lien, from which defendants, having unsuccessfully moved for a new trial and in arrest of judgment, have appealed.

Messrs. Gage, Ladd, & Small, for appellants:

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, decides explicitly that laws like that under consideration are unconstitutional, and that all assessments made in pursuance of such laws are void.

Loeb v. Columbia Twp. 91 Fed. 37; *Fay v. Springfield*, 94 Fed. 409; *Charles v. Marion*, 98 Fed. 166; *Lyon v. Tonawanda*, 98 Fed. 361; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Cowley v. Spokane*, 99 Fed. 840.

In all the states whose laws have been considered, some rights and privileges were reserved for individuals, which, it was claimed with greater or less show of reason, constituted "due process of law;" but here the effort has been to exclude the possibility of any claim on the part of the property owner to any right or privilege whatever.

This court and the appellate court, in construing this law, have only given to it its plain, unmistakable meaning.

Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014; *McQuiddy v. Smith*, 67 Mo. App. 205; *Clapton v. Taylor*, 49 Mo. App. 117; *Crane v. French*, 50 Mo. App. 367.

The front-foot rule is not now "due process of law."

It is not every act, legislative in form, that is law. Law is something more than will exerted as an act of power. It must be, not a special rule for a particular person or a particular case, but, in the language of Mr. Webster in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen holds his life, liberty, property, and immunities under protection of the general rules which govern society," and thus excluding bills of attainder, bills of pains and penalties, acts of confiscation, partial and arbitrary exertions of power under the forms of legislation, etc.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Holden v. Hardy*, 109 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Mr. Henry N. Ess also for appellants.

Mr. Edward L. Searritt, with *Messrs. William O. Searritt, John K. Griffith*, and *Elliott H. Jones*, for respondent:

The law of the land or due process of law, as this expression is used in the 14th Amendment, means the common law and the statute law existing in the state at the time of the adoption of this Amendment, or as subsequently and constitutionally modified by the state.

State ex rel. Kohne v. Simons, 2 Speers L. 761; *Louisville v. Cochran*, 82 Ky. 15.

No new rights were created or conferred by the declaration of the 14th Amendment. Its purpose was to guarantee those already in existence. It is a conservatory, rather than a reformatory, force.

Eames v. Savage, 77 Me. 212, 52 Am. Rep. 751; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Re Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; *Alfalfa Irrig. Dist. Directors v. Collins*, 46 Neb. 411, 64 N. W. 1086; *Wulzen v. San Francisco City & County Supers.* 101 Cal. 15, 35 Pac. 353; *Mayo v. Wilson*, 1 N. H. 53; *Weimer v. Bunbury*, 30 Mich. 201; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678.

The methods of special taxation now criticised were developed and established in Missouri statutes and decisions before the 14th Amendment.

Palmyra v. Morton, 25 Mo. 593; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *St. Joseph v. Anthony*, 30 Mo. 537; *Farrar v. St. Louis*, 80 Mo. 379; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114.

The decisions of the courts of twenty-seven states of the Union uphold the validity of the method of legislative acts assessing the cost of street improvements against

abutting lots according to the frontage or area of the respective lots abutting upon the improvement, and establish the jurisdiction of the legislature so to do.

Irwin v. Mobile, 57 Ala. 7; *Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Whiting v. Quackenbush*, 54 Cal. 306; *Whiting v. Townsend*, 57 Cal. 515; *Jennings v. LeBreton*, 80 Cal. 8, 21 Pac. 1127; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500; *Kees v. Denver*, 10 Colo. 112, 15 Pac. 825; *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899; *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158; *O'Reilly v. Kingston*, 39 Hun. 285; *Hayden v. Atlanta*, 70 Cal. 817; *Bacon v. Narannah*, 86 Ga. 301, 12 S. E. 580; *White v. People ex rel. Bloomington*, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Enos v. Springfield*, 113 Ill. 65; *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Way v. Jerseyville*, 158 Ill. 234, 41 N. E. 736; *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105; *Indianapolis v. Imberry*, 17 Ind. 175; *Palmer v. Stumph*, 29 Ind. 329; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *Amery v. Keokuk*, 72 Iowa, 701, 30 N. W. 780; *Gilroost v. McCartney*, 97 Iowa, 138, 66 N. W. 103; *Allen v. Davenport*, 107 Iowa, 103, 77 N. W. 532; *Burnes v. Atchison*, 2 Kan. 455; *Parker v. Challis*, 9 Kan. 155; *Blair v. Atchison*, 40 Kan. 353, 19 Pac. 816; *Atchison, T. & S. F. R. Co. v. Peterson*, 5 Kan. App. 103, 48 Pac. 877; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *Broadway Baptist Church v. McAtee*, 8 Bush, 508, 8 Am. Rep. 480; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546; *Dumesnil v. Gleason*, 99 Ky. 652, 37 S. W. 69; *Augusta v. McKibben*, 22 Ky. L. Rep. 1224, 60 S. W. 291; *Selby v. Levee Comrs.* 14 La. Ann. 437; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251, 5 So. 848; *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70; *Downer v. Boston*, 7 Cush. 277; *Wright v. Boston*, 9 Cush. 241; *Springfield v. Gay*, 12 Allen, 612; *Re Angman*, 153 Mass. 586, 12 L. R. A. 417, 27 N. E. 778; *Sears v. Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 131; *Williams v. Detroit*, 2 Mich. 560; *Mots v. Detroit*, 18 Mich. 522; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52; *Cass Farm Co. v. Detroit*, 124 Mich. 433, 93 N. W. 108; *Smith v. Aberdeen*, 25 Miss. 458; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *St. Joseph v. Anthony*, 30 Mo. 537; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Springfield use of Central Nat. Bank v. Wcaer*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 270; *Saaton Nat. Bank v. Carswell*, 126 Mo. 436, 29 S. W. 279; *Kansas v. Huling*, 87 Mo. 203; *Morrison v. Morcy*, 146

Mo. 563, 48 S. W. 629; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114; *People v. Brooklyn*, 4 N. Y. 419; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104; *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130; *Ruleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521; *Rolph v. Fargo*, 7 N. D. 640, 42 L. R. A. 648, 76 N. W. 242; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1050; *Webster v. Fargo*, 9 N. D. 208, 82 N. W. 732; *Ernst v. Kunkle*, 5 Ohio St. 520; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Upton v. Oviatt*, 24 Ohio St. 232; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Haviland v. Columbus*, 50 Ohio St. 471, 34 N. E. 679; *Schroder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158; *King v. Portland*, 2 Or. 146; *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691; *King v. Portland (Or.)*, 63 Pac. 8; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Harrisburg v. McCormick*, 129 Pa. 213, 18 Atl. 126; *McKeesport v. Busch*, 166 Pa. 46, 31 Atl. 49; *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576; *Harrisburg v. McPherran (Pa.)*, 49 Atl. 988; *Cleveland v. Tripp*, 13 R. I. 50; *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072; *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447; *Allen v. Drew*, 44 Vt. 174; *Norfolk City v. Ellis*, 26 Gratt. 227; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230; *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249; *Weeks v. Milwaukee*, 10 Wis. 243; *State ex rel. Christopher v. Portage*, 12 Wis. 563; *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566.

Every specific objection that can be reasonably urged against the charter method of assessing the cost of street payments has been considered and refuted in the opinions of the Supreme Court of the United States.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Spencer v. Merchant*, 125 U. S. 355, 31 L. ed. 767, 8 Sup. Ct. Rep. 921; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Mattingly v. District of Columbia*, 97 U. S. 692, 24 L. ed. 1100; *Moline County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Gillette v. Denver*, 21 Fed. 823; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The controlling facts in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, differ from the case at bar.

Scott v. Toledo, 36 Fed. 385; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130; *Cooley*, Taxn. 2d ed. p. 148; *Lohrum v. Byermann*, 5 Mo. App. 481.

The front-foot rule of assessing the cost of street pavements is to be commended because the amount of work and the cost of the

improvement in front of each foot of property is the same. Every property owner, or every person who contemplates owning property, may know in advance approximately what burden the abutting land will be called upon to pay for such improvements, and can take that fact into consideration in determining its value or the character of its use.

The tax which each individual is bound to pay ought to be certain, and not arbitrary. *Smith, Wealth of Nations*, Vol. 2, book 5, chap. 1, part II. p. 352.

Lands in a city are valuable in direct proportion to their accessibility, and in proportion to the number of people passing in front of them. The laying of a street pavement increases the value of abutting property at least to the extent of the cost of the work.

The workings of the whole law are to be considered in determining its effects.

The front-foot rule seems, at first blush, to be perfectly arbitrary, and likely to operate in some cases with great injustice, but it cannot be denied that in the case of some improvements frontage is a very reasonable measure of benefits,—much more than value could be,—and perhaps approaching equality as nearly as any other estimate of benefits made by the judgment of men.

Cooley, Taxn. p. 644; *Elliot, Roads & Streets*, p. 396; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158.

The following cases give the better and wiser interpretation of a sober second thought of the learned and suggestive opinions in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187:

Sears v. Boston, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 131; *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249; *Schroder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500; *Augusta v. McKibben*, 22 Ky. L. Rep. 1224, 60 N. W. 291; *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114; *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130; *Webster v. Fargo*, 9 N. D. 208, 82 N. W. 732; *King v. Portland (Or.)*, 63 Pac. 8; *Harrisburg v. McPherran (Pa.)*, 49 Atl. 988; *Kelly v. Chadwick*, 104 La. 719, 29 So. 295.

Gantt, Ch. J., delivered the opinion of the court:

Prior to the decision of the Supreme Court in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, the method adopted in the charter and ordinance of Kansas City of charging the cost of paving Forest avenue against the adjoining lots according to their frontage had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions. *St. Louis ex rel. Seibert v. Allen*, 53 Mo. 44; *St. Joseph v. Anthony*, 30 Mo. 538; *Neenan v. Smith*, 50 Mo. 528; *Kiley v. Cranor*, 51 Mo. 541; *Rutherford v. Hamilton*, 97 Mo. 543, 11

S. W. 249, *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Farrar v. St. Louis*, 80 Mo. 379. In the last-mentioned case, Judge Norton for the court said: "The liability of lots fronting on a street, the paving of which is authorized to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this state, and we are relieved from the necessity of examining authorities cited by counsel for plaintiff condemning what is familiarly known as the 'front-foot rule.'"

Learned counsel for defendant concede such was the state of the decided law of this state, and that the portion of the Kansas City charter known as the ninth article of the charter, which authorizes the cost of a pavement to be assessed against the lots fronting on the improvement according to their respective frontage, was framed after this court had fully considered and construed similar laws, and sustained them against the charge of unconstitutionality, and the assessment now challenged was made under the construction given by this court. They say: "The question we present is whether under the decision in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, the provision of the Kansas City charter under which the tax bill sued on was issued is in violation of the Constitution of the United States, and therefore null and void. We do not and cannot ask this court to reconsider or recast any of its former decisions on this subject. We simply present this controlling decision of the Supreme Court of the United States, and ask that it be applied in this case." If the facts of this case bring it within the case in judgment in *Norwood v. Baker*, this court is bound to follow that decision, and will do so, whatever views we may hold to the contrary.

In applying the principle of *stare decisis* and controlling authority, we will be safe in following that doctrine as announced by the Supreme Court of the United States, whose judgment on the question at bar will be final. In *Cohen v. Virginia*, 6 Wheat. 399, 5 L. ed. 290, Chief Justice Marshall said: "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court in the case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60. It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Further on he says, in reference to language used in *Marbury v. Madison*: 54 L. R. A.

"Having such cases only in its view, the court lays down a principle, which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principles;" and he concludes this point with the announcement that "the general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion." In the recent case of *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, the same court says: "It is trite to say that general principles announced by courts which are perfectly sound expressions of the law, under the facts of a particular case, may be wholly inapplicable in another and different case, and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict than that which deals with the taxing and police powers."

However familiar the facts in the *Norwood-Baker Case* may be, owing to the great interest excited by its promulgation, it will not be amiss to recall its salient features, for the purpose of determining its controlling effect in the case at bar. Mrs. Ellen R. Baker owned a tract of land in the village of Norwood, which intercepted Ivanhoe avenue. This avenue was 50 feet wide, and had been laid out to the north and south lines of her tract. To make Ivanhoe avenue a continuous street, it was necessary to extend it through the Baker tract, and acquire a strip thereof 50 feet wide and 300 feet long. For this purpose a condemnation proceeding was instituted. The Constitution of Ohio provides that, where private property is condemned for public use, "compensation therefor shall first be made in money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Cities and villages in Ohio, as in Missouri, are by statute given power to lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and light streets, alleys, public grounds and buildings, wharves, landing places, bridges, and market-places within the corporation, and to appropriate private property for the use of the corporation; and each city and village may appropriate, enter upon, and hold real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied: "For opening, widening, straightening and extending streets, alleys, and avenues; also for obtaining gravel or other material for the improvement of the same, and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation." 1 Ohio Rev. Stat. 1890, § 1692, subds. 18, 33, and Id. title *Cities and Villages*, pp. 429, 430, § 2232. It is further provided by the statutes of Ohio (1890) that, where private property is taken for opening and widening streets, alleys, or

other public highways, the costs and expenses of the appropriation may be assessed in one of three ways—First, by the council generally upon the public; second, upon abutting, adjacent, or contiguous lots, in proportion to the benefits which may result from the improvement, or according to the value of the property assessed; third, “by the front foot of the property bounding and abutting upon the improvement as the council by ordinance, setting forth specially the lots and lands to be assessed, may determine before the improvement is made.” Id. § 2264. The council of the village of Norwood passed an ordinance which provided for the institution of condemnation proceedings in the probate court for the ascertainment of the compensation to be paid to Mrs. Baker for the desired strip, and also provided that the compensation paid her, and all costs of the condemnation proceeding, and all other costs, and the interest on the bonds issued, if any, to pay her for her land, should be assessed as a benefit to her upon her land abutting on the strip so taken. It thus appears that the village was invoking at one and the same time the extraordinary power of eminent domain and exercising its power of assessment to pay for the land thus taken. In the condemnation proceeding proper the jury assessed her compensation at \$2,000, and that sum was paid her, and thereupon the village council assessed her with the \$2,000 and all the costs of the condemnation, amounting to \$218.58, as benefits to her abutting property. The result was that the village acquired her property for nothing, and charged her \$218.58 for having deprived her of it. Mr. Justice Harlan delivered the opinion of the court. He said: “The particular question presented for consideration involves the validity of an ordinance of that village assessing upon the appellee’s land abutting on each side of the new street an amount covering, not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings.” The lower court adjudged that the assessment was in violation of the 14th Amendment to the Constitution of the United States, and such was the theory of the bill for injunction. *Inter alia*, Judge Harlan says: “It has been adjudged that the due process of law prescribed by that [14th] Amendment requires compensation to be made . . . to the owner when private property is taken . . . for public use.” *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718. “The taking of the plaintiff’s land for the street was under the power of eminent domain. . . . But the assessment of the abutting property . . . was an exercise of the power of taxation.” “Except for the provision of the Constitution of Ohio above quoted, the state could have authorized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be

made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use.” But, asks the learned justice, does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street? The learned justice then concedes that it is the settled law of the Supreme Court of the United States that “abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property,—such assessments . . . resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements;” citing *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; and the cases there cited. He adds that, “according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements.” He proceeds then to show that the power of the legislature is not unlimited, and that there is a point beyond which the legislative department may not go in exerting its power of taxation consistently with the property rights of the citizen. He concludes: “In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.” The learned justice, speaking for the majority of the court, expressly disclaimed that his opinion was in conflict with *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, or *Spencer v. Merchant*, 125 U. S. 346, 31 L. ed. 763, 8 Sup. Ct. Rep. 921. From a careful reading of the case, we conclude that the supreme court decided three propositions: First, that “due process of law,” as used in the 14th Amendment to the Federal Constitution, requires compensation to be made to the owner of the land condemned for public use; second, that the exaction from the owner of abutting property of the cost of a public improvement in substantial excess of the special benefits received by him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation; third, that in that case the special assessment upon the abutting property of Mrs. Baker of the entire cost of opening the street, including not only the full amount paid her for the strip condemned, but the costs and expenses

of the condemnation proceedings, was a taking of her property for public use without compensation; in a word, that, while nominally it was the exercise of the taxing power, it was nothing less than confiscation.

Notwithstanding the fact that the discussion took a wide range, and much that was said affords ground for the contention of learned counsel that all statutes and ordinances which assess abutting owners with the cost of paving a street according to the front-foot rule, as the charter and ordinance of Kansas City do in the case at bar, are null and void, we are of opinion that it was not the intention of the majority of the court to so hold. We think that *Norwood v. Baker* must be read with a view to the particular facts in judgment in that case, and that it was not the intention of the Supreme Court of the United States to overturn the long line of its own decisions which are in harmony with so many of the decisions of the courts of last resort in the several states of the Union, and upon the faith of which vast property rights have accrued. Indeed, as we understand the opinion, the court expressly declined to shake the authority of *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, in which that court sustained an assessment per front foot upon property abutting upon a street improvement. In that opinion each of the justices who concurred in the majority opinion in *Norwood v. Baker* concurred. In the *Parsons Case* the Supreme Court adopted the language of Judge Dillon in his work on Municipal Corporations (4th ed., vol. 2, § 752), as follows: "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefited, and; if in the latter mode, whether the assessment shall be upon all property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." And the court expressly approved the doctrine of *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, which case originated in New York. The court of appeals of New York in an opinion by Judge Finch held that assessment of abutting property is an exercise of the power of taxation, and is vested in the legislature, which determines the amount to be levied, and fixes the tax district; and its decision is final. The Supreme Court of the United States, in its opinion in the same case, said: "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby, and the determination of the ter-

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ritorial district which should be taxed for a local improvement is within the province of legislative discretion." In *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617, the same court said: "Neither can it be doubted that if the state Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement." To the same effect, see *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238. In *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966, the court said: "But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole state or by the district or neighborhood immediately benefited." "The legislature, in the exercise of the right of taxation, has the authority to direct the whole or such part as it may prescribe of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby." "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners." Some stress is laid upon the distinction between the power of the legislature in the exercise of the taxing power and that of municipalities upon which that power is conferred. But few principles are better settled in the courts of this country than this: That, where legislative powers are delegated to a municipal corporation, its discretion within the legitimate sphere of its authority is proportionately as wide as is the like discretion possessed by the legislature of the state, "and as free from outside interference, and that discretion is not subject to judicial revision or reversal." *Morse v. Westport*, 136 Mo. 286, 37 S. W. 934. It is true that in many jurisdictions—certainly in this state—it is true that municipal acts, whether in the form of ordinances or resolutions, may be impeached for fraud at the instance of persons injured thereby (1 Dill. Mun. Corp. 4th ed. § 311; *Glasgow v. St. Louis*, 107 Mo. 203, 17 S. W. 743); whereas courts will not inquire into the motives of the legislature. That the legislature may delegate this power to open, improve, and pave streets to municipal corporations is no longer an open question. That the charter of Kansas City fully and expressly conferred this power upon that city will not be questioned. That charter has all the dignity and force of a legislative enactment. In the case at bar there was not the slightest intimation that the ordinance was procured by fraud, or amounted to arbitrary confiscation, whereas in the *Norwood Case* the ordinance was arbitrary and oppressive, and could only result in depriving Mrs. Baker of her land for a public use without compensation.

Under the scheme there devised, although Mrs. Baker might have been allowed every process of law to recover the value of her land taken, and a hearing as to how the value of the land taken should be apportioned over the benefit district, she could never, unless the district was enlarged, have recovered a cent for her land that was taken, and all additional efforts would simply have increased the costs which she was adjudged to pay; and thus the case properly fell within the rule announced by Mr. Justice Harlan in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, that "the mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process into due process of law if the necessary result be to deprive him of his property without compensation." But in taxing the citizen with his proportionate share of the cost of a pavement abutting on his lot, there is no taking of property for public use.

Now, is there anything which smacks of arbitrary or fraudulent conduct? This method of taxation has passed under the scrutiny of the courts of this country, and has received their approval. Judge Cooley, in his work on *Taxation* (p. 644), says: "Such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that in the case of some improvements frontage is a very reasonable measure of benefits,—much more than value could be,—and perhaps approaching equality as nearly as any other estimate of benefits made by the judgment of men." Judge Elliott, in his book on *Roads and Streets* (p. 396), says: "The system which leads to the least mischievous and unjust consequences is that which takes into account the entire line of the way improved and apportions the expense according to the frontage; for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of the way, and does not impose upon one lot owner an unjust portion of the burden." Judge Sharpswood, speaking for the supreme court of Pennsylvania in *Hammitt v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615, says: "Perhaps no fairer rule can be adopted than the proportion of feet front, though there must be some inequalities if the lots differ in situation and depth." Such has been the holding of this court throughout its history. A rule so universally adopted and sustained can hardly be called arbitrary, or so unjust as to warrant a court to strike down the discretion of the municipality which adopts it.

It is, however, insisted that the *Norwood-Baker Case* does condemn this front-foot rule because it affords no opportunity for a hearing. Still conceding, as we do, that there are expressions to this effect in that opinion, it seems so clear to us that the opinion was not predicated upon the want of notice, and that no amount of notice could have availed to secure justice to Mrs. Baker under the scheme devised; that we do not believe that the supreme court intended to

lay down the law that a state statute imposing taxes must necessarily and in all cases give notice and a hearing to the taxpayer before it can be held valid. We think the decisions of that court are overwhelmingly to the contrary, and we discern no purpose in this opinion to overrule and set aside all of its prior utterances on this subject. Thus, in *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, the court unanimously said: "In *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, the distinction between a tax or assessment imposed by a direct exercise of the legislative power calling for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination, and a tax or assessment imposed upon property according to its value, to be ascertained by assessors upon evidence, was pointed out, and it was held that in the former case no notice to the owner is required, but that in the latter case the officers in estimating the value act judicially, and notice and an opportunity to be heard are necessary. In giving the opinion of the court it was said by Mr. Justice Field (page 709, 111 U. S., page 572, 28 L. ed., and page 668, 4 Sup. Ct.): 'Of the different kinds of taxes which the state may impose there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him; such as poll taxes, license taxes, . . . and generally specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded.' The court further quote Judge Cooley on *Taxation* with approval to the effect 'that the whole cost [of a local improvement] in other cases is levied on lands in the immediate vicinity of the work.' 'In a constitutional point of view, either of these methods is admissible, and one may be sometimes just and another at other times.' 'The question is legislative, and like all legislative questions may be decided erroneously.' The court thus approves Judge Dillon's text (2 Mun. Corp. § 752), wherein the learned author says: 'Whether the assessment shall be upon all property found to be benefited or alone upon the abutters according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency;' and in *Norwood v. Baker, Parsons v. District of Columbia* is expressly approved by Mr. Justice Harlan on the ground that it was done under an act of Congress establishing a comprehensive system for the District. From the reasoning of the learned justice it is hard to escape the conclusion

that he regarded the fact that the entire cost of the land taken and all the costs of the condemnation were assessed upon Mrs. Baker's land as peculiar to that case, and that a different rule would govern if the assessment per front foot had been levied under a general or comprehensive system for betterments, as was the case in *Parsons v. District of Columbia*, and which clearly exists under the charter and ordinance of Kansas City, which provide a comprehensive system for the paving of all the streets of said city, and an assessment per front foot upon all abutting property to pay therefor. It seems indisputable that, if no inquiry into benefits was required in the *Parsons Case*, and that act was constitutional, neither can the charter and ordinance of Kansas City, which also provide a comprehensive system of improvement, be held unconstitutional. In neither case is there any inquiry as to benefits, nor is the tax levied according to actual benefit, but both alike rest upon the conclusive presumption, indulged by Congress in the one case and the charter in the other, that such an improvement is a benefit to the abutting property. Not only is this true, but the Supreme Court of the United States is solemnly committed to the doctrine that, if the assessment actually exceeds the cost of the work, it would not vitiate or annul the assessment. *Parsons v. District of Columbia*, 170 U. S., *loc. cit.* 56, 57, 42 L. ed. 947, 948, 18 Sup. Ct. Rep. 525, 526; *Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690; *Hyde Park v. Spenoer*, 118 Ill. 446, 8 N. E. 846.

Whether there is really a distinction between the *Parsons Case* and the *Norwood-Baker Case* if the fact of the taking of Mrs. Baker's land without compensation be dissociated from the latter, we will not now discuss, but accepting the whole of the *Norwood Case*, its approval of the *Parsons Case*, as well as the statement that the front-foot rule excluded an inquiry into benefits, we are of opinion that the Supreme Court of the United States will not condemn the assessment in the case at bar, because it falls clearly within the doctrine of the *Parsons Case*, and the construction placed on that case in the *Norwood Case*, and because no court has more emphatically determined that an assessment by the front-foot rule is an exercise of the taxing power, and is a legislative function, with which the courts have no power to interfere, and will not do so. Certainly it is true that until the decision in the *Norwood-Baker Case* the decisions of the supreme court hold that the 14th Amendment to the Constitution of the United States does not prohibit assessments on real estate in excess of special benefits, or by methods other than according to special benefits. In the case of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, the estate of John Davidson was assessed about \$50,000 for draining certain swamp lands in the state of Louisiana. The assessment was levied according to the superficial area or square feet of land within the drainage district; that is, each square foot was taxed as much as every other

square foot in the district. No inquiry was had into benefits, and the assessment was not according to benefits. It was even agreed that no drainage was done on Davidson's land, and that a part of his land needed no drainage, having already been drained. The question was squarely raised and presented whether the 14th Amendment prohibited such an assessment. Justice Miller wrote the opinion, in which all the justices concurred, and held that the Supreme Court of the United States had no jurisdiction of the case, because the 14th Amendment was not violated; that that class of cases did not fall within the provisions of the Amendment. In the course of his opinion the learned judge says: "It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail, with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds." At that time it is clear that the whole court held that the fact that an assessment was for an improvement which in fact was no benefit to the property owner did not bring the case within the 14th Amendment, and it would be hard to conceive of a harder case. Subsequently, in *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, Mr. Justice Gray said: "In *Davidson v. New Orleans* it was held that, if the work was one which the state had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the 14th Amendment to the Constitution upon which this court could review the decision of the state court." And in *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192, Chief Justice Fuller said, in reference to the *Davidson Case*: "And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power. *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Stanley v. Albany County Supers.* 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hager v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *United States v. Memphis*, 97 U. S. 284, 24 L. ed. 937; *Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552. And whenever the law operates alike

on all persons and property similarly situated, equal protection cannot be said to be denied." *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Richmond, F. & P. R. Co. v. Richmond*, 90 U. S. 521, 24 L. ed. 734. In *Walston v. Nevin* the assessment for the construction of a street was apportioned upon abutting land according to the number of square feet. No inquiry could have been made as to benefits any more than in the *Norwood Case*, and yet the court ruled it fell within the *Davidson Case*, and it had no jurisdiction. Finally, in *Fallbrook Irrig. Dist. v. Bradley*, 104 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56, an ad valorem assessment upon all the land within the district was held not contrary to the 14th Amendment. The point was specifically made that the assessment was not made in accordance with and in proportion to the benefits conferred by the improvement, and land which could not be benefited was placed in a district to be taxed to pay for the improvements which would benefit others. The importance of the case is suggested by the great array of eminent counsel on both sides. Mr. Justice Peckham delivered the opinion. Among other things, he said: "As was said by Mr. Justice Miller in *Davidson v. New Orleans*, where the objection was made that part of the property was not in fact benefited, 'this is a matter of detail, with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.' To the same effect: *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Lent v. Tillson*, 140 U. S. 316-333, 35 L. ed. 419-427, 11 Sup. Ct. Rep. 825. In regard to the matters thus far discussed, we see no valid objection to the act in question." Again, he says: "The fourth objection, and also the objection above alluded to as the final one, may be discussed together, as they practically cover the same principle. It is insisted that the basis of the assessment upon the lands benefited for the cost of the construction of the works is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation." And again: "We do not discover, and our attention has not been called to, any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief." 54 L. R. A.

It is in view of this unbroken chain of authority, this unanimous declaration of the Supreme Court, that the 14th Amendment to the Federal Constitution does not prohibit assessments on real estate for local improvements in excess of special benefits, or by methods other than according to the amount of the benefit, and the failure of that court to criticize or overrule any of said decisions, that we say that in a case like the one at bar, involving only an assessment, or no question of taking private property for public use without compensation, there is no Federal question, and that the *Norwood-Baker Case* does not apply to such a case, and does not require that we should overrule the long line of cases decided by this court which sustain the front-foot rule, and that until that court in a case like this shall reverse its former long line of decisions we must adhere to our own construction of our Constitution and laws. Of course, if the Supreme Court shall in a case like this hold that the 14th Amendment does apply, and that the assessment by the front-foot rule under the Kansas City charter is void, we shall conform to its judgment as the final arbiter under the Constitution.

As the assessment was made in strict compliance with the charter and ordinance, we do not think the testimony of the four witnesses to the effect that the benefits to the lots exceeded the cost of the improvement could cure the vice, if any, in the charter and the ordinance. Plaintiff must stand or fall by the charter provision. The admission of the evidence, however, did not constitute reversible error, as we hold the charter and the ordinance were sufficient without the evidence, and would have been had it been to the contrary.

2. The other objection remains. It is urged that the requirement of the ordinance and contract providing for maintaining and repairing the street on which the paving was done for five years is *ultra vires* on the part of the city, and void; that the power of the city to contract for repairs is limited to two years. Speaking for myself, I think the contention of the defendant is sound, but this court has ruled otherwise in *Seaboard Nat. Bank v. Wooster*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939, and *Barber Asphalt Pav. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458, and no good purpose will be subserved by repeating the grounds upon which I based my dissent in those cases. The question must be considered settled by the majority opinions in those cases.

It follows that *the judgment of the Circuit Court must be and is affirmed.*

All concur, except *Burgess, J.*, absent.

Affirmed by Supreme Court of United States April 29, 1901.

George CRIM, *Appt.*,
v.
Jacob CRIM, *Respt.*

(.....Mo.....)

1. One cannot defeat liability on a judgment entered on a note authorizing an attorney to confess judgment, which he signed without reading, on the ground that he did not know that it contained such authority, in the absence of any fraud, misrepresentation, or concealment in procuring his signature.
2. A judgment against a nonresident, entered on a note containing a power of attorney to confess judgment, which is valid in the state where entered, is entitled to full faith and credit in other states, so as to support an action to enforce the judgment in such other states.

(*Valiant and Robinson, JJ., dissent.*)

(May 21, 1901.)

APPEAL by plaintiff from a judgment of the Circuit court for Barton County in favor of defendant in an action brought to enforce payment of a judgment which had been rendered against defendant in the state of Ohio. *Reversed.*

The facts are stated in the opinions.

Messrs. White & McCommon, for appellant:

The judgment rendered in Ohio was a regular, valid judgment in that state.

Matthews v. Thompson, 3 Ohio, 272; *Huntington v. Finch*, 3 Ohio St. 445; *Watson v. Paine*, 25 Ohio St. 340; *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Clements v. Hull*, 35 Ohio St. 141.

The courts of Missouri will give to the Ohio judgment the same force and effect it would have in Ohio, as ascertained by the laws of Ohio.

2 Black, *Judgm.* §§ 860, 861, 868.

Judgments by confession, on warrant of attorney, as this is, are recognized by the courts of this state as valid.

Randolph v. Keiler, 21 Mo. 557; *Harness v. Green*, 19 Mo. 323.

The note was the ordinary printed form which had been in common use among business men in that community for many years; the defendant had been in active business there for twenty years, and had given a great many such judgment notes, and, all in all, every element of fraud which has been held necessary in this state to annul a judgment is lacking in this evidence.

Irvine v. Leyh, 102 Mo. 206, 14 S. W. 715, 16 S. W. 10, 124 Mo. 364, 27 S. W. 512; *Payne v. O'Shea*, 84 Mo. 132; *Murphy v. DeFrance*, 101 Mo. 157, 13 S. W. 756; *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674; *Bigelow, Estoppel*, 3d ed. 162, 163.

The defendant cannot, under his own evi-

NOTE.—For judgment of other state entered on warrant of attorney to confess judgment, see. In this series, *Teel v. Yost* (N. Y.) 13 L. R. A. 796, and note; *First Nat. Bank v. Garland* (Mich.) 33 L. R. A. 83; and *Van Norman v. Gordon* (Mass.) 44 L. R. A. 840.

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dence, nullify the warrant of attorney contained in the note.

Taylor v. Fox, 16 Mo. App. 529; *Campbell v. Van Houten*, 44 Mo. App. 238; *Rothschild v. Frensdorf*, 21 Mo. App. 323; *Brown v. Wabash, St. L. & P. R. Co.* 18 Mo. App. 568; *Robinson v. Jarvis*, 25 Mo. App. 421; *Patterson v. Kansas City, Ft. S. & M. R. Co.* 56 Mo. App. 662; *Wyrick v. Missouri, K. & T. R. Co.* 74 Mo. App. 412; *Kellerman v. Kansas City, St. J. & C. B. R. Co.* 136 Mo. 188, 34 S. W. 41, 37 S. W. 828; *Gwin v. Waggoner*, 98 Mo. 327, 11 S. W. 227; *Girard v. St. Louis Car-Wheel Co.* 46 Mo. App. 106; *Palmer v. Continental Ins. Co.* 31 Mo. App. 472; *Snider v. Adams Exp. Co.* 63 Mo. 376; *O'Bryan v. Kinney*, 74 Mo. 125; *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *Herndon v. Triple Alliance*, 45 Mo. App. 432; *Mateer v. Missouri P. R. Co.* 105 Mo. 352, 16 S. W. 839; *Mulligan v. Illinois C. R. Co.* 36 Iowa, 181; *Shanley v. Laclede Gaslight Co.* 63 Mo. App. 131; 1 Wharton, *Contr.* § 196; *School Dist. No. 4 v. State Ins. Co.* 61 Mo. App. 599; *Mensing v. American Ins. Co.* 36 Mo. App. 602; *Hartford F. Ins. Co. v. Davis*, 59 Mo. App. 405; *Holloway v. Wabash R. Co.* 62 Mo. App. 56; *Frost Mfg. Co. v. Springfield Foundry & Mach. Co.* 79 Mo. App. 652; *Davis v. Krum*, 12 Mo. App. 279; *Pomeroy v. Benton*, 77 Mo. 88; *Steele v. Farber*, 37 Mo. 85; *Powell v. Missouri P. R. Co.* 76 Mo. 80.

Although the judgment in this case was rendered upon a cognovit, the same presumptions in its favor will be indulged as in case of ordinary judgments of courts of general jurisdiction.

Hansen v. Schlesinger, 125 Ill. 230; 17 N. E. 718; *Bush v. Hansen*, 70 Ill. 480; *Roche v. Beldam*, 119 Ill. 320, 10 N. E. 191; *Holden v. Bull*, 1 Penr. & W. 460; *Miller v. Howry*, 3 Penr. & W. 374, 24 Am. Dec. 320; *Stewart v. Stocker*, 1 Watts, 135; *Pennock v. Copeland*, 1 Phila. 29; *Moore v. Hutchinson*, 1 Phila. 377; *McCalmont v. Peters*, 13 Serg. & R. 196; *Cook v. Gilbert*, 8 Serg. & R. 567; *Ely v. Karmany*, 23 Pa. 314; *McClure v. Roman*, 52 Pa. 458; *Stein v. Brunner*, 42 La. Ann. 772, 7 So. 718; *F. Mayer Boot & Shoe Co. v. Falk*, 80 Wis. 216, 61 N. W. 562; *Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242, 36 Pac. 344; *Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576; *Dodge v. Coffin*, 15 Kan. 277; *Ward v. Baker*, 16 Kan. 31; *Crafts v. Clark*, 38 Iowa, 237; *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306; *Nicholas v. Farwell*, 24 Neb. 180, 38 N. W. 820; *Sipes v. Whitney*, 30 Ohio St. 69; *Randolph v. Keiler*, 21 Mo. 557; *Harness v. Green*, 19 Mo. 323.

The court in Ohio obtained jurisdiction by the warrant of attorney to render a personal judgment against defendant.

Dacey, Confl. L. p. 44; *Black, Judgm.* § 78; *Odell v. Reynolds*, 17 C. C. A. 317, 37 U. S. App. 447, 70 Fed. 662; *First Nat. Bank v. Garland*, 109 Mich. 515, 33 L. R. A. 83, 67 N. W. 559; *Stein v. Brunner*, 42 La. Ann. 772, 7 So. 718.

The judgment against defendant, being valid in Ohio, is valid here.

Freeman, Judgm. § 558a; *Sipes v. Whit-*

ney, 30 Ohio St. 69; *Coleman v. Waters*, 13 W. Va. 278; *Nicholas v. Farwell*, 24 Neb. 180, 38 N. W. 820; *Kingman v. Paulson*, 126 Ind. 507, 26 N. E. 393.

The validity of the Ohio judgment is not affected by the fact that such judgments are not authorized here.

Dacey, Conf. L. 437, ¶ 7; *Kingman v. Paulson*, 126 Ind. 507, 26 N. E. 393; *Crafts v. Clark*, 38 Iowa, 237; *Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576.

Messrs. Thurman, Wray, & Timmonds, for respondent:

Respondent signed this supposed note under the impression that it was simply a written evidence of his debt to appellant. He had a right to rely on that fact under the circumstances. Without an agreement permitting it, it is clear that the judgment is an absolute nullity.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Williams v. Monroe*, 125 Mo. 574, 28 S. W. 853.

The judgment, if rendered in the state of Missouri, could not be upheld. Conceding that the agreement in the note had been entered into with full knowledge of its force and effect, such course of procedure is against the policy of our law.

Burr v. Mathers, 51 Mo. App. 470.

Before a defendant can be deprived of his day in court, his waiver of this important right must appear by clear and cogent testimony.

Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571; *Supreme Council, O. of O. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460; *Wood v. Humphrey*, 114 Mass. 185; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365.

Respondent had a perfect right to rely on the fact that his brother had filled out a note, instead of a power of attorney to confess judgment; and if he did not know of the deception, the court properly instructed the jury that he was not bound by the contract.

Pomeroy v. Benton, 57 Mo. 531; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753; *Caldwell v. Henry*, 76 Mo. 254; *Wannell v. Kem*, 57 Mo. 478; *Dickson v. Kempinsky*, 96 Mo. 258, 9 S. W. 618; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496.

When a party to a contract inserts terms not agreed upon, and the other party signs it without knowledge of the deception, relying on the fact that the contract has been drawn as agreed upon, such contract is void.

Wright v. MoPike, 70 Mo. 175; *Cole Bros. v. Wiedmair*, 19 Mo. App. 7; *Briggs v. Ewart*, 51 Mo. 249, 11 Am. Rep. 445; *O. Aultman & Co. v. Olson*, 34 Minn. 450, 26 N. W. 451; *Hitchins v. Pettingill*, 58 N. H. 386; *Phelps v. Decker*, 10 Mass. 278; *Stacy v. Ross*, 27 Tex. 3, 84 Am. Dec. 604; *Van Valkenburgh v. Rouk*, 12 Johns. 337.

On rehearing.

Plaintiff abandoned his right, if any he had, under the power of attorney, when he brought suit in Missouri to secure judgment on the debt.

54 L. R. A.

This judgment without actual notice to defendant is not a "judicial proceeding" of another state within the meaning of § 1, art. 4, of the Federal Constitution.

D'Arcy v. Ketchum, 11 Fow. 165, 13 L. ed. 648; *Latimer v. Union P. R. Co. East Div.* 43 Mo. 105, 97 Am. Dec. 378; *Overstreet v. Shannon*, 1 Mo. 529; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92.

A judgment, although warranted by the laws of a sister state, where the defendant is not served with process and does not in fact enter his appearance, is not "records and judicial proceedings" within the meaning of § 1, art. 4, of the Federal Constitution.

Overstreet v. Shannon, 1 Mo. 529; *Salles v. Hays*, 3 Mo. 116; *Smith v. Ross*, 7 Mo. 464; *Gillett v. Camp*, 23 Mo. 375; *Miles v. Jones*, 28 Mo. 87; *Foot v. Newell*, 29 Mo. 400; *Latimer v. Union P. R. Co. East Div.* 43 Mo. 105; *Sevier v. Roddie*, 51 Mo. 580; *State use of Gilbreath v. Bunce*, 65 Mo. 349.

The weight of the authority is against the validity of such a judgment outside of the territorial limits of the sovereignty where rendered, and not within the meaning of the Federal Constitution and statutes giving to the "records and judicial proceedings" of other states "full faith and credit."

Cooley, Const. Lim. §§ 495, 496, 508; *Story*, Conf. L. §§ 539, 540; *Black*, Const. L. 233; *Wharton*, Conf. L. §§ 656, 660; 2 *Freeman*, Judgm. §§ 562, 563, and note 1; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Weaver v. Baggs*, 38 Md. 255; *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477; *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673; *Underwood v. McVeigh*, 23 Gratt. 409; *McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332; *Thorner v. Batory*, 41 Md. 593, 20 Am. Rep. 74; *Anderson v. Haddon*, 33 Hun, 435.

Marshall, J., delivered the opinion of the court:

The following opinion was heretofore rendered in this case by division No. 1 of this court:

"Action upon a foreign judgment for \$7,004. Judgment for defendant. Plaintiff appeals. The parties are brothers, and both formerly lived in Ohio. The defendant was in debt to the plaintiff, and on the 10th of November, 1881, was about to remove to Missouri. The plaintiff demanded a settlement, and the defendant, as he says, because he would have had trouble if he had not done so, gave the plaintiff his note for \$4,000, payable at one year, with 6 per cent interest, in settlement of the debt. The note contained a cognovit authorizing any attorney at law to appear in any court of the United States, waive process, enter appearance, and confess judgment against defendant for the amount due on the note, including interest and costs, and to release all errors. On the 14th of October, 1891, the plaintiff instituted suit against the defendant in the court of common pleas of Stark

county, Ohio, upon the note. Pursuant to the terms of the note, W. J. Piero, an attorney of that court, entered the defendant's appearance, waived process, and confessed judgment for \$7,004, the principal and interest due on the note, released all errors, and waived all rights of appeal. Thereafter the plaintiff instituted this suit in the Barton county circuit court on the foreign judgment. The answer of the defendant is a general denial, with special pleas: (1) That the Ohio court had no jurisdiction, because defendant was, and had been for over ten years, a resident of Barton county, Missouri, and was not summoned and did not appear in the Ohio court, and never authorized Piero or anyone else to appear for him, and that at the time the suit was begun in Ohio the debt was barred by limitation in Missouri; (2) that the parties are brothers, and the defendant, being, in debt to the plaintiff, was about to remove to Missouri, and plaintiff asked defendant to sign a note for the balance due plaintiff, saying he only wanted a settlement and would never enforce the note against defendant; that defendant did not in fact owe the plaintiff as much as \$4,000; that he signed the note, understanding that it was only a promissory note, and not knowing that it contained a provision authorizing a confession of judgment, and never having agreed to grant such authority to anyone; that the plaintiff falsely and fraudulently represented to him that it was only a promissory note, and concealed from him the fact that it contained a cognovit; and that, relying on the statements of the plaintiff, he signed the note without reading it or examining it. The trial developed the facts to be that notes of this character are usually used in Ohio; that the defendant had been largely engaged in dealing in cattle while he lived in Ohio, and had executed many such notes, and that several judgments had been rendered against him there upon similar notes, under the cognovit therein contained; 'that he had procured many loans from the banks upon similar notes, and that the banks would not make loans upon any other kind of paper; that he had given similar notes to other persons before leaving Ohio; that there were no representations made to him about the character of this note when he signed it, and no attempt made to conceal its character from him; that he owed his brother some amount,—the brother says \$5,000, and he says it was not so much,—and that his brother offered to settle it if he would give him this note for \$4,000; and that he did so because 'I expect I would have had to sign the note or got into trouble.' The court refused all the instructions asked by the plaintiff, and on its own motion instructed the jury as follows: 'You are instructed that your verdict will be for the plaintiff for the full amount of the judgment sued on, with interest on the same from October 14, 1891, to date, at the rate of 6 per cent per annum, unless you further believe, from the preponderance or greater weight of the evidence, that the defendant, at the time he signed the note upon which the judgment sued on

is based, had no knowledge that the said note contained a power of attorney to confess judgment and had no intention to sign such a note, in which case your verdict will be for the defendant.' The jury found for the defendant, judgment was entered upon the verdict, and after proper steps the plaintiff appealed.

"1. There was no fraud, misrepresentation, trick, or concealment in the procurement of the note. It may be true the defendant did not read it before he signed it; but he was *sui juris*, had full opportunity to read it, and deliberately signed it. The law presumes he knew its contents, and he cannot be permitted now to take advantage of his own fault or negligence. *O'Bryan v. Kinney*, 74 Mo. 125; *Snider v. Adams Exp. Co.* 63 Mo. 376; *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo. 637, 46 Am. Rep. 13; *Matteer v. Missouri P. R. Co.* 105 Mo. 352, 16 S. W. 839; *Kellerman v. Kansas City, St. J. & C. B. R. Co.* 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; 1 Wharton, Conv. § 196. The defendant relies on *Wright v. McPike*, 70 Mo. 175, approving what was said in *Briggs v. Ewart*, 51 Mo. 249, 11 Am. Rep. 445, as follows: 'It may be assumed as an axiom that no one can be made a party to a contract without his own consent. Although his signature may be put to the writing, and may have been written by himself, yet if he did not know what he was signing, but acted honestly under the belief that he was signing some other paper, and not the one he really signed, he ought not to be bound by such signature.' In *McPike's Case* this was quoted, and then it was said: 'Although that case has been overruled, the doctrine announced in the foregoing extract from the opinion was not disturbed by the court in the overruling decision. As between the original parties, if one has procured the signature of the other to a written agreement, whether by fraud or not, which does not contain the contract made by the parties, but a different one, he cannot be permitted to avail himself of that contract, but must stand by the one which was in fact entered into by both parties.' In *Briggs v. Ewart*, 51 Mo. 249, 11 Am. Rep. 445, it was held that such a defense could be made, even if the note was held by a bona fide purchaser for value and without notice before maturity. This case, as was also the case of *Corby v. Weddle*, 57 Mo. 452, which followed it, was expressly overruled in *Shirts v. Overjohn*, 60 Mo., loc. cit. 312. The doctrine further announced in *McPike's Case*, that, as between the original parties, such questions are open to inquiry in a suit at law upon the note, whether the note was made by fraud or not, is no longer the law in this state, as the cases cited above clearly show. Courts of equity set aside contracts procured by fraud, and reframe contracts where there has been a mutual mistake of the parties; but it is an invariable rule of law that, in the absence of fraud or mistake, parol evidence is not admissible to contradict or vary a written contract. The written contract is conclusively presumed to merge all prior negotiations, and to express the final

agreement of the parties. To permit a party, when sued on a written contract, to admit that he signed it, but to deny that it expresses the agreement he made, or to allow him to admit that he signed it, but did not read it or know its stipulations, would absolutely destroy the value of all contracts and negotiable instruments. The reason underlying the rule is to give stability to written agreements, and to remove the temptation and possibility of perjury, which would be afforded if parol evidence was admissible. But, aside from these considerations, this is a suit upon a judgment, and not upon the note. The note is merged in the judgment, and the defenses that might have been available, if properly interposed in the suit on the note, are not open to review here. Even if there was fraud in the note constituting the cause of action, the judgment cannot be attacked. Only fraud in the very act of procuring the judgment can be interposed as a defense to the judgment, even in a direct attack in equity to set aside the judgment. *Hamilton v. McLean*, 139 Mo. 678, 41 S. W. 224; *Bates v. Hamilton*, 144 Mo. loc. cit. 11, 45 S. W. 641.

"2. Judgments upon notes containing such a cognovit are valid judgments in Ohio. *Matheus v. Thompson*, 3 Ohio, 272; *Watson v. Paine*, 25 Ohio St. 340; *Clements v. Hull*, 35 Ohio St. 141. Such judgments are also valid in other states. *Hansen v. Schlesinger*, 125 Ill. 230, 17 N. E. 718; *Rooke v. Beldam*, 119 Ill. 320, 10 N. E. 191; *Holden v. Bull*, 1 Penr. & W. 460; *Ely v. Karmany*, 23 Pa. 314; *Stein v. Brunner*, 42 La. Ann. 772, 7 So. 718; *F. Mayer Boot & Shoe Co. v. Falk*, 89 Wis. 216, 61 N. W. 562. The identical question here involved came before this court in *Randolph v. Keiler*, 21 Mo. 557, where the suit was upon a judgment rendered by the 'inferior court of common pleas, in and for the county of Sussex, state of New Jersey,' upon a note containing a cognovit in almost the exact terms with the note upon which the Ohio court entered judgment in this case. Practically the same defenses were made there that are made here. But it was held that such judgment was valid in New Jersey, even though neither of the parties were citizens of that state, or had ever been in that state, and, this being so, the judgment was entitled to 'full force and credit' in this state, under § 1 of article 4 of the Constitution of the United States; and hence the New Jersey judgment was enforced here. Similar judgments are enforced in other jurisdictions, even though the defendant was a resident of another state than that in which the judgment sought to be enforced was rendered. *Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242, 36 Pac. 344; *Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576; *Crafts v. Clark*, 38 Iowa, 237; *Nichols v. Farwell*, 24 Neb. 180, 38 N. W. 820; *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306; *Sipes v. Whitney*, 30 Ohio St. 69. The question whether the note upon which the judgment sued on was barred by limitation in Missouri is not open to review here. The suit is upon the judgment, and that is not barred by limitation. It follows that

the trial court erred in giving the instruction quoted, and also that neither the answer nor the evidence shows any defense to the suit. The trial court should have directed a verdict for the plaintiff, and the judgment of that court is reversed, and the cause remanded, to be proceeded with in accordance herewith."

Upon motion the cause was transferred to court in banc, upon the dissent of Valliant, J. The case has again been fully argued and further briefed by counsel. In addition to what is said in the divisional opinion, it is proper to say that the cases of *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648, and *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, are not applicable to the case at bar,—the first, because there was no service of any kind upon the partner who lived in Louisiana, and therefore the personal judgment of the New York court against him was void; and the second, because the service was by publication, constructive, and therefore it would not support a personal judgment, while in the case at bar the defendant was in court by his own voluntary act when the judgment was rendered against him. Counsel for defendant, in a supplemental brief, has referred to the following cases as authority for the contention that the decision in this case and that in *Randolph v. Keiler*, 21 Mo. 557, are not in harmony with the rule and policy in this state: *Overstreet v. Shannon*, 1 Mo. 529; *Sallee v. Hays*, 3 Mo. 116; *Smith v. Ross*, 7 Mo. 464; *Gillett v. Camp*, 23 Mo. 375; *Miles v. Jones*, 28 Mo. 87; *Foot v. Newell*, 29 Mo. 400; *Latimer v. Union P. R. Co. East Div.* 43 Mo. 105, 97 Am. Dec. 378; *Sevier v. Roddie*, 51 Mo. 580; and *State use of Gilbreath v. Bunce*, 65 Mo. 340. A careful examination of these cases shows, however, that they have no application to the case at bar. Thus, in *Overstreet v. Shannon*, 1 Mo. 529, it appeared that the defendant had not been served in any manner in the foreign state. In *Sallee v. Hays*, 3 Mo. 116, the judgment was against the defendants, who were non-residents of the foreign state, without any service whatever, upon a covenant of their ancestor, and the decree charged the assets descended with the debt of the ancestor. It was alleged that such a decree was conclusive upon the parties in Kentucky. This court held that the judgment was not valid here, because the defendants had not been brought into court in any manner whatever. In *Gillett v. Camp*, 23 Mo. 375, and *Latimer v. Union P. R. Co. East Div.* 43 Mo. 105, 97 Am. Dec. 378, the judgment was based solely upon constructive service by publication. In *Smith v. Ross*, 7 Mo. 464, the action was upon a foreign judgment against Smith, who was served, and Haniman, as to whom the return of process was "not found." The judgment was held to be void as to Haniman, because he was never brought into court. In *Miles v. Jones*, 28 Mo. 87, the defendant was personally served; but the judgment was attacked and set aside because it was procured by fraud. In *Foot v. Newell*, 29 Mo. 400, it appeared that a judgment was rendered against the defendant in In-

diana (it does not appear from the statement of facts whether the defendant was in court or not, but it seems to be assumed that he was; at any rate, that question was not involved in the case), and that the sheriff had levied upon the property, and that by virtue of a statute of that state the defendant replevied the property levied on, and obtained a stay of execution, according to the law of that state, by giving a bond to pay the judgment. The statute (Ind. act Feb. 4, 1831) provided: "And such bond, from the date of its execution, shall be taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates, and execution may issue thereon, accordingly." The judgment was not paid, and the bond was sued on in this state as a judgment of the state of Indiana. It was held that such a bond had "no affinity" to a judgment, and was not such a judgment as is contemplated by the act of Congress: all of which is undoubtedly right, for such a bond is no more a judgment than is any contract or power of attorney authorizing a confession of a judgment. It is the act of the parties, and is not the judgment of a court. In *Sevier v. Roddie*, 51 Mo. 580, the action was upon a Tennessee judgment. It appeared that a third person had obtained a judgment against the defendant as principal and the plaintiffs as his sureties. The sureties paid the judgment, and under the laws of Tennessee obtained a summary judgment, without notice, against the principal, and the suit was upon this judgment. It was properly held that the judgment was not such a judgment as the act of Congress contemplated, because, the defendant not being in court, the proceeding was void. In *State use of Gilbreath v. Bunce*, 65 Mo. 349, it appeared that under the laws of Arkansas the plaintiff, a minor, had been relieved of the disability of infancy, "so far as to authorize him to demand, sue for, and receive all moneys belonging to him in the state of Missouri, in the hands of his curator," etc. Thereupon he sued the defendant, the curator of his estate in Missouri, upon his bond as such curator, to recover the estate in his hands. It was held that the minor could not maintain the suit, as under the laws of Missouri a minor can only appear by guardian, and that the legislature of Arkansas could not pass a law which would have the effect of giving a non-resident minor of this state a different status in the courts of this state from that of a resident minor in this state, when seeking the aid of the courts of this state. This decision is right, but it is not perceived how it applies to the case at bar, nor how the act of Congress has any bearing on it; for the action was not for the enforcement of a judgment of a foreign state, but was simply an attempt to make the minor of age when he came into the Missouri courts, contrary to the laws of this state. It did not remove his disabilities absolutely, or at all in Arkansas, but only "so far as to authorize him to demand, sue for, and recover all moneys belonging to him in the state of Mis-

souri, in the hands of his curator," etc. This was simply a bungling attempt by the courts of Arkansas to control judicial proceedings in Missouri, and is without precedent in law that we are aware of.

The defendant strenuously contends that the case of *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92, is "on all fours" with the case at bar. In that case it appeared: "B., a citizen of Maryland, having executed a bond containing a warrant authorizing any attorney of any court of record in the state of New York, or any other state, to confess judgment for the penalty, and judgment having been entered against him in Pennsylvania by a prothonotary, without service of process or appearance in person or by attorney, under a local law permitting that to be done, held; (1) That in a suit upon this judgment in Maryland the courts of Maryland were not bound to hold the judgment as obligatory, either on the ground of comity or of duty, contrary to the laws and policy of their own state; (2) B. could not properly be presumptively held to knowledge and acceptance of particular laws of Pennsylvania, or of all the states other than his own, allowing that to be done which was not authorized by the terms of the instrument he had executed." It was pointed out (1) that a judgment of a sister state was required to be observed in another state only when the defendant was served with process, or voluntarily entered his appearance, "or that he had in some manner authorized the proceeding;" (2) that an instrument authorizing a confession of judgment must be strictly followed, and its terms could not be enlarged by reading into it the laws of another state, of which he is not charged with knowledge, and hence, if the power to confess judgment was conferred upon any attorney of any court of record, its terms could not be enlarged so as to authorize a prothonotary to confess judgment, even if the laws of the state where the judgment was rendered expressly permitted a prothonotary to act whenever any attorney was authorized to do so. This case is "on all fours" with the case at bar, and is ample support for the decision herein, so far as it holds that, where the defendant has "authorized the proceeding," he is bound by the judgment, and the courts of other states must give force and effect to the judgment of the sister state whenever the authority has been strictly pursued, as is the case here; but it is unlike the case at bar in this: In that case the authority for the proceeding, conferred by the act of the defendant, was not strictly pursued; while here it was done. That judgment was held void in a sister state because a prothonotary does not come within the class of "attorneys of courts of record," and the act of such prothonotary was not, therefore, authorized by the defendant, and the law of the state could not enlarge the authority granted by the defendant. That decision is also valuable as showing plainly the principle upon which *D'Arcy v. Ketohun*, 11 How. 165, 13 L. ed. 648, and *Pennoyer v. Neff*, 95 U. S.

714, 24 L. ed. 565, both of which are referred to in that case, rested, to wit, that in neither case had the defendant been served with process, or voluntarily appeared, or in any manner authorized the proceeding. It also accentuates the proposition that, if the judgment is rendered against a party who is in court in any one of the three ways specified, it is valid, not only in the state where it is rendered, but, under the act of Congress, in all sister states.

We subscribe and adhere to all the cases cited and herein reviewed, but the rules there announced are not contravened by anything that is decided in the case at bar. On the contrary, those were all cases where the party sought to be charged had not been brought into court by personal service, and had not voluntarily entered his appearance, and had not authorized the proceeding against him, while in the case at bar the defendant had expressly authorized the exact proceeding that was had against him in Ohio.

For these reasons the opinion heretofore rendered in division No. 1 is adopted as the opinion of the court in banc, and the judgment of the Circuit Court is reversed, and the cause remanded, to be proceeded with in accordance herewith.

Burgess, Ch. J., and Sherwood, Brace, and Gantt, JJ., concur.

Valliant, J., dissenting:

The Constitution of the United States ordains that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Article 4, § 1. But that clause of the Constitution, as interpreted by the Supreme Court of the United States, does not mean that all judgments in other states must be given the same effect which they may have by law in the state where rendered. It is absolutely essential, in order to give to a judgment in *personam* effect outside of the state in which it was rendered, that the court which rendered it should have had jurisdiction of the person of the defendant. In *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648, a judgment rendered in New York was sued on in Louisiana. A statute of New York provided that, where joint debtors were sued and process was served on one, judgment, if plaintiff prevailed, might go against all; and the New York courts had held such judgments valid. In that case a partner in a New York firm lived in New Orleans, the firm was sued in New York, and the partner there served with process, and judgment was rendered against both. When the New Orleans man was sued on the judgment in Louisiana, the trial court held that, the judgment being valid in New York, where rendered, full faith and credit must be given to it everywhere, and rendered judgment accordingly. But the Supreme Court of the United States reversed the judgment. The theory, I presume, on which the New York statute proceeded, was that it extended the implied agreement which exists among partners to make each the agent for all in

firm matters to making each the agent for all to accept service of a writ. A statutory provision of that kind might be obligatory in the state of its enactment, and a court might on such service render a judgment against a nonresident that would be valid in the state where rendered; but, if so, it would have no extraterritorial effect. A statute of Oregon was to the effect that if personal service of process could not be had on a man, and he had property within the state, publication might be had, and on that notice the court could proceed to hear and render a judgment against him; the statute not requiring first the seizure by attachment of the property. In considering a case under that statute, the Supreme Court of the United States said: "... Attempts have been made to enforce such judgments in states other than those in which they were rendered, under the provision of the Constitution requiring that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;' and the act of Congress providing for the mode of authenticating such acts. . . . In the earlier cases it was supposed that the act gave to all judgments the same effect in other states which they had by law in the state where rendered, but this view was afterwards qualified, so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered or the right of the state itself to exercise authority over the person or the subject-matter." Further down in the same opinion it is said: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens, towards a non-resident, which would be binding within the state, though made without service of process or personal notice to the nonresident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory." *Pennoyer v. Neff*, 95 U. S. 714, *loc. cit.* 729, 734, 24 L. ed. 565, 571, 573. Thus it is demonstrated by the highest expounder of the Constitution of the United States that a judgment may be valid in the state where it is rendered, yet not required by the Federal law to be accorded full faith and credit by another state. If the court in the sister state did not have actual service of process, or if the defendant did not in reality enter his appearance, the United States Constitution does not force us to recognize a judgment rendered on constructive service or on a fictitious entry of appearance.

The question in the case at bar is, Did the court in Ohio have jurisdiction of the person of the defendant when it rendered judgment against him? He was at the time

a resident of Missouri, and was not in Ohio while the suit was pending; but some years before, when he was in Ohio, he executed the note sued on, and included in it what purported to be an authorization to any attorney at law to appear in any court in the United States, waive process, enter appearance, and confess judgment on the note against him. Under that authorization someone, said to be an attorney at law, did essay to enter the defendant's appearance, waive process, and confess judgment. That character of proceeding is said to be valid in Ohio, and I will assume that it is, and that the judgment is valid in that state. Suppose there had been no such authorization in the note, and an attorney at law, without any authority from defendant whatever, had entered his appearance and suffered the judgment to go. That would be a valid judgment in the state where rendered, to the extent, at least, that it could not be avoided collaterally. But the decisions above cited are authority for saying that, if that judgment should be sued on here, the defendant may avoid it by a plea showing that the court had no jurisdiction of his person. Now, the supposed case differs from the case at bar only in this: that in that case there was no semblance of authority to the pragmatical attorney, while here there is claimed to be authority. But, if what is here claimed as authority is no authority, then there is no difference between the cases. That so-called authorization would certainly not be recognized as valid under the laws of this state, not because we do not recognize the right of a man to appoint an attorney in the regular way to enter his appearance in a suit in court, even for the purpose of suffering judgment to go against him, but because it is against the policy of our law to permit a man, when entering into an obligation, to bargain away his right to be heard in court, should a question ever arise between him and his adversary in relation to it. A man who has signed a paper of that kind, if it is valid, is completely at the mercy of the holder, whatever the merits of the case may be, because the holder may go to any forum

in the United States, and select any attorney whom he chooses, and have judgment entered against the maker, who does not know that he is being sued; and this judgment creditor comes to the state in which the judgment debtor resides, and asks the courts of such state to say that "full faith and credit" must be given to the judgment of that sister state. But it is said that this contract was good in the state where it was made, and is therefore valid everywhere. That is not a rule of universal application. In the case last cited the Supreme Court of the United States said: "The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others; and so it is laid down by jurists as an elementary principle that the laws of one state have no operation outside of its territory, except so far as is allowed by comity." That comity never admits the validity of an act done in another state by authority of the law there, if it contravenes the policy of the law here. In Missouri a man's right to be heard in court is inalienable, and a contract like the one in question is not only not authorized, but contrary to our policy. The pretended appearance that is entered under such authority is not real, but fictitious. We are not forced to recognize it, and would do violence to our judicial policy if we did so. In an early case (*Randolph v. Keiler*, 21 Mo. 557) this court seems to have felt constrained to give "full faith and credit" to a judgment rendered in New Jersey on such an obligation. But the court was, even then, divided; Judge Scott rendering a dissenting opinion. The Constitution of the United States, however, in this particular, has had much enlightened interpretation since then, and, as said by the United States Supreme Court in the *Pennoyer Case*, above cited, the earlier decisions have been qualified. For these reasons I am of the opinion that the judgment of the circuit court was for the right party, and should be affirmed.

Robinson, J., concurs in the foregoing views.

UTAH SUPREME COURT.

W. A. CLARK, *Appt.*,
v.
A. G. CAMPBELL, *Respt.*
(.....Utah.....)

Under a writing entitled "Escrow," instructing a depositary to deliver stock deposited with the writing to a third person in case he pays therefor on or before a certain date, no title passes to the vendee

until payment is made, so as to entitle him to dividends on the stock declared between the times of deposit and payment.

(June 19, 1901.)

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County in favor of defendant in an action brought to recover the amount of a dividend

NOTE.—As to right to dividends on transfer of corporate stock, see *Rose v. Barclay* (Pa.) 45 L. R. A. 392, and *note*.

As to right to stock dividends as between owner of capital and income, see *Spooner v. Phillips* (Conn.) 16 L. R. A. 461, and *note*; 54 L. R. A.

Hite v. Hite (Ky.) 19 L. R. A. 173; *Pritchett v. Nashville Trust Co.* (Tenn.) 33 L. R. A. 856; *McLouth v. Hunt* (N. Y.) 39 L. R. A. 230; and *Mills v. Britton* (Conn.) 24 L. R. A. 536.

which had been paid to one whose contract to convey the stock was alleged to have included the right to the dividend. *Affirmed.*

Statement by Hart, District Judge:

Action to recover \$19,000, the amount of a dividend upon certain mining stock. Under the instructions of the court so to do, the jury returned a verdict for the defendant, and, after motion for new trial, duly made and overruled, plaintiff appeals. The facts are that, in pursuance of negotiations between the defendant and one L. C. Trent, agent of plaintiff, on October 29, 1898, defendant signed the following instrument in writing, and deposited the same, together with the mining stock herein mentioned, with Wells, Fargo, & Co., bankers, Salt Lake City, to wit:

ESCROW.

To Wells, Fargo & Co., Bankers, Salt Lake City:—

I inclose 95,112 shares of the capital stock of the Ophir Hill Mining Company, of Utah, represented by certificates numbered 138, 102, 69, 115, and 113. I also inclose 1,000 shares of the capital stock of the Ophir Hill Mining & Concentrating Company, represented by certificates numbered 1, 4, 15, 16, 3, and 2. All said certificates are indorsed in blank, except the certificates in favor of W. B. Stanley, whose indorsement I will secure. If L. C. Trent, or his agent, shall pay to my credit at your bank the sum of \$75,000 on or before Nov. 24th, 1898, then and thereupon you shall deliver to him all the inclosed certificates of stock. If, however, said Trent, or his agent, shall fail to pay to my credit at your bank said sum of \$75,000 on or before Nov. 24th, 1898, then, and upon such failure, you shall return to me all the inclosed shares and certificates. The time limited for the payment of said \$75,000, as aforesaid, is expressly made material to, and of the essence of, the option given by me to said Trent to purchase said shares for said sum, and his option terminates and ceases absolutely at the end of the time limited above for the payment of said \$75,000. In case of payment the buyer is to pay for revenue stamps, and you are authorized to cancel them for me. A. G. Campbell.

Dated October 29th, 1898.

This writing, together with the certificates of stock, remained as deposited until November 24, 1898, when the plaintiff, by his agent, paid to Wells, Fargo, & Co. the sum of \$75,000. Before the payment was thus made and the stock received, the directors of the Ophir Hill Mining & Concentrating Company declared a dividend, on November 22, 1898, in the total sum of \$19,000, and on that day was paid to the defendant. This amount was on deposit with T. R. Jones & Co., bankers, to the credit of said mining company, on October 29, 1898, and remained on deposit until after the dividend was declared. Plaintiff did not know, on November 24, 1898, that

the dividend had been declared, and, while he knew on October 29th that there was some money of the mining company on deposit with T. R. Jones & Co., did not know the amount thereof.

Messrs. Richard B. Shepard, Harrison O. Shepard, Allen T. Sanford, and Roote & Clark, for appellant:

An escrow is "where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed."

Shep. Touch. Common Assurances, p. 58; 2 Bl. Com. 307; 6 Am. & Eng. Enc. Law, pp. 865, 867, and notes; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958; *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400; *Devlin, Deeds*, §§ 313, 324; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Clark, Contr.* 78; 4 Kent, Com. p. 454; *Coe v. Turner*, 5 Conn. 92; *Raymond v. Smith*, 5 Conn. 555; *Hoboken City Bank v. Phelps*, 34 Conn. 103; *Anderson, Law Dict.* title *Escrow*; 11 Am. & Eng. Enc. Law, 2d ed. p. 333, title *Escrow*.

There can be no question but that the agreement in controversy was an agreement in escrow.

The manner of the delivery of a deed or stock in escrow is not essential, so that a delivery is upon a condition and to a stranger to it.

Baldwin v. Potter, 2 Root, 81; 15 Cent. L. J. 163, subd. 4; 11 Am. & Eng. Enc. Law, 2d ed. p. 333, title *Escrow*; *Stanton v. Miller*, 58 N. Y. 197.

All property in escrow, whether deeds, bonds, stocks, or any other kind, is subject to one and the same conditions.

Anderson, Law Dict. title *Escrow*; 15 Cent. L. J. 162; *Deardorff v. Foreman*, 24 Ind. 481; *Hicks v. Goode*, 12 Leigh, 479, 37 Am. Dec. 677; *Hoboken City Bank v. Phelps*, 34 Conn. 103; *Pauling v. United States*, 4 Cranch, 219, 2 L. ed. 601; *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; *Robertson v. Cook*, 11 Ala. 466; *Miller v. Sears*, 91 Cal. 282, 27 Pac. 589; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Baum v. Parkhurst*, 26 Ill. App. 128; *Massmann v. Holscher*, 49 Mo. 87; *Riggs v. Trees*, 120 Ind. 402, 5 L. R. A. 696, note, 22 N. E. 254.

When the stock in question was deposited in Wells, Fargo, & Company's bank by Campbell in escrow under the agreement, Campbell lost all dominion and control of the same, and he could never again exercise any control over it if Clark paid the money within the time named, and, if it was never paid, then not until the expiration of the time named.

Gammon v. Bunnell, 22 Utah, 421, 64 Pac. 958; 11 Am. & Eng. Enc. Law, 2d ed. 344; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499, 18 Pac. 243; *Grove v. Jennings*, 46 Kan. 366, 26 Pac. 738; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *Riggs v. Trees*, 120 Ind. 402, 5 L. R. A. 696, note, 22 N. E.

254; *Millett v. Parker*, 2 Met. 608; *Wellborn v. Weuver*, 17 Ga. 267, 63 Am. Dec. 235.

An agreement in escrow needs no consideration other than the fact that the depository is the agent of both parties, that he is made the custodian of the same, and that dominion over the property is waived during the life of the same by the parties to the agreement.

Raymond v. Smith, 5 Conn. 559; *Grove v. Jennings*, 46 Kan. 366, 26 Pac. 738; *Stan-ton v. Miller*, 58 N. Y. 203; *White v. Bax-ter*, 71 N. Y. 259; *Addison*, Contr. 13; 1 *Parsons*, Contr. 451; *Sands v. Crooke*, 46 N. Y. 564; 2 *Herman*, Estoppel, § 1023, p. 1152; *Miller v. McManis*, 57 Ill. 126.

Clark, when he paid the money, was entitled to the stock and all it represented as of the date it was placed in escrow.

Anderson, Law Dict. title *Escrow*, p. 413; *Shirley v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546; 15 Cent. L. J. 165, subd. 7; 11 Am. & Eng. Enc. Law, p. 346, and notes, title *Escrow*.

All the shares of stock in a corporation represent the *corpus* of the corporation,—in fact, constitute the ownership of all the corporate property, franchises, etc.

1 *Cook*, Corp. 4th ed. § 13; 2 *Thomp. Corp.* 2172, 2173; *Goodwin v. Hardy*, 57 Me. 143, 99 Am. Dec. 758; *Jones v. Terre Haute & R. R. Co.* 57 N. Y. 206; *March v. Eastern R. Co.* 43 N. H. 520; *Coleman v. Columbia Oil Co.* 51 Pa. 77; *Gifford v. Thompson*, 115 Mass. 478.

The stock placed in escrow represented the *corpus* of the corporation, viz.: all the property belonging to it, of every shape, style and description, including the money then on deposit at T. R. Jones's bank to its credit.

The money on hand was a part and parcel of the stock placed in escrow on October 29, 1898.

The courts uniformly apply the doctrine of relation wherever it is necessary in order to make the deed, bond, or stock represent the same thing it represented when placed in escrow.

Gammon v. Bunnell, 22 Utah, 421, 64 Pac. 958; *Price v. Pittsburgh, Ft. W. & C. R. Co.* 34 Ill. 13; *Hall v. Harris*, 40 N. C. (5 Ired. Eq.) 303; *Whitfield v. Harris*, 48 Miss. 710; *Simpson v. McGlathery*, 52 Miss. 723; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Beekman v. Frost*, 18 Johns. 544, 9 Am. Dec. 246; *Ruggles v. Lawson*, 13 Johns. 285, 7 Am. Dec. 375; *Jackson ex dem. Russell v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Gish v. Brown*, 171 Pa. 479, 33 Atl. 60; *Clark*, Contr. 79.

The vendor must be considered in law as making, during every instant of time the offer is open, the same identical offer to the vendee, and then the contract is complete by the acceptance of it by the latter.

Adams v. Lindsell, 1 Barn. & Ald. 681; *Maetier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *White v. Baxter*, 71 N. Y. 259; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Webs-*

ter v. Upton, 91 U. S. 65, 23 L. ed. 384; *Angell & A. Priv. Corp.* § 534; *Johnson v. Underhill*, 52 N. Y. 214; 19 Am. Law Rev. p. 575; *Harris v. Stevens*, 7 N. H. 454; *Curie v. White*, 45 N. Y. 822; *Black v. Homersham*, L. R. 4 Exch. Div. 24; 9 Cent. L. J. 163; *Phinizy v. Murray*, 83 Ga. 747, 6 L. R. A. 426, 10 S. E. 358; *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350.

Clark was entitled to the dividend in controversy.

Burroughs v. North Carolina R. Co. 67 N. C. 376, 12 Am. Rep. 611; *Clive v. Clive*, Kay, 600; *Denmead v. Glass*, 30 Ga. 637; *Central R. & Bkg. Co. v. Papot*, 59 Ga. 342; 67 Ga. 675; *White v. Baxter*, 71 N. Y. 260; *Brundage v. Brundage*, 60 N. Y. 544; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Re Kernochan*, 104 N. Y. 618, 11 N. E. 149; *Rose v. Barclay*, 191 Pa. 594, 45 L. R. A. 394, and notes, 43 Atl. 385; 9 Am. & Eng. Enc. Law, 2d ed. p. 720, notes; *Conant v. Reed*, 1 Ohio St. 298; *Gemmell v. Davis*, 75 Md. 546, 23 Atl. 1032; *March v. Eastern R. Co.* 43 N. H. 515; 2 *Beach*, Priv. Corp. § 619; *Morawetz*, Priv. Corp. §§ 174-178; *Cook*, Stock & Stockholders, § 543; 2 *Addison*, Contr. § 661; *Benjamin*, Sales, §§ 313-319; 2 *Cook*, Corp. § 539; 3 *Thomp. Corp.* § 2183.

Campbell is estopped to claim or retain the dividend by reason of his acts in connection with the matter.

Clark v. Kirby, 18 Utah, 258, 55 Pac. 372; *Centennial Eureka Min. Co. v. Juab County*, 22 Utah, 395, 62 Pac. 1024; *Pyper v. Salt Lake Amusement Asso.* 20 Utah, 9, 57 Pac. 533; *Jones v. New York L. Ins. Co.* 15 Utah, 522, 50 Pac. 620; *Manufacturers' & T. Bank v. Hazard*, 30 N. Y. 226; *Chapman v. Chapman*, 59 Pa. 214; *Bigelow*, Estoppel, 2d ed. 494; 2 *Herman*, Estoppel, §§ 1023 (p. 1152) 1296; *Taylor v. Ely*, 25 Conn. 250; *Miller v. McManis*, 57 Ill. 126.

Messrs. Bennett, Howat, Sutherland, & Van Cott, for respondent:

Campbell gave to Trent an option to take the stock in question within a certain time at a certain price.

There was no agreement whatever on the part of Trent to take the stock at that or any other time, or to do anything whatever; that being the case, Campbell had the right to withdraw the offer at any time before it was accepted, because, until it was accepted, there was no agreement between the parties binding on either of them.

Walker v. Bamberger, 17 Utah, 239, 54 Pac. 108; *Weiden v. Woodruff*, 38 Mich. 130; *Burton v. Shotwell*, 13 Bush, 271; *Tucker v. Lawrence*, 56 Vt. 467; *Benjamin*, Sales, §§ 38-44; *Quick v. Wheeler*, 78 N. Y. 300; *Cheney v. Cook*, 7 Wis. 413.

To constitute a deed in escrow in the legal sense there must be an actual contract of sale on one side and of purchase on the other. But there was nothing of that kind in this case.

A deed placed in escrow takes effect from the second delivery, that is, the delivery by the depository to the purchaser.

Shirley v. Ayres, 14 Ohio, 307, 45 Am.

Dec. 546; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427.

Before a dividend is declared, all the property of the corporation belongs, in fact, jointly to all the stockholders, the legal title being in the corporate body, and its affairs being managed by the directors as trustees for the stockholders. After a dividend is declared each stockholder has a right in severalty to his particular proportion.

Jones v. Terre Haute & E. R. Co. 57 N. Y. 196; *King v. Paterson & H. R. Co.* 29 N. J. L. 82; 2 Thomp. Corp. §§ 2172-2176; *Wheeler v. Northwestern Sleigh Co.* 39 Fed. 347; *Brundage v. Brundage*, 60 N. Y. 544; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; 2 Beach, Priv. Corp. § 619; 1 Morawetz, Priv. Corp. § 177; 2 Cook, Corp. § 539.

A dividend declared upon corporate stock belongs to the owner of the stock at the time, although the dividend is made payable at a future time; and, in the absence of any provision to the contrary in a contract of sale and purchase of stock, dividends previously declared, but made payable thereafter, belong to the seller, and are not transferred by the sale.

Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350; 2 Thomp. Corp. §§ 2172-2176; *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732.

The purchaser of stock does not take, except by express agreement, any dividend declared prior to the purchase.

Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732; *Rose v. Barclay*, 191 Pa. 594, 45 L. R. A. 392, 43 Atl. 385.

Hart, District Judge, delivered the opinion of the court:

The main question is, Who is entitled to the dividends declared and paid, in view of the facts of this case? It is insisted on behalf of plaintiff, Clark, that the so-called "escrow" was a binding agreement upon the defendant, Campbell, before the acceptance of the same by Clark; and that, when the latter did accept the terms of the offer, and made payment on November 24th, and the stock was delivered to him, the transaction related back to the delivery of the so-called "escrow" to the depository on October 29th, and the title should be held to pass as of that date, and thus entitle Clark to the dividends declared subsequently to that date. As there was no withdrawal, or attempted withdrawal, by Campbell, of the offer made in the so-called "escrow" before the same was accepted by Clark, it is not very material to inquire how far the "escrow" was binding upon Campbell prior to the acceptance of the terms by Clark and the payment of the amount required. It may be noted, however, for whatever bearing the same may have in view of subsequent developments, that the instrument deposited was not signed by, nor on behalf of, Clark, and he was not bound to do anything. No money consideration appears to have been given for the writing, nor does there appear to have been any independent contract between the parties as to said "escrow" 54 L. R. A.

either binding Campbell to keep the offer to sell open for the time named, or binding Clark to buy the said stock at any time, or at all. Doubtless, bills or notes or stocks, as well as real estate, may be the subject of an escrow agreement. As to the necessity for an actual contract, 1 Devlin, Deeds, § 313, says: "Not only are sufficient parties, a proper subject-matter, and a consideration required, but also an actual contract by the parties. In other words, the grantor must have sold and the grantee must have purchased the land; for a proposal to sell or a proposal to buy, although it may be stated in writing, is not sufficient. An actual contract of sale on one side and purchase on the other is just as requisite as the execution of the instrument by the grantor to make it an escrow." *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Fitch v. Bunch*, 30 Cal. 208; *Hoig v. Adrian College*, 83 Ill. 267; *Stanton v. Miller*, 58 N. Y. 197. In the Wisconsin case above cited the court says: "But we have not discovered a single case in which it has been held that one who has deposited a deed of land with a third person with directions to deliver it to the grantee on the happening of a given event, but who has made no valid executory contract to convey the land, may not revoke the directions to the depository, and recall the deed, at any time before the conditions of the deposit have been complied with, provided those conditions are such that the title does not pass at once to the grantee upon delivery of the deed to the depository." If title to the mining stock did not pass to Clark until November 24, 1898, then, according to the well-established rule, Campbell is entitled to the dividend, as being the owner of the stock on the day the dividend was declared. The doctrine is quite fully stated in the case of *Wheeler v. Northwestern Sleigh Co.* 39 Fed. 347, as follows: "Stockholders are, as to the property of the corporation, quasi partners, holding *per my et per tout*. The earnings of the corporation are part of the corporate property, held by the same tenure; and, until separated from the general mass, the interest of the stockholders therein passes with the transfer of the stock; and this irrespective of the time during which earnings have accrued. By the declaration of a dividend, however, the earnings, to the extent declared, are separated from the general mass of property, and appropriated to the then stockholders, who become creditors of the corporation, for the amount of the dividend. The relationship of the stockholder to the corporation, as to the amount of the dividend, is thus changed from one of partnership ownership to that of creditor. He therefore stands to the corporation in a dual relation,—with respect to his stock, as partner and part owner of the corporate property; with respect to the dividend, as creditor upon a par with other creditors of the corporation. The severance of the earnings from the general mass of corporate property, and the promise to pay, arising from the declaration of the dividend, works this change. The

earnings represented by the dividend, although the fruit of the general property of the company, are no longer represented by the stock, but become a debt of the company to the individual who, at the time of the declaration of the dividend, was the owner of the stock. That the dividend is payable at a future date can work no distinction in the right. The debt exists from the time of the declaration of the dividend, although payment is postponed for the convenience of the company. The right became fixed and absolute by the declaration. This right could, of course, be transferred with the stock by special agreement, but not otherwise. The dividend would not pass as an incident of the stock." Among other authorities sustaining the general rule that dividends belong to the owner of the stock at the time the same are declared, are the following: 2 Thomp. Corp. §§ 2172-2176; *Dow v. Gould & C. Silver Min. Co.* 31 Cal. 630, 648; *Jones v. Terre Haute & R. R. Co.* 57 N. Y. 196; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Cook, Stock & Stockholders*, § 541; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483; *Re Kernochan*, 104 N. Y. 618, 11 N. E. 149; *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732; *Hopper v. Sage*, 112 N. Y. 532, 20 N. E. 350.

The essential inquiry is, When did the title to the stock pass to Clark? Was it on October 29th, when the option and stock were deposited, or was it on November 24th, the date of the acceptance, payment, and delivery? Conceding, for the purposes of this case, that the writing deposited was an escrow agreement, binding upon Campbell before acceptance by Clark, still it by no means follows that upon delivery to Clark of the stock on November 24th the sale related back and took effect as of August 29th. We are aware of the rule, in certain cases of escrow contracts, to permit the deed to take effect by relation as of the time of the first delivery. The rule is thus stated in *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427: "By all of the authorities, a deed so deposited with a third person to be delivered to the grantee on the happening of some event in the future, which may or may not happen, does not pass title to the land described in it to the grantee until such event occurs, and then only from that time, or perhaps from the actual de-

livery of the deed to the grantee after the event has occurred. There may be exceptional cases, as where a man delivers his deed in escrow, and dies before the conditions of the deposit are fulfilled. In such cases it has been said that from necessity, after the conditions are fulfilled, the deed must take effect by relation as of the time of the first delivery." *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426. But the facts of the case at bar do not bring it within any of the exceptional cases permitting title to pass as of the first delivery. This case is also distinguishable from cases where there was an absolute agreement of sale and purchase, so as to be a sale *in præsenti*. The cases of *Currie v. White*, 45 N. Y. 822, *Johnson v. Underhill*, 52 N. Y. 203, and *Phinney v. Murray*, 83 Ga. 747, 6 L. R. A. 426, 10 S. E. 358, are all clearly distinguishable from the case at bar. In so far as the case of *Harris v. Stevens*, 7 N. H. 454, supports plaintiff's claim to the dividends in question, the same is against the great weight of authority. Under the undisputed evidence in this case, Campbell is entitled to the dividends as a matter of law, and the trial court did not err in so instructing the jury. There was no agreement between the parties as to who should have any dividend declared before the acceptance of the offer to sell, and therefore there was nothing in this connection that should have been submitted to the jury. It was not the case of an attempted, imperfect, or ambiguous agreement as to the right to dividends on the stock sold, and there was nothing to submit to the jury in that connection. It was purely a question of law to award the funds sued for under the undisputed evidence. While there is some complaint that plaintiff was misled, in that he believed that he was buying the bank funds represented by the dividends declared and paid, it must be noted that this is not an action to rescind the contract on the ground of mistake or fraud. This disposes of many of the errors assigned, and not particularly mentioned above.

There being no reversible error in the trial of the case, it is ordered that the judgment be affirmed, at appellant's cost.

Baskin and Bartch, JJ., concur.

OKLAHOMA SUPREME COURT.

Robert MORFORD, *Plff. in Err.*,
v.

TERRITORY of Oklahoma.

(10 Okla. 741.)

- *1. Perjury cannot be assigned upon the alleged false testimony of a witness, given in the course of a trial, where the court has no jurisdiction of the offense charged or of the defendant. But if the proceedings are merely erroneous or voidable, even if there be such irregularities or defects as would require a reversal of the cause on appeal, false testimony given in the course of such trial, if material, does constitute perjury.
- *2. Where an office exists under the law, and a person is elected to fill such office, and duly qualifies and enters upon the discharge of his official duties, he is a *de facto*

officer, and his acts are valid, notwithstanding the fact that he may not possess all the necessary qualifications as prescribed by the statute to fill such office.

3. The official acts of a *defacto* officer are recognized as valid on the high ground of public policy, and for the protection of those having official business to transact; and the acts of such *de facto* officer cannot be collaterally attacked.

(February 8, 1901.)

ERROR to the District Court for Payne County to review a judgment convicting defendant of perjury. *Affirmed.*

The facts are stated in the opinion.

Messrs. Keaton & Kearful, for plaintiff in error:

Perjury cannot be predicated upon the alleged false testimony of the plaintiff in error, because the proceedings in the case

*Headnotes by HAINER, J.

NOTE.—*Perjury as affected by invalidity of proceeding in which testimony is taken.*

Scope.

This note is confined to cases in which the perjury is charged to have been committed in a judicial proceeding of a class recognized by law, and of such a nature that perjury may, concededly, be predicated of a false oath therein, in the absence of any jurisdictional or other defect. Therefore, cases in which the oath was nonjudicial, or in which the proceeding was one on which perjury could not be assigned under any circumstances, are excluded.

Jurisdictional defects, generally.

It is established by numerous cases and beyond question that perjury cannot be predicated of a false oath in a proceeding before a court which had no jurisdiction to inquire into the matter which was the subject of that proceeding. *Collins v. State*, 78 Ala. 433; *Buell v. State*, 45 Ark. 336; *People v. Cohen*, 118 Cal. 74, 50 Pac. 20; *United States v. Jackson*, 9 Mackey, 424; *Pankey v. People*, 2 Ill. 80; *Maynard v. People*, 135 Ill. 416, 25 N. E. 740; *Kerfoot v. Com.* 89 Ky. 174, 12 S. W. 189; *Flower v. Swift*, 8 Mart. N. S. 449; *State v. Dreifus*, 38 La. Ann. 877; *State v. Wymberly*, 40 La. Ann. 460, 4 So. 161; *State v. Furlong*, 26 Me. 69; *State v. Plummer*, 50 Me. 217; *Com. v. Bugbee*, 4 Gray, 206; *Com. v. Brady*, 7 Gray, 320; *State v. Gregory*, 6 N. C. (2 Murph.) 69; *State v. Wyatt*, 8 N. C. (2 Hayw.) 56; *State v. Alexander*, 11 N. C. (4 Hawks) 182; *State v. Gallimon*, 24 N. C. (2 Ired. L.) 374; *State v. Gates*, 107 N. C. 832, 12 S. E. 319; *State v. Ridley*, 114 N. C. 827, 19 S. E. 149; *State v. Jenkins*, 116 N. C. 972, 20 S. E. 1021; *Steinton v. State*, 6 Yerg. 531; *State v. Stillman*, 7 Coldw. 341; *Butler v. State*, 36 Tex. Crim. Rep. 483, 38 S. W. 787; *State v. McCone*, 59 Vt. 117, 7 Atl. 406; *Paine's Case*, 1 Bulst. 107, Noy, 114, Yelv. 111; *Rex v. Aylett*, 1 T. R. 68; *Wyld v. Cookman*, Cro. Eliz. pt. 1, p. 492; *Reg. v. Bacon*, 22 L. T. N. S. 627, 11 Cox, C. C. 540.

In the following cases the question was as to the sufficiency of the averments in the indictment for perjury with respect to the jurisdiction of the court before which the proceeding in which the perjury is charged to have been committed was held, but in each of them it is assumed

that the court must have had jurisdiction in order to sustain the charge of perjury. *Maynard v. People*, 135 Ill. 416, 25 N. E. 740; *State v. Thibodaux*, 49 La. Ann. 15, 21 So. 127; *State v. Newton*, 1 G. Greene, 160, 48 Am. Dec. 367; *State v. Schlessinger*, 33 La. Ann. 564; *State v. Grover*, 38 La. Ann. 567; *People v. Phelps*, 5 Wend. 10; *Com. v. White*, 8 Pick. 453.

In *Reg. v. Hughes*, 7 Cox, C. C. 286, *Dears. & B. C. C.* 188, and *Reg. v. Senior*, 9 Cox, C. C. 469, *Leigh & C. C. C.* 401, 33 L. J. M. C. N. S. 125, 10 Jur. N. S. 547, 10 L. T. N. S. 428, 12 Week. Rep. 749, it was held that the court did have jurisdiction, but it was assumed that, without such jurisdiction, the charge of perjury could not have been sustained.

And, so, *Horn v. Foster*, 19 Ark. 354, and *Montgomery v. State*, 10 Ohio, 220, imply the necessity of jurisdiction by stating the rule that perjury may be predicated of the false testimony of an incompetent witness, with the qualification: provided, the court or justice had jurisdiction of the subject-matter.

Pendency of proceedings.

An indictment for perjury committed before magistrates, which merely states that the defendant, to subject a certain person to the punishment provided for persons guilty of felony and larceny, went before the magistrates and swore to a deposition (which is set out) is bad, because it fails to show that any charge of felony had been previously made, or that any judicial proceeding was pending before the magistrates. *Reg. v. Pearson*, 8 Car. & P. 119.

In *Reg. v. Bishop*, Car. & M. 302, defendant was charged with committing perjury in an affidavit on an interpleader rule. It was held that the indictment for perjury was bad because the affidavit did not appear to have been made in a judicial proceeding.

Where perjury is predicated of answers made by defendant to certain interrogatories propounded to him on a writ of *scire facias*, unless the indictment alleges the entry or pendency of such writ in court, it will be invalid. *State v. Hanson*, 39 Me. 337.

In *Com. v. Warden*, 11 Met. 406, an indictment assigned perjury on an answer to a bill of discovery. There was no particular and precise averment that the court took jurisdiction or cognizance of the bill for the discovery, or by any judicial order required the defendant to answer thereto. The court, however, held

wherein the testimony was given were null and void for want of jurisdiction.

The trial of all crimes, except in cases of impeachment, shall be by jury.

U. S. Const. art. 3, § 2.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Const. 6th Amend.

These constitutional provisions are applicable in full force to the territory of Oklahoma.

Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Collier v. Territory*, 2 Okla. 444, 37 Pac. 819.

They require that, in the territory of Oklahoma, all criminal trials shall be con-

ducted according to the practice at common law at the time of the adoption of the Federal Constitution; and in all cases where an offense was triable by a jury they require a trial by a common-law jury, and a common-law jury consists of twelve persons.

Cooley, Const. Lim. 6th ed. p. 390; *Cannemi v. People*, 18 N. Y. 128; *Hill v. People*, 16 Mich. 351; *Work v. State*, 2 Ohio St. 298, 59 Am. Dec. 671; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301.

The offense of libel, with which the defendant Martin, in the case wherein the plaintiff in error testified, was charged, is a very grave public, indictable crime, and upon conviction is, and, at that time was, "punishable by imprisonment in the county jail not more than one year, or by a fine not exceeding \$1,000, or both, at the discretion of the judge.

that, taking the whole indictment, it sufficiently appeared that the answer was made by the defendant as a party to the bill which had been filed against him.

Perjury may be assigned on an affidavit in support of the allegations in a bill for an injunction, though no motion was ever made for an injunction. *Rex v. White, Moody & M.* 271.

In *Com. v. Knight*, 12 Mass. 274, 7 Am. Dec. 72, it was held to be sufficient in an indictment for perjury to allege that the perjury was committed on the trial of an issue duly joined, without an express allegation that the cause of action was within the jurisdiction of the court.

Defects in organisation or constitution of tribunal.

The doctrine that want of jurisdiction will defeat a charge of perjury has been applied where the want of jurisdiction arose from some defect or invalidity in the organisation or constitution of the judicial tribunal before which the perjury is charged to have been committed; thus:

Perjury cannot be assigned on false testimony in a bastardy proceeding in a "justice's court" presided over by two justices of the peace, where the law confers the jurisdiction of such proceedings upon a temporary court consisting of one justice of the peace only. *Renew v. State*, 79 Ga. 162, 4 S. E. 19. In this case the judgment under the indictment for perjury was arrested because the indictment alleged that the false oath was taken and the false testimony given in a "justice's court" presided over by two named justices of the peace.

An indictment for perjury before a military court of inquiry is bad where it does not appear therefrom of what number of officers the court of inquiry consisted, or what was the respective rank of the officers, so as to enable the supreme court to discern whether the court of inquiry was constituted according to law. *Conner v. Com.* 2 Va. Cas. 80.

Perjury cannot be predicated of testimony upon an investigation before a committee of the general council of a city illegally appointed to investigate certain charges made against its members. *Com. v. Hillenbrand*, 96 Ky. 407, 29 S. W. 287. In this case there was no authority whatever for the appointment of the committee.

In *State v. Plummer*, 50 Me. 217, an indictment for perjury was held insufficient because it did not appear therefrom that the referees before whom the perjury was charged to have been committed had been appointed before the time of the alleged perjury.

It is a necessary element of the offense of 54 L. R. A.

perjury charged to have been committed in a criminal trial in a justice's court that the tribunal in which such trial was had should have been regularly and legally organized for the trial, and, as an incident of this, it must be shown that the justices were sworn to try the issue joined between the state and the defendant in that case. *Curtley v. State* (Tex. Crim. Rep.) 59 S. W. 44.

Perjury may not be predicated of a criminal complaint made upon oath before a magistrate who was not authorized to administer the oath, because he had taken the oath of qualification before a person not authorized to administer it. *State v. Hayward*, 1 Nott & M'C. 546.

But perjury may be predicated of the false testimony of a witness who was sworn by a justice of the peace in a proceeding before arbitrators, notwithstanding that the arbitrators were not sworn, where the parties to the arbitration tacitly consented to go on without swearing them. *Howard v. Sexton*, 1 Denio, 440.

One guilty of false swearing in a proceeding presided over by a judge of the county court who had no authority to act in such a proceeding cannot be punished as for perjury. *People v. Tracy*, 9 Wend. 265.

It was held in *State v. Williams*, 61 Kan. 739, 60 Pac. 1050, that perjury might be predicated of false testimony in a proceeding before a *de facto* police judge. In this case there was a *de jure* office, and the functions thereof had been exercised by the *de facto* judge with the acquiescence of the public. And the defendant himself had acquiesced by appealing from his decision in the case in which the perjury was charged to have been committed. It was claimed, however, that such judge had resided out of the city, and was therefore disqualified to hold the office. For the reasons given in stating the scope of this note, the general question as to whether perjury may be assigned on a false oath before a *de facto* officer is not treated herein.

When the court had lost or exceeded its jurisdiction.

When a court once having jurisdiction has lost it, perjury cannot be predicated of the evidence given in the subsequent proceedings; thus:

In *State v. Hall*, 49 Me. 412, it was held that perjury could not be predicated of false testimony given on a trial before a justice of the peace after the justice, having on the return day defaulted the action, had, without authority, taken off the default and allowed the ac-

Okla. Stat. 1893, § 2152; Okla. Sess. Laws 1895, chap. 33, § 3; 3 Wharton, Crim. Law, § 2523a, note.

The only tribunal authorized to try criminal libel at the time the case of *Territory v. Martin* was tried was one consisting of a court of record and twelve qualified jurors.

People v. Smith, 9 Mich. 193; *Wilson v. State*, 16 Ark. 601; *Brown v. State*, 16 Ind. 496; *State v. Carman*, 63 Iowa, 130, 50 Am. Rep. 741, 18 N. W. 691; *State v. Larrigan*, 66 Iowa, 426, 23 N. W. 907; *Karll v. Kuhn*, 38 Neb. 539, 57 N. W. 379; *Collier v. Territory*, 2 Okla. 444, 37 Pac. 819; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Greene v. Briggs*, 1 Curt. C. C. 311, Fed. Cas. No. 5,764; *Saco v. Wentworth*, 37 Me. 165, 58 Am. Dec. 786; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

tion to proceed. The decision is upon the ground that the justice had lost jurisdiction, and that the consent of the parties did not restore it.

And the doctrine applies when the jurisdiction has been exceeded; thus:

Perjury cannot be predicated of false testimony given by others than the complainant on a preliminary examination before a justice of the peace under a bastardy act, where such act only authorized the justice to administer the oath to the complainant, but he, without authority, assumed jurisdiction to try the case on its merits and administer oaths and examine other witnesses. *Hamm v. Wickline*, 26 Ohio St. 81.

Defects in preliminary matters affecting the jurisdiction in the particular case.

That the jurisdiction of the court, which had general jurisdiction of the offense, had not properly attached to the particular case in which the perjury is charged to have been committed because the complaint in that case was not sworn to does not defeat the charge of perjury. *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40. The court distinguishes between a case where the court was without jurisdiction of the offense, the subject-matter of litigation, and a case where the jurisdiction had not attached. It conceded that, under the common law, perjury could not be assigned on false testimony in either of these cases, but held that that rule has been in effect abrogated, with respect to a case where the court had jurisdiction of the offense but not of the particular case, by the provision of the bill of rights that a person shall not be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction. The argument is that the purpose of this provision was to protect one who had been acquitted after a trial by a court of competent jurisdiction though jurisdiction had not properly attached in the particular case; and that the prosecution in such a case, being sufficient to bar another prosecution, is also sufficient for the purpose of assigning perjury on false testimony therein.

In *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, it was held that perjury could not be predicated of false testimony in a criminal proceeding where the information in that proceeding was not supported by the oath of a credible person as required by statute. The court says: "This oath is called a complaint. It is the basis and foundation upon which the information rests and is a necessary part of, and must be filed with, the information (Code 54 L. R. A.

Perjury cannot be predicated upon testimony given in the course of a proceeding which is *coram non judice*; and therefore, upon the record, the plaintiff in error could not have been, was not, and cannot be, lawfully convicted.

People v. Tracy, 9 Wend. 265; *Com. v. Hillenbrand*, 96 Ky. 407, 29 S. W. 287; *Montgomery v. State*, 10 Ohio, 220; *Com. v. White*, 8 Pick. 453; *State v. Thibodaux*, 49 La. Ann. 15, 21 So. 127; *People v. Howard*, 111 Cal. 655, 44 Pac. 342.

The probate court had no jurisdiction to try the case of *Territory v. Martin* upon a complaint, and without an information or indictment.

Collier v. Territory, 2 Okla. 444, 37 Pac. 819.

At the time of the trial of *Territory v. Martin*, the probate judge, who assumed to

Crim. Proc. art. 36). Without a complaint an information would be wholly invalid,—would confer no jurisdiction upon the court, and would be worthless for any purpose. . . . It follows, then, that, in order to sustain an allegation of judicial proceedings by information, not only must such information be introduced in evidence, but the complaint upon which it is based or founded must be also introduced." *Anderson v. State*, 24 Tex. App. 706, 7 S. W. 40, is not alluded to with reference to this point, although it is cited on another point in the case. It is not apparent, however, why the theory on which that case was decided would not equally apply to this case.

The concession in *Anderson v. State* that at common law, in order to sustain a charge of perjury, the court must not only have had general jurisdiction, but jurisdiction must have attached in the particular case in which the perjury is charged to have been committed, is supported by the following cases:

Perjury cannot be predicated of a false oath where the officer or tribunal before whom it was taken had no jurisdiction of the subject-matter of the oath, notwithstanding that there may have been general authority to administer oaths in like cases if within the jurisdiction. *People v. Howard*, 111 Cal. 655, 44 Pac. 342.

In *Johnson v. State*, 58 Ga. 397, perjury was assigned of testimony in a prosecution for larceny before a criminal court whose jurisdiction was limited to cases of larceny not amounting to a felony. The record in such proceeding was excluded from evidence, because the affidavit upon which the written accusation was required by statute to be founded did not affirmatively show that the larceny charged did not amount to a felony. The decision is upon the ground that the affidavit is the foundation of the jurisdiction.

Perjury cannot be assigned on sworn statements of a person subpoenaed before a justice of the peace to furnish testimony upon which to base a complaint for a violation of the liquor law, no complaint, oral or written, having been made to the justice at the time the statements were made. *People v. Titmus*, 102 Mich. 318, 60 N. W. 693.

In *Reg. v. Scotton*, 5 Q. B. 493, Dav. & M. 501, 1 New Sess. Cas. 27, 13 L. J. Q. B. N. S. 58, it was held to be a fatal objection to a prosecution for perjury assigned on testimony given in a criminal prosecution that the information in such prosecution was not based on a charge under oath. The decision is upon the ground that the oath in this case was a jurisdictional requisite. The statute required

preside, did not possess the requisite qualifications.

The supervision of a judge possessing this statutory qualification was an absolutely essential component part of a jury trial as secured by the Constitution.

Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

Mr. J. C. Strang, Attorney General, for defendant in error:

The jurisdiction of the probate court in cases of criminal libel (the crime of which Martin was convicted) is settled.

Martin v. Territory, 8 Okla. 41, 56 Pac. 712.

Hainer, J., delivered the opinion of the court:

The appellant, Robert Morford, was indicted, tried, and convicted of the crime of

perjury in the district court of Payne county, and sentenced to serve a term of five years at hard labor in the territorial penitentiary, at Lansing, Kansas. The perjury of which the defendant was convicted was assigned upon certain alleged false testimony given in the case of the territory against William G. Martin, who was tried and convicted upon the charge of criminal libel in the probate court of Payne county in November, 1897. There is no contention in the brief of counsel for appellant that any error was committed in the trial of the case at bar which would warrant a reversal of the cause, but the only contention is that in the case of the territory against Martin, who was tried and convicted of criminal libel in the probate court, and which judgment was subsequently affirmed by this court (8 Okla. 41, 56 Pac. 712), he was not tried for

the charge to be deposed to under oath before any other proceedings should be had.

In *Reg. v. Pearce*, 3 Best & S. 531, 9 Cox, C. C. 258, 9 Jur. N. S. 647, 7 L. T. N. S. 597, 11 Week. Rep. 235, it was held that perjury could not be assigned on an examination under a judgment summons taken out by a married woman in her own name, without making her husband a party, on a judgment recovered before her marriage, notwithstanding that before the giving of the evidence on which perjury is assigned the court amended the summons by striking out the name of the plaintiff and substituting therefor the names of the husband and wife. The decision is upon the ground that the amendment was made without jurisdiction, and that the defendant therefore was sworn in a cause which had no existence.

It will be observed that in the English cases next cited it was held that perjury might be predicated of false evidence in cases that were apparently subject to defects in the preliminary proceedings very much like the defect in the proceeding involved in *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40. These cases, however, do not contradict the concession made in that case, but, on the contrary, support it. In that case the defect was held to be one that prevented the jurisdiction from attaching in the particular case; but in the English cases, it will be observed, the defects were not deemed to prevent the jurisdiction from attaching in the particular case.

In *Reg. v. Berry*, Bell, C. C. 46, 8 Cox, C. C. 121, 28 L. J. M. C. N. S. 86, 5 Jur. N. S. 320, it was held that the fact that the summons in a bastardy proceeding alleged that the defendant had paid money for the maintenance of the child within twelve months after its birth, instead of alleging that she had given proof of this fact, did not prevent perjury from being assigned on testimony given in the proceedings, where the putative father appeared according to the exigency of the summons, and made no objection to the proceedings, but went to trial upon the merits. The decision is upon the ground that the father had waived any irregularity that there might be in the process, and that when he had thus committed himself to the jurisdiction of the court, the court had jurisdiction to hear and decide the suit. This was said to be the case, even conceding that, if he had not appeared, the court could not lawfully have proceeded to hear evidence of paternity, or that, if he had appeared and objected to the issuing of the summons, the objection ought to have prevailed.

Reg. v. Simmonds, 8 Cox, C. C. 190 applies the doctrine of *Reg. v. Berry* to a case where

the bastardy summons was regular on its face, and alleged that proof had been given of payment of money by the father within twelve months after the birth of the child for its maintenance, though in fact no such proof had been made before the summoning justice. Cockburn, Ch. J., says that *Reg. v. Berry* shows that such proof is not a matter of substance essential to found the jurisdiction of the justices, but a matter of process only, which may be waived by the defendant if he chooses.

Perjury may be assigned on the testimony in a criminal trial before justices, notwithstanding that the warrant upon which the defendant in such trial was arrested was illegal having been issued without a written oath or information. *Queen v. Hughes*, L. R. 4 Q. B. Div. 614, 48 L. J. M. C. N. S. 151, 40 L. T. N. S. 685. This was a decision in the court for Crown cases reserved. Lord Coleridge, Ch. J., Denman, J., Pollock and Huddleston, BB., Field, Lindley, Manisty, Hawkins, and Lopes, JJ., concurred in affirming the conviction in the perjury case. The opinion of Hawkins, J., in which Lord Coleridge, Ch. J., Pollock, B., and Lindley, J., concurred, puts the decision upon the ground that while the defendant in the original proceeding was illegally brought before the court, the court, nevertheless, had jurisdiction. It says that there is a marked distinction between the jurisdiction to take cognizance of an offense and the jurisdiction to issue a particular process to compel the accused to answer it. *Reg. v. Scotton*, 5 Q. B. 498, Dav. & M. 501, 1 New Sess. Cas. 27, 13 L. J. Q. B. N. S. 58, *supra*, was distinguished upon the ground that there the statute required a charge to be deposed to on oath before any proceedings should be had or taken upon the information, thus making the deposition under oath a jurisdictional requirement.

Perjury may be assigned on false testimony at the hearing of an affiliation summons, notwithstanding that there was no written deposition of the woman stating the paternity of the child as required by statute. *Reg. v. Fletcher*, L. R. 1 C. C. 820, 12 Cox, C. C. 77, 40 L. J. M. C. N. S. 123, 24 L. T. N. S. 742, 19 Week. Rep. 781. The decision is upon the ground that the magistrate had jurisdiction to hear the summons, the defendant in the affiliation proceeding having waived the want of a deposition by failing to make any objection in that proceeding.

In *Reg. v. Millard*, Dears. C. C. 166, 6 Cox, C. C. 150, 22 L. J. M. C. N. S. 108, 17 Jur. 400, it was held that where a magistrate was, by one section of a statute, given jurisdiction to convict summarily in cases of malicious dam-

such offense according to law; that said trial of Martin was *coram non judice*, and therefore void, for the following reasons: (1) That the trial in the case of the territory against Martin in the probate court, wherein it is alleged in this case that the false testimony was given was had before a jury composed of only six persons; (2) that said trial was had upon a mere complaint of one other than the county attorney; (3) that the trial by jury was presided over by a probate judge who was not a lawyer, nor ever licensed to practise law.

In *Martin v. Territory*, 8 Okla. 41, 56 Pac. 712, this court held that the probate courts of this territory have jurisdiction of the offense of criminal libel. The probate court having jurisdiction of the defendant and of the offense of which he was convicted, any error occurring during the trial, no matter

how irregular or erroneous it might have been, is no excuse or justification for the crime of perjury, for which Morford was indicted, tried, and convicted. It is true that the doctrine is well established that, where the court has no jurisdiction of the defendant or of the crime of which he is charged, any false testimony given in the course of such trial does not constitute perjury, but, on the other hand, if the trial was merely voidable, even if there be such defects as would require a reversal of the cause on appeal, false testimony given in the course of such trial, if material, constitutes perjury. Wharton, in his work on Criminal Law (§ 2225), announces the rule as follows: "A suit which is actually void and null from want of jurisdiction or other incurable defects is not one in which perjury can be committed. But if the proceedings are merely

age to property, a subsequent section providing for an information on oath in such case did not make an information on oath essential to the jurisdiction of the magistrate to hear the case when the party charged appeared before him, and therefore perjury might be assigned on false testimony on a trial under such statute without an information or oath.

Where a party appears before a justice charged with an offense within his jurisdiction, the justice has jurisdiction to dispose of the case without a summons, or without any information in writing being laid before him, unless the statute creating the offense imposes the obligation of not hearing the case without these preliminaries. *Reg. v. Shaw*, 10 Cox, C. C. 86, *Leigh & C. C. 579*, 34 L. J. M. C. N. S. 169, 11 Jur. N. S. 415, 12 L. T. N. S. 470, 13 Week. Rep. 602.

In *State v. Peters*, 107 N. C. 876, 12 S. E. 74, it was held that the fact that the warrant in the prosecution in which the perjury is charged to have been committed was issued without a sworn complaint or affidavit did not defeat the charge of perjury. This was upon the ground that no written affidavit or complaint was required; that an appellate court could only look at the warrant, and could not look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence; and that whatever might have been the effect, if there had been no oral complaint or oath, and such objection had been taken on the trial, such objection could not have availed when raised for the first time on appeal. *A fortiori* it could not be raised collaterally in a prosecution for perjury.

When want of jurisdiction arises from facts dehors the record.

A distinction is to be observed between want of jurisdiction to take cognizance of a case and want of jurisdiction to proceed to judgment therein. It frequently happens that want of jurisdiction in the latter sense arises from some matter *deshors* the record, which appears only after investigation. The court, therefore, may have had jurisdiction to make such investigation, although the facts as they ultimately appeared showed that it had no jurisdiction to proceed to judgment; and it follows that perjury may be predicated of false testimony during such investigation.

In *Com. v. Weingartner*, 16 Ky. L. Rep. 221, 27 S. W. 815, perjury was assigned on false swearing in a forcible detainer proceeding before a justice of the peace in and for a certain county. It was urged, in support of a 54 L. R. A.

demurrer to the indictment, that it should have shown the jurisdictional fact that the premises in dispute in the forcible detainer case were situated in such county, as otherwise the justice would have been without authority to administer the oath. The court said, however, that the officer was authorized to administer oaths generally, and that the subject-matter of the controversy was one concerning which the witness could generally be sworn, and that he might have been sworn by the justice touching any matter, however immaterial, connected with the proceeding, even to locating the premises, and if he had knowingly and wilfully sworn falsely, he was guilty without regard to whether or not the justice had jurisdiction to render a final judgment. The testimony as set out in the indictment did not relate to the location of the property.

In *State v. Gates*, 107 N. C. 832, 12 S. E. 319, *supra*, where it was held that perjury could not be predicated of false evidence on a motion to tax a prosecutor with costs in a criminal proceeding in which the grand jury had ignored the bill, because no power was conferred upon the court to tax a prosecutor with costs when the bill is ignored, the court said: "The test, according to the authorities, seems to be that if upon the state of facts alleged by the state or (in a civil action) by the plaintiff the court has jurisdiction, there is an issue if they are denied by the defendant, and any false swearing upon a matter material to such issue is perjury, although on the trial it might turn out that upon the truth of the facts as found there was not any case against the defendant, or none of which the court had jurisdiction. Here the contention of the state was that . . . [he, the prosecutor] had instituted a criminal action frivolously and maliciously, and that the grand jury had ignored the bill. Taking these facts to be all true, the court had no jurisdiction of the offense, and it was therefore immaterial in law whether the defendant swore falsely or not."

Perjury may be predicated of a false deposition made in Ohio to prove the residence of the complainant in a bill of divorce brought in another state, and to establish the cause of divorce, where the petition in the divorce suit alleged, as required by statute, the residence of the complainant in the county wherein the suit was brought, notwithstanding that, as a matter of fact, he was not a resident of the county or the state. *Stewart v. State*, 22 Ohio St. 477.

In *Reg. v. Proud*, L. R. 1 C. C. 71, 36 L. J. M. C. N. S. 62, 16 L. T. N. S. 364, 15 Week. Rep. 796, 10 Cox, C. C. 455, the defendant was indicted for perjury committed before a police

voidable, even though there be such defects as require a reversal on error, false swearing in its conduct is perjury, if such false evidence could by any contingency be introduced as testimony."

The trial of Martin by a jury composed of only six persons, upon the charge of criminal libel, if error, was merely erroneous, and would not render the entire proceedings null and void for want of jurisdiction. And hence, we think, so far as the issues involved in this case are concerned, it is wholly immaterial whether or not Martin was tried by a jury of six persons or by a jury composed of twelve persons, as it is contended by the appellant. It would be a strange and novel doctrine to announce that perjury could not be predicated upon false testimony given in the course of a trial that was merely irregular, erroneous, or voidable, and

magistrate upon a summons taken out by him as an apprentice against his master. It was urged that, as the summons was not taken out until after the relation of master and servant had ceased, the magistrate had no jurisdiction, and therefore perjury could not be assigned. The court held that the magistrate had jurisdiction to proceed in the case, but said that, whether he had jurisdiction to proceed or not, he clearly had jurisdiction to inquire whether the relation of master and apprentice existed, with a view to determining the dispute as to wages if such relation did exist.

So, while it was held in *Reg. v. Ewington*, Car. & M. 819, 2 Moody, C. C. 223, that perjury could not be predicated of evidence given upon an examination before commissioners in bankruptcy touching the estate of a person whom they had previously adjudicated to be a bankrupt, because the petitioning creditor's debt on which the fiat of bankruptcy issued was not of sufficient amount to support the proceeding, Lord Abinger, C. B., intimated that perjury might have been predicated of evidence in the preliminary proceeding to ascertain whether the debtor should be adjudged a bankrupt or not.

That a justice erroneously granted an attachment upon the oath of the creditor applying, which was not the "satisfactory proof" required by the statute authorizing attachments, does not prevent perjury from being assigned on the oath, especially where the attachment proceeding stands unreversed. *Van Steenberg v. Korts*, 10 Johns. 187. This decision is upon the ground that it was a question within the jurisdiction of the justice what was satisfactory proof, and that if he made a mistake in judging of the proof it was a case of error, and not of excess of jurisdiction.

Some cases have gone further, and held that where the court had general jurisdiction, which, however, might have been, but was not, defeated in the particular case by proof of extrinsic facts, perjury might be predicated generally of false evidence in such case, even if it did not relate to such facts; thus:

Where the court had general jurisdiction, and there are circumstances which, if they had been shown, would have made a particular case an exception to the general rule, a defendant convicted on a former trial, wherein he is charged to have committed perjury, cannot re-open the case in which he was tried, and show, as a matter of defense against the charge of perjury, the circumstances that would, if proved on the trial, have ousted the jurisdiction of the court. The oath cannot be deemed extrajudicial while the conviction and judgment of 54 L. R. A.

which could not affect the jurisdiction of the court in which the trial was had, although such errors might have occurred on the trial as to constitute reversible error on appeal.

The next proposition for which counsel contend this case should be reversed is that the trial of Martin in the probate court for the offense of criminal libel was had upon a mere complaint of one other than the county attorney. The record does not sustain counsel in this contention. It appears from the testimony of Robert Lowry, who was a witness in this cause, that an information was filed in the probate court, instead of a complaint; that such information was filed by the county attorney; and that said information was prepared by Mr. Lowry in connection with the county attorney. The record, also, in the case of the *Territory against William G. Martin*, 8

a court of general jurisdiction are still undisturbed, and upon the face of the record appear to be valid, not void. The question is whether the jurisdiction existed, not whether it might, by the introduction of extrinsic facts on the trial, have been defeated. *State v. Ridley*, 114 N. C. 827, 19 S. E. 149.

It may be said generally that where the jurisdiction of the court is voidable by matter *dehors*, but no defect of authority appears upon an inspection of the record of an indictment, trial, and conviction, such record cannot be collaterally impeached in a prosecution for perjury for taking a false oath in the course of the trial by showing that the jurisdiction might have been ousted, though it was not defeated. *Ibid.*

The pendency in one county of a suit in equity brought by a third person on a mechanic's lien for services, at the time of the commencement of an action in another county for a personal judgment for such services by the person who filed the mechanic's lien,—the plaintiff and the defendant in the latter action being codefendants in the former,—does not prevent the assigning of perjury on testimony in the latter action. *State v. Clough*, 111 Iowa, 714, 83 N. W. 727. The decision is upon the ground that, even conceding that the actions were such that a plea in abatement would lie against the last action, the court, having properly acquired jurisdiction of that action, would retain the same until some reason was shown why it should not longer do so. It was also held that the rule that the court acquiring jurisdiction of a particular case will retain the same to the exclusion of another court of concurrent jurisdiction was not applicable because the suits were not between the same parties seeking the same remedies.

Perjury may be predicted of false testimony on the trial of a third person for a crime other than that for which he was extradited from a foreign country. *Cordway v. State*, 25 Tex. App. 405, 8 S. W. 670. The decision is upon the ground that the court had jurisdiction of the subject-matter of the prosecution, though it did not originally have jurisdiction over the person of the accused to try him for an offense other than that for which he was extradited, but that the lack of jurisdiction over the person could be waived, at least so far as to uphold the prosecution as against collateral attack, and was waived when the defendant in that prosecution submitted to trial without objection.

In *People v. Howard*, 111 Cal. 655, 44 Pac. 342, however a complaint for perjury which charged the making of a false oath to a crimina-

Okl. 41, 56 Pac. 712, shows that the information was filed by the county attorney, A. T. Neal, based upon a positive affidavit sworn to by one Samuel Dial.

And, lastly, counsel for appellant insist that this cause should be reversed for the reason that the trial in the libel suit of Martin was presided over by a probate judge who was not a lawyer, nor ever licensed to practise law. The record discloses that the presiding judge was duly elected, qualified, and acting as probate judge of Payne county at the time the alleged false testimony was given by the appellant; that the presiding judge had served for more than two years as probate judge of said county, and had been re-elected and was serving his second term. It is true that the record shows that he was not a licensed lawyer, and did not possess the qualifications prescribed in § 2,

chap. 18, Sess. Laws 1895, which reads as follows: "Sec. 2. That in addition to other qualifications required of a probate judge, he shall be a licensed lawyer in good standing, shall be of the age of twenty-five years or over, and shall have practised his profession for at least three years next preceding his election." But, notwithstanding the fact that the probate judge was not a licensed attorney at the time he was elected, there is no question that at the time said cause was tried in the probate court he was a *de facto* probate judge of said county, and had full power and authority to try said cause and administer oaths to witnesses. The acts of a *de facto* officer are as valid and effective, when they concern the public or rights of third persons, as though they were officers *de jure*. Where an office exists under the law, and a person is elected to fill

al complaint before a city recorder charging one with a misdemeanor in disturbing a religious meeting was held bad because it did not show that the alleged misdemeanor was one which the recorder had jurisdiction to inquire into, since it was not alleged that the same was committed within the city. There was no general averment in this case that the city recorder had jurisdiction of the misdemeanor.

And in *Com. v. Pickering*, 8 Gratt. 628, 56 Am. Dec. 158, it was held that an indictment for perjury committed before a grand jury must show that the testimony related to an offense committed within the county to which the jurisdiction of the grand jury extended.

And in *Reg. v. Willis*, 12 Cox, C. C. 164, where perjury was assigned on testimony at a petty sessions on hearing of an information against the keeper of a beerhouse for knowingly permitting drunkenness on her premises contrary to the tenor of her license, the court held that, as the license of the beerhouse keeper was not produced, the charge of perjury would not lie. Cleasby (after consulting Mr. Justice Byles) said: "I am of the opinion that it is not sufficient to show a general jurisdiction in the justices to inquire into such a charge as is laid in the information, but they must have jurisdiction in the particular case. If there was no license there could be no offense, and therefore no jurisdiction."

Defects not affecting jurisdiction, generally.

It is well established that defects, errors, or irregularities in the proceedings in which perjury is charged to have been committed, though sufficiently serious to require a reversal, do not defeat a charge of perjury, unless they were jurisdictional; thus:

The reversal of a judgment of conviction in the case in which the perjury is charged to have been committed does not constitute a defense to the charge of perjury. *Reg. v. Meek*, 3 Car. & P. 513.

Perjury may be assigned on an oath taken in a proceeding which was erroneous but not void, at least while the proceeding stands un-reversed. *State v. Moller*, 12 N. C. (1 Dev. L.) 263.

Where perjury is assigned on false swearing in the course of a judicial proceeding it is essential that the court in such proceeding shall have had jurisdiction of the subject-matter and power to administer an oath to the witness; but it is not necessary that all proceedings in the trial should be strictly regular. *State v. Hall*, 7 Blackf. 25.

If the court had jurisdiction of the subject-
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matter of the suit in which the alleged perjury was committed and the oath was required by law, irregularities in the proceedings will not prevent perjury. *Smith v. State*, 81 Tex. Crim. Rep. 815, 20 S. W. 707.

Perjury charged to have been committed on a nonjudicial oath cannot be maintained if the person who administered it had no lawful authority; but perjury alleged to have been committed on a judicial oath can be maintained unless the court was without jurisdiction of the cause. *State v. Dreflus*, 38 La. Ann. 877.

It is not a legitimate defense for a party charged with perjury to show that the court committed error in its proceedings, provided the court had jurisdiction. *State v. Lavalley*, 9 Mo. 824. In this case perjury was assigned on false testimony on an examination before the circuit court as to the sufficiency of the security on an appeal from a justice's judgment. The court held that the circuit court had power to hold such an examination, but held that, if it had not, that fact would not have avoided the charge of perjury since the circuit court had jurisdiction over the case by virtue of the appeal to it.

When courts have jurisdiction of the subject-matter of the suit, all irregularities may be waived, and such irregularities will afford no defense to a charge of perjury. *Re Smith*, 110 Mich. 435, 68 N. W. 228. In this case it was held that it was no defense to a charge of perjury that the testimony of which it was predicated was given before the circuit judge under oath administered by him in a county adjoining that in which the action was pending but in the same judicial circuit, the parties in the case having stipulated, with the consent of the judge, that the testimony should be so taken.

Though a tribunal must have jurisdiction of the cause or proceeding before perjury can be committed therein, yet where the defect renders the proceeding voidable only, and not absolutely void, and such proceeding is amendable, or where the defect has been waived by the parties, there perjury may be committed. *Maynard v. People*, 135 Ill. 416, 25 N. E. 740. In this case perjury was assigned on testimony in a bastardy proceeding. The court conceded that the complaint in the bastardy proceeding did not show probable cause, and was insufficient to justify the issuance of a warrant, but held that the defendant, having elected to waive his right to quash the process or dismiss the complaint, and having gone to a hearing upon the merits and introduced testimony, perjury might be assigned on false testimony given by him, though perhaps his conduct would not

such office, and duly qualifies and enters upon the discharge of his official duties, he is a *de facto* officer, and his acts are valid, notwithstanding the fact that he may not possess all the requisite qualifications as prescribed by the statute to fill such office. In *Hussey v. Smith*, 99 U. S. 20, 25 L. ed. 314, the Supreme Court of the United States, in discussing this subject, said: "An officer *de facto* is not a mere usurper, nor yet within the sanction of law, but one who *colore officii* claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213; *Den ex dem. Gilliam v. Reddick*, 26 N. C. (4 Ired. L.) 368; *Brown v. Lunt*, 37 Me. 423. Judicial as well as ministerial officers may be in this position. Freeman, Judgm. § 148. The acts of such officers are held to be valid because the public good requires it. The principle wrongs no one. A different rule would be a source of serious and last-

ing evils." In *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121, Mr. Justice Field, in delivering the opinion of the court upon this subject, said: "Where an office exists under the law, it matters not how the appointment of the incumbent was made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. As said by Mr. Justice Manning, of the supreme court of Michigan, in *Carleton v. People*, 10 Mich. 250, 259: 'Where there is no office there can be no officer *de facto*, for the reason that there can be none *de jure*. The county offices existed, by virtue of the Constitution, the moment the new county was organized. No act of legislation was necessary for that purpose. And all that is required, when there is an office, to make an officer *de facto*, is that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color

have estopped him from taking advantage of the defect in the bastardy proceeding itself.

In *Henry v. Hamilton*, 7 Blackf. 508, it was held that, even if an affidavit upon which a prosecution before a justice was based was too vague to require, or even to authorize, the justice to act upon it, it did not follow that, after he did act upon it, and after the accused person appeared and answered to the charge without objection, the proceedings were *coram non iudice*, so that perjury could not be assigned on false testimony therein. This statement, however, is qualified by the assumption that the affidavit charged in general terms an offense of which the justice had jurisdiction.

In *Weston v. Lumley*, 83 Ind. 486, the court, after expressing some doubt on the question, held that a county board of commissioners, which was a court of inferior and limited jurisdiction, acquired such jurisdiction of the subject-matter of a statutory proceeding to have a highway ascertained, described, and entered of record, as to make it legal perjury for a witness to swear falsely therein, although the petition did not show the existence of the circumstances which, under the statute, were necessary to enable the commissioners to have the road ascertained, described, and entered of record as prayed for by the petition. The court said that if the proceedings had taken place in a court of general jurisdiction there would have been no question of its jurisdiction, notwithstanding the defect in the petition.

In *People v. McCaffrey*, 75 Mich. 115, 42 N. W. 681, perjury was assigned upon an oath to a bill for divorce. It was held that the charge might be sustained, notwithstanding that the residence of one of the parties to the bill for divorce was essential to granting the relief sought therein, and that there was no such averment in the bill. The decision is upon the ground that the omission of such an averment was not a jurisdictional defect, and might be cured by amendment.

State v. Rowell, 72 Vt. 28, 47 Atl. 111, held that it was not a bar to an indictment for perjury charged to have been committed in a previous prosecution for perjury that the indictment upon which such prosecution was founded was quashed subsequently to the finding of the indictment in question for insufficiency in failing to allege that the writing to which the defendant was charged, in that case, to have sworn falsely, was one that the law

required to be verified by oath. The decision is upon the ground that, notwithstanding the insufficiency of the former indictment, the trial court had power to hear and determine the cause, and, therefore, had jurisdiction of the subject-matter. The court said that the case was not different in principle from one in which there is a mistrial by reason of error in the admission or rejection of evidence, or in instructions to the jury, or where judgment is arrested by reason of a defect in the declaration, in which cases it could not be seriously contended that false testimony did not constitute perjury.

Perjury may be committed upon the trial of a criminal proceeding in a police court although the complaint would be bad upon demurrer, or upon motion in arrest of judgment. *State v. Brown*, 68 N. H. 200, 38 Atl. 781.

Matters especially affecting sanction under which testimony is given.

Perjury cannot be predicated of false testimony in a statutory arbitration given under an oath administered by a notary public where the statute requires it to be administered by a judge or justice of the peace. *State v. Jackson*, 36 Ohio St. 281.

Perjury cannot be predicated of false testimony given under the sanction of an oath administered by arbitrators, appointed by the court, who had no authority to administer an oath. *State v. McCroskey*, 3 McCord, L. 308.

One of the primary elements requisite to constitute the offense of perjury is that the violated oath shall appear to have been administered by competent authority. The officer before whom the oath is taken must not only have jurisdiction in the proceeding, but the oath must be alleged and shown to have been administered by one having authority to administer it. And it is not sufficient that the officer may have had general power to administer oaths, but it must appear that he possessed authority to administer the oath in the particular proceeding involved. *People v. Cohen*, 118 Cal. 74, 50 Pac. 20. In this case the indictment for perjury was held to be demurrable because it appeared therefrom that the oath in the proceeding before the magistrate in which the perjury is alleged to have been committed was administered by an unauthorized deputy county clerk.

In *State v. Dreifus*, 38 La. Ann. 877, and

of an election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for that would make him an officer *de jure*. The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact." In a very recent case, Mr. Chief Justice Fuller, in discussing this subject in *Ex parte Ward*, 173 U. S. 452, 43 L. ed. 765, 19 Sup. Ct. Rep. 459, announced the following rule: "Where a court has jurisdiction of an offense and of the accused, and the proceedings are otherwise regular, a conviction is lawful, although the judge holding the court may be only an officer *de facto*; and the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of habeas corpus." The learned judge also declared in this case that "the title of a person acting with color of authority, even if he be not a good officer in point of law,

cannot be collaterally attacked." Conceding that the probate judge who tried Martin for criminal libel and administered the oath to the appellant when the alleged false testimony was given, and upon which the perjury was assigned, was only a *de facto* officer, his acts while exercising the duties and functions of a probate court were valid; and his acts could only be attacked in a direct proceeding, and not in a collateral manner, as attempted in this case.

We have examined the record, and can perceive no error committed in the trial of this cause which could in any manner affect the substantial rights of the plaintiff in error.

The judgment of the District Court is therefore affirmed.

All the Justices concur, except **Barford**, Ch. J., who presided in the court below, not sitting.

Stephens v. State, 1 Swan, 157, it was held that the fact that the oath was administered in the presence of the court by an incompetent person did not defeat a charge of perjury, but these decisions were upon the ground that the oath was in legal effect administered by the court itself.

In *People v. Cohen*, 118 Cal. 74, 50 Pac. 20, *supra*, it was held that the circumstances disclosed in the case would not admit of the position that the deputy who administered the oath was merely acting as the mouthpiece of the judge.

Perjury cannot be predicated of so much of the disclosure of a trustee as was not reduced to writing as required by statute. *State v. Trask*, 42 Vt. 152.

In *Queen v. Lloyd*, L. R. 19 Q. B. Div. 213, 56 L. J. M. C. N. S. 119, 56 L. T. N. S. 750, 35 Week. Rep. 653, 52 J. P. 86, 16 Cox, C. C. 235, it was held that perjury could not be assigned on an examination of a witness in a bankruptcy proceeding under § 27 of the bankruptcy act of 1883, which provides for an examination by "the court," where, though the oath was administered to the witness in court by the registrar, the examination took place in another room, in the absence of the registrar.

In *State v. Moller*, 12 N. C. (1 Dev. L.) 263, it was held that, the magistrate having jurisdiction of the matter in which the perjury is charged to have been committed, any irregularities in the mode of administering the oath could not oust the jurisdiction.

And in *State v. Whisenhurst*, 9 N. C. (2 Hawks) 458, it was held that the fact that one who had no conscientious scruples against being sworn by kissing the book, and who did not request that he be sworn with uplifted hand, was sworn in the latter manner, does not prevent perjury from being predicated of his testimony. This decision, however, is upon the ground that there was no error or irregularity in swearing the witness in that manner.

Matters relating to jury.

That the jury were not properly sworn in the case in which the perjury is charged to have been committed does not defeat the charge of perjury. *Smith v. State*, 31 Tex. Crim. Rep. 815, 20 S. W. 707.

That the case in which perjury is charged to have been committed was tried by a jury of 54 L. R. A.

only six men does not defeat the charge of perjury. *State v. Hall*, 7 Blackf. 25. The decision is upon the ground that the irregularity was one which might be, and was, waived.

In *United States v. Jackson*, 9 Mackey, 424, it was held that perjury could not be assigned on the testimony given upon a trial before the police court of the District of Columbia on a charge of receiving stolen goods, where such trial was without a jury; but this decision was upon the ground that, under the statute defining the jurisdiction of such police court, it had no jurisdiction to try a charge of that character without a jury. The court says that this is a different question than the question whether one having the choice of being tried by a jury may waive a jury and submit to be tried by the court.

Summary.

The authorities thus reviewed seem to establish that want of jurisdiction to inquire into a matter at all is fatal to a charge of perjury, and this is true, at least at common law, even if the court had general jurisdiction of the subject-matter, but the jurisdiction had not attached in the particular case. In this connection, however, it is important to bear in mind that defects which in some cases, and under some circumstances, are deemed to deprive the court of jurisdiction of the particular proceeding, in other cases and under other circumstances are regarded as mere irregularities that may be waived. So, also, it is to be observed that, though the court may not, under the circumstances as developed in a particular case, have had jurisdiction to proceed to judgment, yet it may have had jurisdiction to take cognizance of the case in the first instance. So, also, a distinction has been made between a case where there was no jurisdiction and a case where the jurisdiction might have been, but was not, defeated by proof of extrinsic circumstances. Defects, errors, and irregularities not jurisdictional do not ordinarily defeat a charge of perjury. An exception, however, is to be made in case of serious defects directly affecting the sanction under which the alleged perjured evidence is given, unless such defects are to be regarded as jurisdictional and therefore as coming within the rule that jurisdictional defects will defeat a charge of perjury. G. H. F.

CALIFORNIA SUPREME COURT.

SOUTHERN PACIFIC COMPANY, *Appt.*,
v.

J. W. HYATT *et al.*, *Respts.*

(132 Cal. 240.)

1. A railroad right of way is of such a public nature that title thereto cannot be acquired against the company by prescription or the running of the statute of limitations.
2. The name by which an action brought to establish title to a portion of a railroad right of way is designated is immaterial in determining the relief to be afforded, or whether the defense of prescription is available, where there is, under the statute, but one form of civil action, the character of which is determined by the substance of the complaint.

(March 16, 1901.)

APPEAL by plaintiff from a judgment of the Superior Court for Placer County in favor of defendants in an action brought to recover possession of a portion of plaintiff's right of way. *Reversed.*

The facts are stated in the opinion.

Messrs. John M. Fulweiler and Frederick B. Lake, for appellant:

By the act of Congress the grant of the right of way is a virtual dedication thereof to a public use as a public highway.

It necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant.

Southern P. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606; *Olcott v. Fond du Lac County Supers.* 16 Wall. 694, 21 L. ed. 388; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679; *Bloodgood v. Mohawk & H. River R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *Worcester v. Western R. Co.* 4 Met. 564; *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L. R. A. 68, 20 S. W. 493.

Private persons cannot acquire by adverse possession title to highways, streets, squares, or other lands dedicated to such public uses.

Hoadley v. San Francisco, 50 Cal. 265; *People v. Pope*, 53 Cal. 437; *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; *Yolo County v. Barney*, 79 Cal. 375, 21 Pac. 533; *Ex parte Taylor*, 87 Cal. 91, 25 Pac. 258.

Individuals may intrude upon or obstruct a public thoroughfare, but the public cannot be dispossessed of such lands, and such intruder acquires no rights.

NOTE.—For other cases in this series as to adverse possession of railroad right of way, see *Illinois C. R. Co. v. Houghton* (Ill.) 1 L. R. A. 213, and *note*; *Narron v. Wilmington & W. R. Co.* (N. C.) 40 L. R. A. 415; and *Northern P. R. Co. v. Ely* (Wash.) *post*, 526.
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Orena v. Santa Barbara, 91 Cal. 631, 28 Pac. 268.

No difference exists, so far as the public nature of the highway is concerned, between railroads operated by the state and those operated by any other agency of its selection.

Southern P. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032.

Mr. William F. Herrin, with *Messrs. William Singer, Jr.*, and *C. B. Sessions*, also for appellant:

There is no particular form necessary in the dedication of land to a public use. All that is requisite is the assent of the owner of the land, and the fact of its use for the public purpose intended by the appropriation.

Cincinnati v. White, 6 Pet. 434, 8 L. ed. 454; *United States v. Union P. R. Co.* 91 U. S. 81, 23 L. ed. 229; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679; *Olcott v. Fond du Lac County Supers.* 16 Wall. 691, 21 L. ed. 387.

Railroads are public highways, dedicated to a public use.

9 Am. & Eng. Enc. Law, p. 365; *Whitesides v. Quccn*, 13 Utah, 341, 44 Pac. 1032; *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 655; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138; 19 Am. & Eng. Enc. Law, pp. 371, 842; *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 371; *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547.

The width of the way is expressed in the act of Congress creating and granting it, and inquiry is precluded.

Jones Easements, § 385; *Joy v. St. Louis*, 138 U. S. 45, 34 L. ed. 857, 11 Sup. Ct. Rep. 243; *Smith v. San Luis Obispo*, 95 Cal. 471, 30 Pac. 591; *Central P. R. Co. v. Benity*, 5 Sawy. 119, Fed. Cas. No. 2,551; *Southern P. Co. v. Burr*, 86 Cal. 284, 24 Pac. 1032; *Northern P. R. Co. v. Smith*, 171 U. S. 275, 43 L. ed. 163, 18 Sup. Ct. Rep. 794.

The act of July 1, 1862, creating and conferring plaintiff's right of way, though but technically an easement, is a conclusive determination of the necessary width of such way.

Central P. R. Co. v. Benity, 5 Sawy. 118, Fed. Cas. No. 2,551; *Southern P. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032; *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641; *Northern P. R. Co. v. Smith*, 171 U. S. 269, 43 L. ed. 161, 18 Sup. Ct. Rep. 794; *New Mexico v. United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128.

The passage of trains over the track and roadbed extending through the right-of-way lands is such re-entry and daily interruption of the possession of adverse occupants within the limits of the way as to preclude the possibility of an adverse occupant acquiring a prescriptive right.

Jones, Easements, § 281, p. 232; *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 372; *Orena v. Santa Barbara*, 91 Cal. 631, 28 Pac. 268.

No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right.

Civil Code, § 3490; *Hoadley v. San Francisco*, 50 Cal. 265; *Visalia v. Jacob*, 65 Cal. 435, 52 Am. Rep. 303, 4 Pac. 433; *People v. Pope*, 53 Cal. 450; *Yolo County v. Barney*, 79 Cal. 378, 21 Pac. 833; *San Leandro v. LeBreton*, 72 Cal. 177, 13 Pac. 405; *San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803; *San Francisco Bd. of Edu. v. Martin*, 92 Cal. 218, 28 Pac. 799; *Archer v. Salinas City*, 93 Cal. 51, 16 L. R. A. 145, 28 Pac. 839; *Southern P. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032; *Northern P. R. Co. v. Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; *Doran v. Central P. R. Co.* 24 Cal. 245; *San Francisco v. Sullivan*, 50 Cal. 606; *People v. Gold Run Ditch & Min. Co.* 66 Cal. 152, 56 Am. Rep. 80, 4 Pac. 1152; *Ex parte Taylor*, 87 Cal. 91, 25 Pac. 258; *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106; *Archer v. Salinas City*, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; *Southern P. R. Co. v. Ferris*, 93 Cal. 263, 18 L. R. A. 510, 28 Pac. 828; *Sumner v. Peebles*, 5 Wash. 471, 32 Pac. 221, 1000.

Messrs. Tabor & Tabor, for respondents:

If appellant can maintain the present action—ejectment—at all, then the plea of the bar of the statute is good.

Allen v. McKay, 120 Cal. 337, 53 Pac. 828; *McManus v. O'Sullivan*, 48 Cal. 7; *Hayes v. Martin*, 45 Cal. 559.

The title of the Central Pacific to the right of way and odd sections is by purchase. Hence the public have no such interest in ways so secured as would authorize or empower the government to interfere in regard to its management and control.

Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 28 L. R. A. 612, 40 N. E. 1014.

A railroad right of way may be extinguished by the actual adverse possession of the locus in quo in all respects as his own, by the owner of the servient tenement.

Pollock v. Maysville & B. S. R. Co. 103 Ky. 84, 44 S. W. 359; *Illinois C. R. Co. v. Moore*, 160 Ill. 9, 43 N. E. 364; *San Francisco v. Straut*, 84 Cal. 124, 24 Pac. 814; *Hoadley v. San Francisco*, 50 Cal. 276.

Cal. Cont. art. 13, § 1, says: No property owned by the United States government, the state, or any municipal corporation within the state, is subject to taxation.

But the right of way belonging to the railroad is by § 10, art. 13, of the said Constitution made liable to taxation.

This is a declaration that the right of way belonging to a railroad company is not a "highway" in the sense that roads, streets, alleys, bridges, etc., are.

On petition for rehearing.

The congressional act of 1862, and that of 1864, amendatory thereof, contain two distinct grants. Since the grant of the odd sections is a grant in *præsenti* the legal title 54 L. R. A.

in fee vested in the railroad company *eo instanti* upon the filing of the map or plat of definite location in the local United States Land Office. But the grant of the right of way attached at no earlier date. It was fixed by the same act, *i. e.*, the filing of the map of definite location.

Now § 2 of the act of 1862 granted the right of way where "it may pass over the public lands." But the odd sections, having been granted in *præsenti* to the railroad company, are not public lands. Hence no right of way is granted over these odd sections. The railroad company in selling these odd sections reserves a right of way 200 feet wide on either side of the center of its main track. Owning the title in fee to the entire odd sections granted by Congress, it holds the same as any other private owner would hold them; and limitation would run in favor of one claiming the same adversely, whether crossed by the "right of way" or not, except in so far as the use of the roadbed and right of way immediately adjoining it for railroad purposes by the railroad, *possessio pedis*, interfered with such adverse possession.

Calcasieu Lumber Co. v. Harris, 77 Tex. 18, 13 S. W. 453.

Messrs. Tuttle & Wright also for respondents.

Van Dyke, J., delivered the opinion of the court:

The questions involved in this appeal are:

- (1) Whether a railroad right of way is such a public use as to prevent the running of the statute of limitations, or the acquisition of an adverse title thereto by prescription.
- (2) In case of intrusion upon such right of way, is ejectment the proper remedy?

Respondent Hyatt entered upon and occupied, for more than five years prior to the commencement of the action, a portion of the right of way in Placer county granted to the Central Pacific Railroad Company by act of Congress of July 1, 1862 (12 Stat. at L. 480, chap. 120). The court finds that prior to 1867 the predecessor of the plaintiff constructed its line of railroad over said right of way, and plaintiff and its predecessor have ever since maintained its railroad over said right of way; that the defendant Hyatt has been in the open, notorious, and exclusive possession and occupancy of the property described in the complaint for more than five years previous to the commencement of the action, and has paid taxes thereon, and defendant Savage was the tenant of said Hyatt, but that plaintiff during said time has also paid all taxes levied and assessed upon said right of way. The court below held, as a conclusion of law from the facts found, that the plaintiff is not entitled to recover possession of the premises in question, and from the judgment in favor of defendant the plaintiff appeals.

1. The questions involved are not new, but have been passed upon frequently in the courts of the United States, and in this state and other states. In *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 371, this

court says: "Whether the use of the property taken for the purposes of the railroad is a public use within the meaning of the Constitution, or the contrary, is involved in the question presented for consideration. But on this subject there is no room for controversy at this day, if respect is paid to the adjudications of the highest courts of the land. Railroads are esteemed as public highways, constructed for the advantage of the public,"—citing several authorities from other states. In *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547, it is said: "Railways are a species of public highways, and as such have uniformly been held to be public improvements, to which the right of eminent domain attaches, although they may be constructed by private corporations or individuals, and operated for the emoluments to be derived therefrom by the operators,"—citing *Mills, Em. Dom. § 14*; *Wood, Railway Law, § 226*; and other cases. *Southern P. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032, was an action like this, to recover possession of about 5 acres of land situated in Placer county, within and forming a part of the right of way granted to the Central Pacific Railroad Company by the act of Congress referred to; citing from § 2 of that act, wherein the right of way is granted to the Central Pacific Railroad Company of California for the construction of said railroad through the public lands, the plaintiff in that case, as in this, being the successor in interest of said grantee. The defendant in that case was the successor in interest of the party to whom a patent to the quarter section embracing the disputed premises was issued by the United States in December, 1880, and as such he claimed title in fee. The defendant had the land inclosed, and the plaintiff offered to allow him to maintain his inclosure, and use the land, on condition that he would accept a lease thereof, and pay a nominal rent, which he accepted; but at the expiration of the term of one year he refused to renew it, claiming the land as his own. After commenting upon some other cases, the court says: "Here there was a special grant of a right of way 200 feet in width on each side of the road. This grant is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true, the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the 400 feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so." In *Olcott v. Fond du Lac County Supers.* 16 Wall. 678, 21 L. ed. 382, the United States Supreme Court says: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of 54 L. R. A.

nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly, it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the state courts. . . . It is said that railroads are not public highways *per se*; that they are only declared such by the decisions of the courts; and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True, they must be used in their peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway, only because declared such by judicial decision. A railroad built by a state no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation; yet it is the purpose and the uses of a work which determine its character." In *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L. R. A. 68, 20 S. W. 493, it was held that a conveyance to a railroad company of a right of way though the grantor's land is a dedication to the public. In the court opinion it is said: "There can be no doubt from the text-books and adjudications that, where a railroad is empowered, as in the present instance, to condemn land for a public use, it occupies in all respects the same footing as any other corporation or quasi corporation, municipal or otherwise, or governmental agency, when exercising similar authority, to obtain land for a market place, for a street, highway, jail, or courthouse." In *St. Joseph & D. O. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578, the court had under consideration the congressional railroad right of way grant above referred to. "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the

company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route. The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands from this circumstance it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. . . . We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road." Jones on Easements lays down the rule that the prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public, or by individuals, while the railroad is constantly using a single track over such right of way. The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track, constantly in use, is a definite badge of ownership, and the only practical assertion of title that can be made. If the public has used paths by the side of the railroad track for any length of time, the use must be considered as permissive, and not adverse; citing a long list of authorities from different states. Jones, Easements, p. 232, §§ 2, 81. Individuals may intrude upon or obstruct the public thoroughfare, but cannot acquire title by prescription to such lands. *Orena v. Santa Barbara*, 91 Cal. 631, 28 Pac. 268; *Hoadley v. San Francisco*, 50 Cal. 265; *Visalia v. Jacob*, 65 Cal. 435, 52 Am. Rep. 303, 4 Pac. 433; *People v. Pope*, 53 Cal. 450; *San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803; *Archer v. Salinas City*, 93 Cal. 51, 16 L. R. A. 145, 28 Pac. 839.

2. Respondents counsel contend that, "if the appellant can maintain the present action [ejectment] at all, then the plea of the bar of the statute is good." And he cites in support of this contention *Allen v. McKay & Co.* 120 Cal. 332, 52 Pac. 828, wherein it is claimed the court held that, if the title to the lands in question was such as to found thereon an action to recover the possession of the same, such title may be lost by adverse possession. That was an action to recover possession of a tract of land in Humboldt county covered by the waters of Humboldt bay, and the court says: "If the land in controversy was not private property, plaintiffs had no title. If it was private property, there certainly could be an adverse occupancy of it for the statutory period." The difference between that

and this is that the contest there was in reference to the ownership and possession of private property. Here, as already shown, the premises in question were granted for, and dedicated to, a public use. There is but one form of civil action in this state. The substance of the action determines its character. Being entitled to the possession of the premises in question as a part of the railroad right of way under the congressional grant for the purposes therein specified, and the defendants having intruded thereupon and withholding the same, the plaintiff has a right to recover the possession thereof by any appropriate action; and whether that action be called "ejectment," or by any other name, is quite immaterial. *Central P. R. Co. v. Benity*, 5 Sawy. 118, Fed. Cas. No. 2,551, was an action in ejectment by the railroad company against the defendant therein for a portion of the railroad right of way acquired under the grant in question. The court there says: "If the plaintiff is entitled to actual possession of the land for the purpose of effecting the object in view when the right of way was granted, it can recover such possession in some judicial proceeding. The mere form of the action has ceased to be of any importance in this court. There is now but one form for all common-law actions. . . . We think this complaint does state a good case. It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy. But, in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land." *Southern P. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032, was also an action at law to recover possession of a portion of the railroad right of way in question. As already shown, the court held that that action was not only maintainable but that the statute of limitation did not run against the right of the plaintiff therein. *Visalia v. Jacob*, 65 Cal. 435, 52 Am. Rep. 303, 4 Pac. 433, was also an action of ejectment, and the court in passing says: "An action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee or the adjoining proprietor retains it. In the latter case the right of the municipality to regulate the public use, and, for that purpose, to possess, use, and control the property, is treated by the courts as a legal, and not merely an equitable, right,"—citing authorities; and adding: "But it does not follow that such an action is barred by an adverse possession for a statutory period;" and referring to *San Francisco v. Calderwood*, 31 Cal. 589, 91 Am. Dec. 542, where it seems to have been held that ejectment would be barred, the court says: "But in that case it was found

that the 'slip' had never been dedicated to the public use,"—referring, as against that case, to *Hoadley v. San Francisco*, 50 Cal. 265, and *People v. Pope*, 53 Cal. 450. *San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803, was ejectment to recover the possession of an engine lot reserved to the city under the Van Ness ordinance. See also the later

case of *San Francisco v. Grote*, 120 Cal. 60, 41 L. R. A. 335, 52 Pac. 127.

For the reasons stated, *the judgment must be reversed*; and it is so ordered.

We concur: **Garowette, J., Harrison, J.**

Rehearing denied.

WASHINGTON SUPREME COURT.

NORTHERN PACIFIC RAILWAY COMPANY, *Appt.*,

v.

William ELY et al., Respts.

(.....Wash.....)

1. The statute of limitations runs against a right of action to recover possession of a portion of a railroad right of way in adverse possession of a third person.
2. A railroad company cannot set up the rights of the government to defeat a title acquired through adverse possession by a third person to a portion of its right of way.
3. A railroad company is estopped to assert title to a portion of its right of way upon which third persons have, with its knowledge, placed valuable improvements under a claim of title from the government, and in possession of which they have been for a period exceeding that designated by the statute of limitations for the recovery of real property, and the streets upon which were located with reference to others established by the railroad company

(June 29, 1901.)

A PPEAL by plaintiff from a judgment of the Superior Court for Spokane County in favor of defendants in an action brought to recover possession of portions of plaintiff's right of way which were held adversely by defendants. *Affirmed*.

The facts are stated in the opinion.

Messrs. C. W. Bunn and James B. Kerr, with *Messrs. Stephens & Bunn*, for appellant:

The act of Congress conferred upon the company the right to locate its route, and granted a right of way over the public lands 400 feet wide,—200 feet on each side of the railroad.

Proof that the premises in controversy over which the road was constructed were public lands on July 2, 1864, established the title of the Northern Pacific Railroad Company under the grant.

St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641; *Central P. R. Co. v. Dyer*, 1 Sawy. 641, Fed. Cas. No. 2,552; *Hamilton v. Spokane & P. R. Co.* 2 Idaho, 898, 28 Pac. 408.

The estate which passed under this grant

NOTE.—See the preceding case of *Southern P. Co. v. Hyatt* (Cal.) 54 L. R. A.

is more than a technical "right of way" or easement, and is a qualified fee with the incidents of possession and exclusive use and enjoyment of the whole strip granted.

Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496; *New Mexico v. United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128.

The grant of right of way was conferred upon the Northern Pacific Railroad Company by Congress to enable it to perform the duties which it owed the public under its charter, and the company had no power to part with any portion of the right of way so granted and charged by the act of Congress with a public use.

East Alabama R. Co. v. Doe ex dem. Vischer, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Northern P. R. Co. v. Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; *Southern P. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032; *Burton v. Laughrey*, 18 Mont. 43, 44 Pac. 406.

The doctrine of estoppel does not apply where rights are claimed under an agreement with a corporation, which is *ultra vires* and at the same time against public policy.

Thomas v. West Jersey R. Co. 101 U. S. 86, 25 L. ed. 953; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

Messrs. Samuel R. Stern and Frederick W. Dewart, for respondent Ely:

Government grants are construed against the grantee.

Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17; 3 Washb. Real Prop. 4th ed. p. 190; *Gildart v. Gladstone*, 11 East, 675; *Proprietors of Stourbridge Canal v. Wheeley*, 2 Barn. & Ad. 793; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66, 16 L. ed. 500; *Rice v. Minnesota & N. W. R. Co.* 1 Black, 360, 17 L. ed. 147; *Barden v. Northern P. R. Co.* 154 U. S. 325, 38 L. ed. 1001, 14 Sup. Ct. Rep. 1030; *United States v. Oregon & C. R. Co.* 164 U. S. 539, 41 L. ed. 544, 17 Sup. Ct. Rep. 165.

When the railroad was first built through Spokane the railroad company construed its grant as being only 200 feet in width.

The construction given to the contract by the parties themselves is naturally entitled

to great weight, where parties later desire to change their claims.

Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; *Bishop, Contr.* § 412; *Topliff v. Topliff*, 122 U. S. 131, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1057; *Knox County v. Ninth Nat. Bank*, 147 U. S. 100, 37 L. ed. 97, 13 Sup. Ct. Rep. 267; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 34 Fed. 255; *Metropolitan Nat. Bank v. Benedict Co.* 20 C. C. A. 377, 36 U. S. App. 604, 74 Fed. 185; *Leete v. Pacific Mill. & Min. Co.* 88 Fed. 967; *Helme v. Strater*, 52 N. J. Eq. 603, 30 Atl. 333; *Isham v. Parker*, 3 Wash. 764, 29 Pac. 835.

Whether the interest of plaintiff is an easement, with the right to exclusive possession and use, or a fee qualified and limited to certain uses, each of these may be lost by adverse possession, unless there is something in plaintiff's condition by reason of which the statute of limitations would not apply.

The statute of limitations does not "presume a grant by the true owner."

3 Washb. Real Prop. 4th ed. p. 134.

The government gave to respondent's predecessors all the rights and interests in the property which the government possessed.

They took the property subject to the right of way given by the previous grant.

St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; *Bybee v. Oregon & O. K. Co.* 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641.

The right of way of a railroad may be lost by adverse possession, whether the railroad has merely an easement, or has a qualified fee, or an absolute fee.

Nashville, C. & St. L. R. Co. v. Hammond, 104 Ala. 191, 15 So. 935; *Coleman v. Flint & P. M. R. Co.* 64 Mich. 160, 31 N. W. 47; *Mattheus v. Lake Shore & M. S. R. Co.* 110 Mich. 170, 67 N. W. 1111; *Pittsburgh, O. C. & St. L. R. Co. v. Stickley*, 155 Ind. 312, 58 N. E. 192; *Illinois C. R. Co. v. Houghton*, 126 Ill. 233, 1 L. R. A. 213, 18 N. E. 301; *Donahue v. Illinois C. R. Co.* 165 Ill. 640, 46 N. E. 714; *Turner v. Fitchburg R. Co.* 145 Mass. 433, 14 N. E. 627; *Northern P. R. Co. v. Spokane*, 56 Fed. 917, 12 C. C. A. 246, 29 U. S. App. 81, 64 Fed. 506.

A railroad right of way may be abandoned.

Flaten v. Moorhead, 58 Minn. 324, 59 N. W. 1044; *Crolley v. Minneapolis & St. L. R. Co.* 30 Minn. 541, 16 N. W. 422; *People v. Eel River & E. R. Co.* 98 Cal. 665, 33 Pac. 728; *Lake Erie & W. R. Co. v. Boswell*, 137 Ind. 336, 36 N. E. 1103; *Fort Worth & N. O. R. Co. v. Sweatt*, 20 Tex. Civ. App. 543, 50 S. W. 162; *Muhle v. New York, T. & M. R. Co.* 86 Tex. 459, 25 S. W. 607; *New York, N. H. & H. R. Co. v. Benedict*, 169 Mass. 262, 47 N. E. 1027; *Westcott v. New York & N. E. R. Co.* 152 Mass. 465, 25 N. E. 840; *Bicknell v. New York & N. E. R. Co.* 161 Mass. 428, 37 N. E. 378; *Proprietors of Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1, 6 Am. Rep. 181; *Henderson v. Central Pass. R. Co.* 21 Fed. 358; *Central Iowa R. Co. v. Moulton & A. R. Co.* 57 Iowa, 249, 10 N. W. 639; *Hickox v. Chicago* 54 L. R. A.

& *C. S. R. Co.* 94 Mich. 237, 53 N. W. 1105; *Blakely v. Chicago, K. & N. E. Co.* 34 Neb. 284, 51 N. W. 767, 46 Neb. 272, 64 N. W. 972; *Roanoke Invest. Co. v. Kansas City & S. E. R. Co.* 108 Mo. 50, 17 S. W. 1000; *Elliott, Railroads*, § 931; *Norton v. London & N. W. R. Co.* L. R. 9 Ch. Div. 623.

This is a typical case for the application of the doctrine of estoppel in pais.

Berry v. Seawell, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 742; *Walker v. Flint*, 3 McCrary, 507, 11 Fed. 31; *McBane v. Wilson*, 8 Fed. 734; *Cowley v. Spokane*, 99 Fed. 840; *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113.

Appellant may convey indirectly through abandonment and adverse possession this part of its property, which is not essential to enable it to perform its corporate duties.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 100, 44 L. ed. 89, 20 Sup. Ct. Rep. 33; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 309, 30 L. ed. 92, 6 Sup. Ct. Rep. 1094; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409.

It would be an unreasonable application of *ultra vires* to hold that a release by a railroad corporation of part of its granted right of way to its grantor or his successors is void.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Olcott v. International & G. N. R. Co.* (Tex. Civ. App.) 28 S. W. 728; *American Emigrant Co. v. Adams County*, 100 U. S. 61, 25 L. ed. 563; *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321; *Atlantic & P. Teleg. Co. v. Union P. R. Co.* 1 McCrary, 541, 1 Fed. 745; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953.

Even if there were valid objection to the deeding of this land or its release through the limitation statutes, the objection could be raised only by the United States itself in a direct proceeding.

American Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. ed. 563; *Kings County v. Tulare County*, 119 Cal. 512, 51 Pac. 866; *United States v. Louisiana*, 127 U. S. 187, 32 L. ed. 68, 8 Sup. Ct. Rep. 1047; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Crolley v. Minneapolis & St. L. R. Co.* 30 Minn. 541, 16 N. W. 422; *Wheeler v. Chicago*, 68 Fed. 526; *Northern P. R. Co. v. Miller*, 20 Wash. 34, 54 Pac. 603; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Phillips v. Moore*, 100 U. S. 208, 25 L. ed. 603; *Southern P. R. Co. v. United States*, 16 C. C. A. 114, 29 U. S. App. 669, 69 Fed. 47.

The laches of the plaintiff precludes it from obtaining aid from a court of equity.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953; *Boston, C. & M. R. Co. v. Boston & L. R. Co.* 65 N. H. 393, 23 Atl. 529; *Olcott v. International & G. N. R. Co.* (Tex. Civ. App.) 28 S. W. 728;

Kuhn v. Port Townsend, 12 Wash. 605, 29 L. R. A. 445, 41 Pac. 923.

Mr. F. T. Post, for respondents *Brown et al.*:

A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defense to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officers are not governmental agents whose laches creates no bar.

If one occupies adversely for twenty years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain, as a private proprietor.

Pittsburgh, C. C. & St. L. R. Co. v. Stickley, 155 Ind. 312, 58 N. E. 192; *Illinois C. R. Co. v. Houghton*, 126 Ill. 233, 1 L. R. A. 213, 18 N. E. 301; *Illinois C. R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563; *Illinois C. R. Co. v. Moore*, 160 Ill. 9, 43 N. E. 364; *Donahue v. Illinois C. R. Co.* 165 Ill. 640, 46 N. E. 714; *Mattheus v. Lake Shore & M. S. R. Co.* 110 Mich. 170, 67 N. W. 1111; *Paxton v. Yazoo & M. Valley R. Co.* 76 Miss. 536, 24 So. 536; *Gay v. Boston & A. R. Co.* 141 Mass. 407, 6 N. E. 236; 19 Am. & Eng. Enc. Law, p. 26; *Northern P. R. Co. v. Spokane*, 12 C. C. A. 246, 29 U. S. App. 81, 64 Fed. 508.

Even a public corporation may lose property rights by adverse possession.

Meyer v. Lincoln, 33 Neb. 566, *sub nom. Meyer v. Graham*, 18 L. R. A. 146, 50 N. W. 763.

And by estoppel.

Spokane Street R. Co. v. Spokane Falls, 6 Wash. 524, 33 Pac. 1072.

Nothing so much retards the growth and prosperity of a country as insecurity of title to real estate.

Ward v. Huggins, 7 Wash. 624, 32 Pac. 740, 1015, 36 Pac. 285; *Lewis v. Marshall*, 5 Pet. 470, 8 L. ed. 195; *Crowall v. Sherrerd*, 5 Wall. 269, *sub nom. Den ea dem. Crowall v. Sherrerd*, 18 L. ed. 572.

An easement may be lost by abandonment, as well as by adverse possession.

10 Am. & Eng. Enc. Law, p. 434; *Snell v. Levitt*, 110 N. Y. 595, 1 L. R. A. 414, 18 N. E. 370; Washb. Easements, 3d ed. p. 661; *Louisville & N. R. Co. v. Covington*, 2 Bush, 526; *Lattimer v. Livermore*, 72 N. Y. 174; *Flaten v. Moorhead*, 58 Minn. 324, 59 N. W. 1044; *Muhle v. New York, T. & M. R. Co.* 86 Tex. 459, 25 S. W. 607.

The appellant and its predecessor have for almost twenty years stood silently by and seen these respondents add valuable and permanent improvements to the respective pieces of property in question, and seen them pay taxes thereon during all said time, and pay assessments for grading streets in front of these lots, without protest, without objection, without any statement whatsoever of any claim of any character or description. Such conduct works an estoppel.

Fletcher v. Holmes, 25 Ind. 458; *Anderson*, 54 L. R. A.

son v. Hubble, 93 Ind. 570; *Gregg v. Von Phul*, 1 Wall. 281, 17 L. ed. 537; *Arnold v. Cornman*, 50 Pa. 361; *Roeder v. Fouts*, 5 Wash. 135, 31 Pac. 432; *Anderson v. Armstead*, 69 Ill. 452.

Appellant cannot plead *ultra vires*.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 957; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 827; *Taylor v. South & North Ala. R. Co.* 4 Woods, 575, 13 Fed. 155; *Nashua & L. R. Co. v. Boston & L. R. Co.* 27 Fed. 826; *Cincinnati, H. & D. R. Co. v. McKee*, 12 C. C. A. 14, 24 U. S. App. 218, 64 Fed. 44; *Long v. Georgia P. R. Co.* 91 Ala. 519, 8 So. 706; *Day v. Spiral Springs Ruggy Co.* 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; *Tacoma v. Lillis*, 4 Wash. 806, 18 L. R. A. 372, 31 Pac. 321.

Messrs. James Dawson, Henley, Kellam, & Lindsley, and *Joseph Rosslow*, for respondents *Reith et al.*:

The statute of limitations is a statute of repose, constituting a statutory bar, and does not depend upon presumption or prescription.

2 Washb. Easements, 110; 3 Washb. Easements, 110; *Cooper v. Smith*, 9 Serg. & R. 26, 11 Am. Dec. 661; *Reed v. Reed*, 46 Pa. 242; *Bentley's Appeal*, 99 Pa. 500; *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055; *Lewis v. Marshall*, 5 Pet. 470, 8 L. ed. 195; *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Crowall v. Sherrerd*, 5 Wall. 269, *sub nom. Den ea dem. Crowall v. Sherrerd*, 18 L. ed. 572; *Bioknell v. Comstock*, 113 U. S. 151, 28 L. ed. 963, 5 Sup. Ct. Rep. 399; *Illinois C. R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563; *Donahue v. Illinois C. R. Co.* 165 Ill. 640, 46 N. E. 714; *Paxton v. Yazoo & M. Valley R. Co.* 76 Miss. 536, 24 So. 536; *Glenn v. Dorsheimer*, 28 Fed. 907, 23 Fed. 697; *Flaten v. Moorhead*, 58 Minn. 324, 59 N. W. 1044.

So long as the company does not cripple its obligations to the public, it has full discretion as to how much of the right of way it will keep or abandon.

Northern P. R. Co. v. Spokane, 56 Fed. 917, Affirmed in 12 C. C. A. 246, 29 U. S. App. 81, 64 Fed. 506.

Appellant is estopped from now asserting, as against them, the claim to the premises in conflict between appellant and these respondents.

Atlantic & P. Teleg. Co. v. Union P. R. Co. 1 McCrary, 541, 1 Fed. 745; *Nauert v. Duke* (Iowa) 79 N. W. 271; *Fletcher v. Holmes*, 25 Ind. 470; *Gregg v. Von Phul*, 10 Wall. 281, 17 L. ed. 538; *Arnold v. Cornman*, 50 Pa. 361; *Roeder v. Fouts*, 5 Wash. 135, 31 Pac. 432; *Anderson v. Armstead*, 69 Ill. 452; *Niven v. Belknap*, 2 Johns. 573; *Chapman v. Chapman*, 59 Pa. 214; *Redmond v. Excelsior Sav. Fund & Loan Assn.* 194 Pa. 643, 45 Atl. 422; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Richardson v. Chickering*, 41 N. H. 380, 77 Am. Dec. 769; *Meyer v. Lincoln*, 33 Neb. 566, *sub nom. Meyer v. Graham*, 18 L. R. A. 146, 50 N. W. 763; *Pella v. Scholte*, 24 Iowa, 293,

95 Am. Dec. 729; *Cincinnati v. First Presby. Church*, 8 Ohio, 298; *State ex rel. Atty. Gen. v. Janesville Water Co.* 92 Wis. 496, 32 L. R. A. 391, 66 N. W. 512; *Com. ex rel. Atty. Gen. v. Bala & B. M. Turnp. Co.* 153 Pa. 47, 25 Atl. 1105; *Atty. Gen. v. Delaware & B. R. Co.* 27 N. J. Eq. 1.

Appellant is prevented by the laches of its predecessor and itself from maintaining this action.

Sackman v. Campbell, 15 Wash. 57, 45 Pac. 895; *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422; *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807; *Hammond v. Hopkins*, 143 U. S. 251, 36 L. ed. 145, 12 Sup. Ct. Rep. 418; *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. ed. 548, 14 Sup. Ct. Rep. 671.

Dunbar, J., delivered the opinion of the court:

This action was brought by the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, to recover possession of certain portions of its right of way in the county of Spokane. The complaint alleges that the plaintiff was the owner and entitled to the possession of a strip of land 400 feet wide, and that defendants had wrongfully entered thereon, and judgment was demanded for the removal of a cloud, for the quieting of title to the lands mentioned in the complaint, and for the possession of same. Separate answers were interposed by many of the defendants, separate trials had, and separate verdicts rendered. A single judgment, however, was rendered, determining all the issues in the case.

It may be conceded, we think, that the right of way which embraces the land in dispute was granted to the Northern Pacific Railroad Company by act of Congress in 1864 (13 Stat. at L. 365, chap. 217), and that to the title to the right of way thus granted to the Northern Pacific Railroad Company the Northern Pacific Railway Company has succeeded. It may also be conceded, for the purposes of this case, that the Northern Pacific Railway Company has complied with all the terms and provisions of the act of Congress aforesaid, and has constructed its railroad through the whole of the line of road between the points named in the granting act; that a map of definite location was filed October 4, 1880, prior to the acquiring of the title to the land in question by the defendants or their predecessors or grantors; and that said railroad has been continuously operated since its construction. The defendants, answering, claim title by patent from the United States government. The land was acquired under the pre-emption and homestead acts, respectively, and all the defendants or their grantors have been in quiet, peaceful, undisturbed, and undisputed possession of said land for more than ten years immediately prior to the commencement of this action, many of them for nearly twenty years. Valuable improvements have been made by the defendants, the said land consisting of

town lots in the city of Spokane, and having been platted and laid out as additions to the city of Spokane by the defendants or their grantors after acquiring title to the same from the United States government. During all these years no claim whatever to these lands has been made by the appellant. It has stood by and seen improvements made thereon, and, in the case of defendant Brown, an agreement was entered into between him and Gen. Sprague, who was then the general superintendent of the Northern Pacific Railroad Company, that they would plat their lots so that the streets of the addition which the railroad company was dedicating would correspond with and meet the streets which Brown was dedicating to the city of Spokane, and the agreement was carried out by arranging the streets in accordance therewith. These streets have been used by the public for from ten to eighteen years. The testimony shows that, in addition to the improvements which these defendants have made upon their lots, many thousands of dollars have been paid by them for assessments levied upon abutting land for the improvement of streets running through this right of way; that the appellant has never paid these assessments; that they have never been assessed to the appellant; and that no question has ever been raised by the appellant as to the right and obligation of the defendants to pay the same. While the record does not show that any of the lands owned by the defendants were deeded to them by the appellant, it does show that the Northern Pacific Railroad Company has deeded to other parties lots in the city of Spokane situated within the 400 feet of right of way, upon which valuable improvements have been made by its grantees.

The questions involved in this case are: (1) Adverse possession of respondents; (2) that the action was barred by the statute of limitations; (3) equitable estoppel by the laches and misconduct of appellant. The questions of fact were put in issue by the pleadings, were submitted to a jury, and found in favor of the several defendants, and the court upon said findings entered its decree declaring the title of said lands to be in the defendants. Under our statute, the right to commence an action of this kind is barred after ten years' possession on the part of the defendants, and it may be conceded that the bar is effectual in this case if the statute of limitations runs against the appellant. It is contended by the appellant that it does not, and there is considerable discussion on the proposition of whether the interest of the company in this right of way is merely an easement, or whether it is possessed of a fee-simple title. As we view the law, however, these questions are immaterial; for, if the statute runs in one instance, it would in the other. It is the contention of the appellant that the statute does not run against it, for the reason that the right of way is granted in the interest of the public, and that it would be against public policy to allow the company to alienate its right of way, thereby

depriving it of the power to carry on the business in aid of which the franchise was granted, and that it must necessarily follow that, if the company could not alienate its lands, public policy would equally prevent an alienation through process of law; that the statute of limitations presupposes a grant by the true owner; and the appellant's predecessor having been the true owner, and the title to the land having been acquired by the defendants subsequent to the acquiring of title by the appellant, that no grant by the true owner had ever been made, and consequently that the statute of limitations did not apply. The statute of limitations, we think, is not based upon such a thought, but is purely and essentially a statute of repose, in the interest of the stability of titles and of good morals. One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations, and this is true, even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title, and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washb. Real Prop. 4th ed. p. 164: "The operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate or transfer the title." That the statute of limitations is a statute of repose has been decided by all modern authority, including many decisions from this court. See *Wickham v. Sprague*, 18 Wash. 466, 61 Pac. 1055. There are no exceptions under our statute, and it must apply to the case at bar, unless the appellant's right to commence the action is guaranteed by some higher authority. The statute is as follows: Section 4796, 2 Ballinger's Anno. Codes & Statutes. "Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued. . . ." Section 4797: ". . . Within ten years, (1) actions for the recovery of real property, or for the recovery or the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action."

It will be observed that this case does not involve in any manner a construction of the act of Congress incorporating the Northern Pacific Railroad Company, or the granting to the company of its right of way. Neither is this an action against the company, as many of the actions are which are cited by the appellant. There is no attempt here to bind the company by an *ultra vires* agreement, but the attempt is on the

part of the company to repudiate executed contracts and rights which have grown up through the laches, negligence, and direct agreements of the company. Neither is this an action where the court has attempted to determine how much of the right of way was necessary for the railway company to use in operating its road, but it was a determination of the fact of how much of the right of way the railroad company had abandoned, and how much of the right of way, according to its own determination, it did not need for the purpose of operating its road, and how much it could abandon without defeating the purpose for which the grant was made. Of the cases cited by appellant, the strongest one favoring its contention, and the only one, therefore, which it is necessary for us to notice, is *Northern P. R. Co. v. Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; and it is claimed by the appellant that in this case the rule was clearly announced that the company could not abandon any portion of its right of way. There are some expressions used by the court in this case which give plausibility to appellant's contention, but there are so many different propositions involved in the case that it is hard to tell upon what exact proposition the case was decided. Great stress seems to have been placed by the court upon the defect in Smith's deed, and an examination of the cases cited by the court shows that the exact question raised in this case was not involved or considered seriously in that, although it was decided in that case that the court had no right to determine the question of how many feet had been used and occupied for railroad purposes by the company, and that it was entitled to the number of feet that were granted to it by the government. The concluding remark of the court is as follows: "The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company, and, at any rate, a forfeiture for misuser could not be enforced in a private action,"—a proposition which certainly cannot be controverted. But in that case the company was in possession of the lands sought to be obtained by Smith, the allegation being that it had been, more than six years prior to the commencement of the action, in possession of the premises. So that no question of adverse possession and user or of the statute of limitations was involved, and we do not think that the Supreme Court of the United States, notwithstanding some expressions which are made in this case and which were not necessary for its determination, would, under the circumstances of this case, deprive these defendants of their homes and property where a title had been obtained through the government, and where, by consent, agreement, and acquiescence of the company, time and money had been expended in their improvement during all these years of quiet and undisputed possession. If the doctrine of estoppel can ever be invoked, it seems to us that it should be invoked in

this case against the appellant. In any event, the question of protecting the rights of the government is not one which can be raised by the appellant. If the rights of the government are in any way involved or jeopardized by the possession of these lands by the defendants, the government may act in the premises unaided by the appellant, whose negligence and laches have been the cause of these investments by the defendants. The appellant should not be allowed to escape the consequences of its own wrongful acts, and reap a fraudulent benefit, by pleading the rights of the government. Indeed, our government is presumably founded upon equitable principles, not in theory alone, but in practice, and the citizen has a right to expect equitable treatment, even at the hands of the government; and it has been held that in good conscience the government is frequently estopped from asserting rights which would destroy the equitable rights of the citizen. In *State ex rel. Atty. Gen. v. Janesville Water Co.* 92 Wis. 496, 32 L. R. A. 391, 66 N. W. 512, it was held that leave would not be granted to the state to institute an action to forfeit the franchises of a solvent, active corporation, carrying out the purposes of its creation in supplying the necessities of a large number of people, whose securities are held by innocent persons, in the absence of a clear, wilful misuse, abuse, or nonuse of its franchises. In that case the court quotes from *Com. ex rel. Atty. Gen. v. Bala & B. M. Turnp. Co.* 153 Pa. 47, 25 Atl. 1105, where the court held that, in case of delay accompanied by circumstances which would estop individuals, the state was equally estopped. There the circumstances showed that a corporation had been allowed to proceed and expend large sums of money when the facts relied upon in the application for leave to bring the action to forfeit the franchises were notorious. Held, that the delay, under the circumstances, created an estoppel so as to effectually prevent the institution of such proceedings. The court, in effect, said: If the complainant were a private individual, the court would not hesitate to say that his laches were a bar, and the same rule holds good notwithstanding the application is by the attorney general on behalf of the state. The question involved is not one under the statute of limitations, but one of laches, which may be imputed to the state as well as to an individual. While time does not run against the state, time, together with other elements, may make up a species of fraud, and estop even sovereignty from exercising its legal rights.—citing *Willmott v. Barber*, L. R. 15 Ch. Div. 105; *Atty. Gen. v. Johnson*, 2 Wils. Ch. 102; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1. The court, concluding, said: "The principles here maintained should be quite rigidly applied where, as in this case, the corporation has not merely been allowed, but has been compelled, by those chiefly interested and the real moving parties, to proceed at great expense, under the franchises sought to be annulled, for a considerable period of time, while the facts relied

upon as grounds for forfeiture have been all well known."

This language might be appropriately applied to the facts in this case, and could as well be applied to the individual defendants here as to corporate defendants there; for these defendants have not only been allowed to possess these lots, but the title to them has been conveyed to them by the government of the United States after a compliance on their part with the requirements of the law in relation to pre-emption and homestead claims, and after, in addition to the expense and time necessarily involved in obtaining title under these acts from the government, the expenditure of many thousands of dollars in creating permanent improvements on these lands, and in paying many thousands of dollars' assessments for the improvement of streets, in addition to other taxes for the benefit of the government, with the knowledge and acquiescence, and in some cases the actual agreement, of the appellant. It is also held in *Com. ex rel. Atty. Gen. v. Bala & B. M. Turnp. Co.* 153 Pa. 47, 25 Atl. 1105, that where a turnpike company is allowed, without objection, to expend a large amount of money in extending its road, under authority of a decree of court, a commonwealth is estopped to question the regularity of the proceedings under which such authority was granted. There again the court said: "In England, from whence we derived the great body of common law, and most of our principles in equity, it is well settled that, while time will not run against the Crown, yet time, together with other elements, may make up a species of fraud, and estop even sovereignty from exercising its legal rights,"—citing *Atty. Gen. v. Johnson*, 2 Wils. Ch. 102, where there was an attempt on behalf of the Crown to restrain a purpresture in the river Thames, and the court refused to entertain the bill because of the delay on the part of the attorney general in instituting the proceeding. Citing, also, *Atty. Gen. v. Sheffield Gas-Consumers' Co.* 3 De G., M. & G. 304. See also *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631.

As showing that the rule that the company cannot alienate any part of its right of way is not to be literally construed, it has been decided that a railroad company to which Congress has granted a right of way across the public lands and sections of lands adjoining such right of way, in aid of the construction of its road, has power to dedicate to the public the right to cross its tracks and right of way. *Northern P. R. Co. v. Spokane*, 12 C. C. A. 246, 29 U. S. App. 81, 64 Fed. 506. On the proposition that, when a corporation has made contracts in violation of its powers, the validity of such contracts can be questioned only by the government, see *Union Nat. Bank v. Matthews*, 98 U. S. 621; 25 L. ed. 188. No case is cited by the appellant which holds that a railway company may not lose a part of its right of way by adverse possession, by abandonment or estoppel, and we do not think that any case can be found which advances those propositions, but many courts

have held the reverse. In *Pittsburgh, C. O. & St. L. R. Co. v. Stickle*, 155 Ind. 312, 58 N. E. 192, it was held by the supreme court of Indiana that adverse possession, acquired in by the company for the statutory period, prevented a recovery, and we cannot do better than insert a portion of the opinion of the court in that case: "Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defense to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officers are not governmental agents whose laches creates no bar. It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists.

... If a company voluntarily disable itself to perform its duties to the public, its charter may be forfeited. But there is no reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation. It is true that the statute entitles a railway company to take land in fee, and forbids interference with the company's exclusive use. But the right to the exclusive use (which is an incident to every unqualified ownership) must be asserted. If one occupies adversely for twenty years land owned by a railway company, the statute of limitations should raise the presumption of a grant; for the company holds its lands for private gain, as a private proprietor. The state confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the state should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents,"—citing *Illinois C. R. Co. v. Houghton*, 126 Ill. 233, 1 L. R. A. 213, 18 N. E. 301; *Illinois C. R. Co. v. O'Connor*, 154 Ill. 550, 30 N. E. 563; *Illinois C. R. Co. v. Moore*, 160 Ill. 9, 43 N. E. 364; *Donahue v. Illinois C. R. Co.* 165 Ill. 640, 46 N. E. 714; *Illinois C. R. Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Matthews v. Lake Shore & M. S. R. Co.* 110 Mich. 170, 67 N. W. 1111; *Bobbett v. South-Eastern R. Co.* L. R. 9 Q. B. Div. 424; *Norton v. London & N. W. R. Co.* L. R. 13 Ch. Div. 268; *Erie & N. R. Co. v. Rousseau*, 17 Ont. App. Rep. 483. In *Matthews v. Lake Shore & M. S. R. Co.* 110 Mich. 170, 67 N. W. 1111, it was held that, after a right to use land as part of its right of way had been granted to a railroad company, and such company fenced its right of

way excluding such land, and thereafter the grantor conveyed the land to the plaintiff, who inclosed the same and used it for crops and pasturage, openly and continuously, without the assent of the company, for more than fifteen years, the plaintiff acquired title by adverse possession. To the same effect are numerous other cases. In fact, it seems to be the universal authority. The case of *Northern Counties Invest. Trust v. Enyard* (Wash.) 64 Pac. 516, cited in appellant's reply brief in support of the position that possession for more than the statutory time on a railroad right of way was not adverse, but permissive, shows, on examination, that the circumstances surrounding it were altogether different from the circumstances surrounding the case at bar. Under the circumstances of that case it was held that the occupancy of a portion of the right of way of the railroad company by the owner of a servient estate was not inconsistent with the easement, the occupation there being for the purposes of farming the land embraced in the right of way. We do not desire to extend the rule enunciated in that case. But, whether or not the facts in that case warranted the conclusion reached by the court, certainly the circumstances shown by the record in this case will not justify the conclusion reached in that, that the occupancy of the defendants, taken in connection with the improvements and the use to which the improvements were put, was not inconsistent with the appellant's right to use the same for railroad purposes. In consideration of all the circumstances surrounding this case, and of the underlying principles governing rights and remedies, we are of the opinion that the judgment should be affirmed.

Beavis, Ch. J., and Fullerton, Mount, Anders, White, and Hadley, JJ., concur.

Frank DORAN, Resp.,
v.

City of SEATTLE, Appt.

(.....Wash.....)

The statute of limitations does not begin to run against all actions for injuries to adjoining property, growing out of the negligent erection by a municipality of a bulkhead so as to constitute a continuing nuisance, at the time of its completion, but damages may be recovered for injuries which have accrued within the statutory period before the commencement of the action, although more than the statutory period has elapsed since the completion of the work.

(March 7, 1901.)

NOTE.—The question of the effect of the statute of limitations in case of a continuing nuisance is involved with that of the right to bring successive actions for successive injuries caused by such nuisances, as to which see also *Aldworth v. Lynn* (Mass.) 10 L. R. A. 210; *Watts v. Norfolk & W. R. Co.* (W. Va.) 23 L. R. A. 674; and *Kidley v. Seabold & R. Co.* (N. C.) 32 L. R. A. 708.

A PPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's property by the alleged negligent construction by defendant of a bulkhead. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. E. Humphrey and Edward Von Tobel, for appellant:

This is not the case of a nuisance. It is the case of a negligent improvement of a street. The improvement was in itself rightful and legal but the manner in which the improvement was made was wrongful.

The wrong in negligently grading the street is the basis of the action, for there are no facts alleged constituting a nuisance. It is not a nuisance to do what the law authorizes, but it may be a tort to do the authorized act in a negligent manner.

North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821.

Messrs. John F. Dore, John W. Kelley, James F. McCafferty, and J. S. Mulvey, for respondent:

The injury was continuing, and the damage sustained within six months immediately prior to the giving notice to the defendant. This brings the case squarely within the law applicable to continuing trespasses and nuisances, and the construction of the statutes of limitation relating thereto.

Ulline v. New York C. & H. R. R. Co. 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536; *Nashville v. Comar*, 88 Tenn. 415, 7 L. R. A. 465, 12 S. W. 1027; *Prentiss v. Wood*, 132 Mass. 486; *Wells v. New Haven & N. Co.* 151 Mass. 46, 23 N. E. 724.

Where a trespass is continuous, each continuance is a new trespass and an invasion of the plaintiff's right from day to day; and he may select his own time for bringing an action therefor.

Prentiss v. Wood, 132 Mass. 486; *Wells v. New Haven & N. Co.* 151 Mass. 46, 23 N. E. 724; *Ulline v. New York C. & H. R. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536; 5 Am. & Eng. Enc. Law, p. 14; *Nashville v. Comar*, 88 Tenn. 415, 7 L. R. A. 465, 12 S. W. 1027; *Smith v. Seattle*, 18 Wash. 485, 51 Pac. 1057.

Dunbar, J., delivered the opinion of the court:

The plaintiff, Frank Doran, alleges that the defendant, the city of Seattle, negligently constructed a bulkhead in front of his premises, and on account of such negligence the bulkhead pressed against and injured his house. This suit was begun on the 24th day of January, 1898. The plaintiff's claim for damages was filed on the 13th day of September, 1897. On the trial, after the plaintiff had introduced his evidence, motion for nonsuit was made by defendant and denied by the court. The jury returned a verdict in favor of the plaintiff.

The question involved in this appeal is in relation to the statute of limitations, and that question is raised by the following instructions asked by the defendant: "The

plaintiff can have but one cause of action for damages under the facts of this case, and in the one action the plaintiff is entitled to recover for all damages, if at all, sustained by him, both past and prospective. The cause of action, if any, accrued to the plaintiff at the time of the first damages—no matter how small they may have been—that he sustained; and unless a claim for past and prospective damages was presented to the city council and filed with the clerk of the defendant within six months after the time the cause of action accrued, and the action was commenced within two years after the first damages were sustained, there can be no recovery, and your verdict must be for the defendant." "The statute requires actions for damages such as are claimed in the complaint to be commenced within two years after the right of action has accrued. If you find that the damages accrued to plaintiff's property more than two years before the commencement of this action, no matter how small that damage may have been, then the whole claim is barred by the statute of limitations, and your verdict must be for the defendant. The law will not permit the plaintiff to split his cause of action, and to recover by piecemeal; but he must recover, if at all, for all damages, past and prospective, in one single action." These instructions the court refused to give, but instructed as follows: "If you believe, from a preponderance of the evidence in this case, that in building and maintaining the bulkhead in question the defendant has not used such care as ordinarily prudent city officials, having similar work in charge, generally exercise in erecting and maintaining entirely similar bulkheads, and that through such failure the house of plaintiff was, within six months immediately prior to the giving of this notice of claim of plaintiff to defendant, injured by the gradual sliding of said bulkhead, then your verdict will be for plaintiff in one such gross sum as will, in your opinion, from the evidence, just compensate plaintiff for such injury as so accrued within said six months immediately prior to the filing of said plaintiff's claim with defendant." It is insisted by the appellant that according to the instructions given by the court, the statute of limitations began to run from the time the injury ceased, and not from the time the right of action accrued; that the case was tried upon this theory, which was an erroneous one.

Passing the question of the legality of the statute in relation to the presentation of claims before the commencement of the action and within a certain time after the damages had occurred, we will proceed to the main question involved, which is decisive of the case, granting, for the sake of argument, that the filing of the claim was necessary. There are a few cases which support the theory of defendant that the statute of limitations begins to run from the inception of the injury. In *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, it was held that whenever a nuisance

is of such a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated. In *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177, the same doctrine was announced, although in that case it was held that if the act done was not necessarily injurious, or if it was contingent whether further injury would arise, the plaintiff could recover damages only to the date of his writ. In this connection it might be said that it would be difficult to tell in the case at bar whether the injury would continue, and, if so, to what extent. In *Fowle v. New Haven & N. Co.* 107 Mass. 352, it was held that a judgment against a railroad corporation for damages, not limited to those actually suffered at the date of the writ, for locating and constructing their road on the bank of a river, so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action by him against them for subsequent damages from the same cause. But it will be observed that in this case the decision was placed upon the ground that the damages in the other case had not been limited to those suffered at the date of the writ, and the rule contended for by the appellant cannot be said to have been adopted in Massachusetts, as, in the subsequent case of *Prentiss v. Wood*, 132 Mass. 486, it is held that an action for damages sustained within six years by the wrongful continuance of a dam is not barred by the statute of limitations, although the dam was erected without right more than six years before the date of the writ; the court in that case saying: "The ground taken by the defendants, that these suits are barred by the statute of limitations, cannot be maintained. A person who continues a nuisance is liable to successive suits, each continuance being a new nuisance; and therefore the plaintiff in these actions is entitled to recover for all damages accruing after the award above referred to, it being within six years of the date of his writs,"—citing *Hodges v. Hodges*, 5 Met. 205. The same doctrine was announced in *Wells v. New Haven & N. Co.* 151 Mass. 46, 23 N. E. 724, and the question of permanency, upon which some of the courts have distinguished the cases, was discussed as follows: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful, as against the plaintiff, unless by release or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner." And the court noticed the decision in *Fowle v. New Haven & N. Co.* 107 Mass. 352, and distinguished it from the case it was then deciding by saying: "The plaintiff [in that case] had brought a former action in which he expressly declared for prospective damages, and he was allowed by the court to recover

them, apparently without any objection on this ground from the defendant; and if he had been allowed to hold his second verdict he would have got double damages, which clearly was not permissible. The decision of that case does not necessarily imply that an action must have been brought within six years, or, if it does, we cannot follow it."

The case upon which appellant largely relies is that of *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, and the opinion, having been written by Judge Elliott, who is recognized by the bar of this country as a learned author and jurist, demands particular attention. In that case it was squarely held that in an action for injury to real estate caused by the negligence of corporation officers in constructing a public work of a permanent character, as the grading of a street, all damages, past and prospective, can be recovered in one action; that they must be recovered in one suit; and that for fresh damages resulting from the original wrong a second action cannot be maintained. A very vigorous opinion is written in that case, but, with due deference to the eminent judge who wrote the opinion, we are inclined to think that both reason and authority concur in overruling the rule there announced. In *Uline v. New York C. & H. R. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536, where an elaborate and painstaking investigation of this question was indulged in, and the authorities collated, it was decided that where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages thereafter sustained up to the commencement of the action, and that for any damages thereafter sustained other actions might be brought successively until the nuisance should be abated. In the discussion of this question Judge Earl, who wrote the opinion for the court, in noticing the case of *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, and after discriminating that case to a certain extent from the one in question, said: "But the case is also inferentially authority for the second ground of error upon which I have based my conclusion. . . . But I am of opinion that that decision is clearly unsound as to the precise question adjudged. What right was there to assume that the street would be left permanently in a negligent condition and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation under proper authority may erect an embankment in a street, and, if the work be carefully and skilfully done, it cannot be made liable for the consequential damages to adjacent property. But, if it be carelessly and unskilfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment; and this it may do after its carelessness and unskilfulness, and the consequent damages, have been established by a recovery in an

action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrongdoer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken, and foresee them long before—it may be many years before—they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued, and that the wrongdoer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated." And it may be added that, under the logic of the doctrine announced in the Indiana case, the wrongdoer might, by the payment of prospective damages, actually become permanently possessed of real property which, under the theory of the law, can only be taken by corporations under the provisions of the law in relation to eminent domain. In addition to this, the rule is inequitable, in that the damages in the first instance and before the statute of limitations expires may be so trifling that it would not justify litigation. It would be inequitable, and not in accordance with good morals, to estop a person from obtaining his rights or damages for injuries which might eventually become burdensome because he was not litigious enough to plunge into a lawsuit over a trifling matter.

It is said by the appellant that the cases cited above are not in point, for the reason that the wrongs committed were nuisances; but an examination of all the many cases on this subject shows that they are treated in all instances as nuisances when they are wrong, and that the construction of that which is originally legal and right, if wrongfully constructed and maintained, may become a nuisance. Under the title, *Trespasses Resulting in Continuing Nuisances*, it is said, in 5 Am. & Eng. Enc. Law, p. 17: "The rule here is a combination of the two rules just given. The institution of the wrong is treated as a trespass, while the continuance of it is treated as a nuisance. The damages for the original act of trespass are all to be recovered in the first action, but successive actions must be brought to recover for damages for the continuation of the wrongful conditions, and in these the damages are estimated only to the date of the bringing of each suit." In *Aldworth v. Lynn*, 153 Mass. 53, 10 L. R. A. 210, 26 N. E. 229, the rule of continuing damages was announced; the contention of the plaintiff in that case being that, if the damages re-

sulted from a cause which was either permanent in its character or which was treated as permanent by the parties, it was proper that the entire damages should be assessed with reference to past and probable futures. The attorney in that case cited *Fowle v. New Haven & N. Co.* 107 Mass. 352, and *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; and the court in its opinion said: "So far as there are intimations in the successive opinions in *Fowle v. New Haven & N. Co.* which seem to make the case an authority for the plaintiff's contention in the case at bar we are not inclined to follow them." In *Nashville v. Omar*, 88 Tenn. 415, 7 L. R. A. 465, 12 S. W. 1027, it was held that damages for an alleged negligent construction of a sewer, in consequence of which plaintiff's premises are injured by discharge therefrom, must be limited to the actual damage sustained up to the time of bringing suit, and cannot include prospective damages on the ground that the defects are permanent, although human labor will be necessary to remedy the defects. In this case the same cases were cited, viz., *Troy v. Cheshire R. Co.* 23 N. W. 83, 55 Am. Dec. 177, and *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, to sustain the doctrine that all the damages must be included in one suit; and the court, in passing upon that question, after laying down the rule that damages could be assessed only up to the time of the writ, and after reviewing the arguments in the cases cited to sustain the opposite contention, among other things said: "This seems to us an artificial and arbitrary test. There are supposable nuisances which by the effect of time might at last abate themselves; but by far the greater number of trespasses, wrongs, and nuisances would continue indefinitely, without the expenditure of human labor to remove or abate them. It is a rule which does not recommend itself by either its reasonableness, its certainty of application, or its justice." And, after noticing the rule announced in *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; and *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, it continued: "Thus the application of the rule now contended for would require a plaintiff to foresee all the possible results, and to convince a jury of what he, with prophetic ken, is required to foresee, on penalty of subsequently having to quietly endure consequences which he could not reasonably have conjectured as likely to result from what at first seemed a trifling injury. The cases of *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, and *Fowle v. New Haven & N. Co.* 112 Mass. 334, 17 Am. Rep. 106, have been examined, and we find that they do measurably support the contention of defendant in error. None of these cases are satisfactory in their reasoning, and the decided weight of authority is opposed to them." See also *Blunt v. McCormick*, 3 Denio, 283; *Greene v. New York C. & H. R.*

R. Co. 65 How. Pr. 154; *Powers v. Ware*, 4 Pick. 106; *McGuire v. Grant*, 25 N. J. L. 350, 67 Am. Dec. 49; *Schell v. Plumb*, 55 N. Y. 592; *Mahon v. New York C. R. Co.* 24 N. Y. 658.

The rule contended for by appellant, it seems to us, would work unnecessary hardship, is fraught with doubt and uncertainty

in its application, and we are not inclined to adopt it.

The instructions of the court were without error, and the judgment is therefore affirmed.

Reavis, Ch. J., and Fullerton and Anders, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Clara J. FLOYD *et al.*, Appts.,
v.
NATIONAL LOAN & INVESTMENT COMPANY.

(.....W. Va.....)

*1. So far as it conflicts with the provisions of § 30 of chap. 54 of the Code of 1890, the general law of comity, as affecting the rights of foreign corporations, has been repealed in this state.

2. By virtue of the 2d clause of said section, providing that "such corporation so complying shall have the same rights, powers, and privileges, and be subject to the same regulations, restrictions, and liabilities, that are conferred and imposed by this and the 52d and 53d chapters of this Code, and of chapter 20 of the Acts of 1885, on corporations chartered under the laws of this state," foreign corporations, upon complying with the conditions required by said section, have the same rights, powers, and privileges respecting their contracts and remedies, if not otherwise repugnant to the policy of the state, as domestic corporations of like character, whether, under the general law of comity, they would have had such rights, powers, and privileges or not, but they can exercise no greater powers in this state than its domestic corporations.

3. A foreign corporation coming into this state to transact business must conform to the law of this state, if there be any, regulating similar corporations organized under the laws of this state; and its contract, although in terms solvable in the foreign state in which such corporation has its domicile, must be such a contract as a similar domestic corporation is authorized to make, or the courts of this state cannot enforce, or permit the enforcement of, its performance.

4. A domestic building and loan association may fix a minimum premium to be deducted in advance or paid in periodical instalments, but in either case such premium must be a certain, definite sum, fixed and determined at the time of the making of the loan; and the contract of a foreign building association, made with a citizen of this state, secured by a deed of trust upon real estate situated in this state, and by its terms to be performed in the domiciliary

state, must conform to this requirement; and, if it does not, such contract is not within the exemption from the operation of the usury laws given by our statute to domestic building and loan associations; and in such case only the principal of the loan, with legal interest thereon, together with such sums as have been necessarily expended in preserving the property, less the amounts paid into the association by the borrower as dues, interest, premium, and fines, to be treated in the settlements as partial payments, can be collected; and a sale under the deed of trust will be enjoined until the amount thus due is settled, unless the basis of settlement herein laid down be conceded by the association in proceeding to sell.

(March 23, 1901.)

APPEAL by complainants from a decree of the Circuit Court for Kanawha County in favor of defendant in a suit to enjoin defendant from selling complainants' property for noncompliance with their contract for the repayment of a loan made thereon. *Reversed.*

The facts are stated in the opinion.

Mr. J. W. Kennedy for appellants.

Messrs. Brown, Jackson, & Knight, for appellees:

The Michigan statute under which the appellees exists, explicit in every particular, identical with the by-laws of appellee company, has been construed and upheld as constitutional by the supreme court of that state.

People's Bldg. & L. Asso. v. Billing, 104 Mich. 186, 63 N. W. 373.

It is eminently proper in this case that the laws of Michigan should prevail, as they are in no wise repugnant to the laws of this state; and all borrowers and shareholders of such associations should be placed on the same footing, and only required to settle with the association on the same basis.

Gray v. Baltimore Bldg. & L. Asso. (W. Va.) 37 S. E. 533.

To hold void, and not enforceable, premiums and fines imposed by this Michigan association for the common fund for all its

*Headnotes by POFFENBARGER, J.

NOTE.—For conflict of laws as to usury in contract of building and loan association, see, in this series, *Bennett v. Eastern Bldg. & L. Asso.* (Pa.) 34 L. R. A. 595, and *Falls v. United States Sav. Loan & Bldg. Co.* (Ala.) 24 L. R. A. 174.

For usury upon loans by building associations generally, see *notes* to *Reeve v. Ladies' Bldg.* 54 L. R. A.

Asso. Perpetual (Ark.) 18 L. R. A. 129; *Pioneer Sav. & L. Co. v. Cannon* (Tenn.) 33 L. R. A. 113; *Post v. Mechanics' Bldg. & L. Asso.* (Tenn.) 34 L. R. A. 201; *Smoot v. People's Perpetual Loan & Bldg. Asso.* (Va.) 41 L. R. A. 589; *Iowa Sav. & L. Asso. v. Heidt* (Iowa) 43 L. R. A. 689; and *Borrowers' & Investors' Bldg. Asso. v. Eklund* (Ill.) 52 L. R. A. 637.

members, as against its members in West Virginia, when by the laws of Michigan all members, residents of that state, must respond, would be to violate the first principle of equity, and perpetuate the very outrage condemned in *Gray v. Baltimore Bldg. & L. Asso.*, by permitting the citizens of one state to escape contribution to the common fund upon allegation of an invalid contract, and at the same time share in that fund forced from citizens of other states, all upon the faith of the same contract.

The contracts here under consideration were made and to be performed in the state of Michigan, in which state their validity has been expressly upheld.

Klinck v. Price, 4 W. Va. 4; *Pugh v. Cameron*, 11 W. Va. 523; *Wilson v. Lasier*, 11 Gratt. 477; *Findlay v. Hall*, 12 Ohio St. 610; *Shipman v. Bailey*, 20 W. Va. 140; *John A. Tolman Co. v. Reed*, 115 Mich. 71, 72 N. W. 1104; *Sawyer v. Dickson*, 66 Ark. 77, 48 S. W. 903; *De Wolf v. Johnson*, 10 Wheat. 383, 6 L. ed. 347; *Jones, Mortg.* § 657; *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684.

Poffenbarger, J., delivered the opinion of the court:

On the 1st day of September, 1894, the plaintiffs, by their deed of trust, conveyed to the defendant, B. H. Oxley, trustee, certain real estate, situated in the city of Charleston, Kanawha county, in trust to secure to the National Loan & Investment Company of Detroit, Michigan, the payment of \$2,500, according to the conditions of a certain bond bearing even date therewith, executed by the plaintiff to said company for the loan of said sum of \$2,500 by it made to them, and to secure the repayment of any and all sums said company might pay for taxes, insurance, and maintaining the property in repair, in case of the failure of the plaintiffs to make such necessary payments, and to secure the strict performance of all the obligations incumbent upon the said Clara J. Floyd as a shareholder in, and borrower from, said company under its charter, by-laws, rules, and regulations then existing, or which might thereafter lawfully be made, altered, or amended. It is recited in this deed that said Clara J. Floyd is the owner of twenty-five shares of stock in said company, and has borrowed of it, pursuant to its by-laws, the money thereby secured, and by said deed she covenants and agrees to all things required of her to be done by the by-laws of said company as a shareholder and as a borrower, and to pay to said company the sum of \$1.45 per share per month on her stock and loan, that being, as stated, stock, interest, and premium; also to pay all fines that should be legally assessed against her, such payments to be made until the stock owned by her should mature under said by-laws, and, when it shall have matured or reached the value of \$100 per share, said stock to be surrendered and canceled, and thereupon the deed to be void and the property thereby granted to be released. Said deed provided that, in case of

default, said trustee, upon the request of the company, should make sale of the property upon the following terms: "(a) For cash in a sum sufficient to pay (1) the costs of executing this trust, the same to include a commission to said trustee of 5 per centum upon the gross amount of said sale; and (2) the whole amount then due to said third party, according to the terms of this deed, the bond herein mentioned, and the by-laws and regulations of said company; (b) and the residue, if any there be, upon such terms as the said trustee or his successor may deem best." And it was further expressly agreed therein that in case said trustee should sell said premises as provided in said deed, by reason of the default of said parties of the first part in computing the amount due said party of the third part, said first parties should be considered and treated the same as a borrowing member of said company. It was also covenanted and agreed in said deed that all payments therein mentioned should be made at said company's office in the city of Detroit, Michigan, that being the place where the contract therein set forth and the bond therein referred to were made; that the bond and instrument given to secure the payments mentioned in the bond shall in all cases be construed as under and in accordance with the laws of the state of Michigan, and the articles of incorporation and by-laws of said association, any provision whatsoever in the laws of any other state to the contrary notwithstanding; and that any provision in the laws of any other state at variance with the laws of the state of Michigan, either on the subject of interest, premium, or any other matter, is expressly waived,—it being mutually intended by the parties thereto to make the contract in all things as a contract under and in accordance with the laws of the state of Michigan.

Upon her obligations thus contracted Mrs. Floyd made sixteen payments, of which the first was in September, 1894, and the last in December, 1896, amounting in all to \$618.22 of which \$120 was dues on stock, \$220 interest on the loan, \$240 premium, and \$38.22 fines for failures to pay. She having ceased to make payments, the trustee advertised the property for sale for cash in a sum sufficient to pay the costs of executing the trust, including 5 per cent commission to the trustee upon the gross proceeds of the sale, and the whole amount due said company, \$3,022.20, as of the 19th of July, 1897, and the residue to be paid in two equal instalments, of one and two years, and fixing August 21, 1897, as the day of sale. On the 17th day of August, 1897, the plaintiffs filed their bill of complaint in the cause in the circuit court of Kanawha county, setting forth substantially the foregoing facts, and alleging that said transaction was, in substance and in fact, a simple loan only, and was put in the form in which it was made under the requirement of the defendant company as a shift and device on its part to avoid the usury laws of the state; that the balance claimed to be due by the

defendant on account of said loan is about \$600 more than under the laws of this state it is entitled to on account of said loan, it being greatly in excess of the principal advanced, with 6 per cent per annum interest; that defendant company is entitled only to the balance due on account of said loan, computed upon the principal advanced, with 6 per cent interest, allowing as credits the monthly payments, upon the principle of partial payments; that by reason of the covenants and provisions of the deed of trust, for breaches of which authority could not be vested in the trustee to fix the damages, it could not be executed *in pais*, and, though in form a conveyance to a trustee, it is in fact and law nothing but a mortgage, and can be executed and enforced only by judicial decision in a court of equity; that the terms of sale specified in the trust deed and notice of sale are not such as the law requires in such case, and a sale thereunder would be improper, erroneous, and illegal, and greatly to the prejudice of the plaintiff's rights; that said company has no authority, under the laws of this state or the state of Michigan, to make the loan in the manner and form in which it was made, as thereinbefore alleged, the sole object for which said association was formed, and the only legal authority vested in it, being to afford its members a safe and comfortable investment for their savings, and aid them in the purchase and improvement of real estate, and the building and improving of homesteads; that less than nine persons having formed said company, the number required by the laws of this state, it was without authority to make said loan; and that the amount claimed by said company, computed under its by-laws, is greatly in excess of the amount that would be due, computed on the basis of 6 per cent interest, and treating the payments as partial payments, made on the debt in the usual way, and is therefore exorbitantly usurious. Copies of the deed of trust and by-laws of the company are filed with the bill as exhibit. The bill prays that the defendants be enjoined from making the sale, and that the court take jurisdiction of the matters in controversy between the parties, and make and enter such decrees and orders as justice and equity may require, and for general relief. The injunction was awarded as prayed for.

The defendant company appeared, and demurred to the bill, and answered it, admitting the loans and contracts of membership and security, and its attempt to enforce them, as alleged in the bill; averring their legality under the laws of Michigan and of this state; that it has complied with the requirements of the statute relating to foreign corporations, and that the contract is solvable in Michigan; denying that it is a shift or device to evade the usury laws of West Virginia, and also that the contract is illegal or usurious; that the amount due under it is uncertain, and there is necessity for resort to a court of equity for its enforcement. To this answer there is no re-

plication, and no depositions or affidavits were taken and filed.

On the 15th day of April, 1899, the circuit court dissolved the injunction and dismissed the bill, and an appeal from, and supersedeas to, this decree were allowed.

The allegation that this contract between the parties was not a contract of membership in said association on the part of Mrs. Floyd, and a loan to her as such member in good faith, but, on the contrary, a mere shift and device to evade the usury laws of this state, is denied, and there is no replication to the answer, which must be taken as true; but, if there were a replication, there is no evidence to sustain the allegation. Upon the face of the papers, nothing appears from which such an interpretation can be reached. The corporate existence of the association is admitted, and it is only insisted and objected that it has attempted to make a contract that it has no power or authority to make under the laws of this state or the laws of Michigan. As to the terms of sale, they are exactly as stipulated in the deed of trust, except as to any surplus that may remain after paying the costs of executing the trust, expenses of sale, including an agreed commission, and the amount due the company, and as to this surplus it is covenanted that it shall be upon such terms as the trustee might deem best. In the exercise of this discretion, which the parties were authorized to vest in him, the trustee fixed the terms of sale, as to such surplus, in the notice. The agreement in the deed for 5 per cent commission to the trustee could not affect the validity of the loan or invalidate the notice. It does not go to the association nor enter into the loan, nor did it interfere with a prevention of the sale by payment of the debt. If illegal, the trustee could not withhold it on a settlement of his accounts. The allegation of uncertainty in the amount due is denied, not replied to, and no proof offered. As to the character of the instrument, it is clearly not a mortgage, but the ordinary deed of trust to secure the performance of a building and loan contract and loan, such as are common in this state. There is a denial of the allegation of uncertainty as to the amount due, accompanied by an averment of a statement having been rendered to which no exceptions were taken nor objections made. Besides that, no facts are alleged from which uncertainty appears. In none of these matters does any ground appear upon which the bill or the injunction can be sustained.

There is but one real question in the case, and that is whether this contract made by a Michigan building and loan association with a citizen of this state, to be performed in the other state, and secured by deed of trust upon real estate situated in this state, can be enforced here. It involves the question of the status in this state of a foreign building and loan association that has complied with the statutory conditions preliminary to its doing business here, and the nature of the contract it can make under such

conditions; and this raises, as a preliminary inquiry, the question of the difference between the rights of individuals and corporations doing business beyond the limits of the state to which they belong. Except by the law of comity, no corporation created in one state has the power to do business in another. Its very life is the franchise granted by its parent state, and creation of its law, which has no extraterritorial force. It is not entitled, under the Constitution of the United States, to the privileges and immunities of citizens. "Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy." Mr. Justice Field in *Paul v. Virginia*, 8 Wall. 180, 19 L. ed. 360. But this rule of comity exists and is enforced by the courts in every nation and every state of the Union, until destroyed by the lawmaking power. "In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interest." Story. Conf. Laws, 35. "We think it well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts, and that the same law of comity prevails among the several sovereignties of this Union." Chief Justice Taney in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274. "In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, not forbidden by the laws of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct enactments of the latter state, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court." Mr. Justice Harlan in *American & Foreign Christian Union v. Yount*, 101 U. S. 356, 25 L. ed. 890.

Any state, however, may forbid and prevent a foreign corporation from carrying on its business within its limits, and also from doing certain acts or making certain con-

tracts within its jurisdiction. "Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made." Chief Justice Taney in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274. "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest. The whole matter rests in their discretion." *Paul v. Virginia*, 8 Wall. 180, 19 L. ed. 360. The only exceptions to this rule are in the cases of corporations engaged in foreign commerce, corporations engaged in interstate commerce, and corporations employed in the business of the government of the United States. The only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. Corporations are not citizens, within the meaning of the clause of the Constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Article 4, § 2, cl. 1. A private corporation is included under the designation of "person" in the 14th Amendment to the Constitution (§ 1). The provisions in the 14th Amendment to the Constitution (§ 1), that "no state shall deny to any person within its jurisdiction the equal protection of the laws," do not prohibit a state from requiring for the admission within its limits of a corporation of another state such conditions as it chooses. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737. In reaching these conclusions the court says: "The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and, on condition that it pays the required license tax, it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more. The state is not prohibited from dis-

criminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided, always, such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation, that other states may be willing to admit within their jurisdiction, or consent that it have offices in them; such, for example, as a corporation for lotteries. And, even where the business of a foreign corporation is not unlawful in other states, the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character." Under the law of comity which exists in every state until repealed, and which the courts must, as well as may, enforce, a foreign corporation has no authority to do any act in a state other than that of its being which is not permitted by the laws of such state to individuals generally. The law of comity merely enables a body of corporators chartered by one state to act in a corporate capacity in another state, subject to all the laws and regulations of the latter. *Morawetz, Priv. Corp. § 964*, citing numerous cases.

From these authorities it is plain that any foreign corporation may do business in this state unless prohibited by law, or its business be such as is repugnant to our laws or the public policy of the state, "to be deduced from the general course of legislation or from the settled adjudications of its highest court," and may do such acts in the state as are permitted by its laws to individuals generally, and no others. But such prohibition or repugnancy will not be implied from the mere silence of the state. "If the policy of a state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law." *Concell v. Colorado Springs Co.* 100 U. S. 59, 25 L. ed. 549.

The legislature of our state has not been silent on this subject. It has prescribed certain requirements, to be complied with as conditions precedent to the right of all foreign corporations to do business in the state, and inserted therewith the following clause: "Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this state, upon complying with the requirements of this section, and not otherwise." Section 30, chap. 54, Code. This is equivalent to saying that "no corporation duly incorporated by the laws of any state or territory of the United States, of the District of Co-

lumbia, or of any foreign country, unless it be otherwise expressly provided, shall hold property and transact business in this state without having first complied with the requirements of this section." In one sense, it is a prohibition against foreign corporations, and repeals the general law of comity; but it admits all foreign corporations, except those expressly forbidden, to the right to hold property and transact business in the state upon compliance with the requirements. There is no statute expressly prohibiting foreign building and loan associations from doing business in the state. They are not excluded, and such of them as comply with the statutory requirements are admitted. The bill alleges that the appellee here has not complied with them. This allegation is denied in the answer, accompanied with an averment that it has complied with them. To this there is no replication. The answer must, therefore, be taken as true.

This Michigan corporation being thus authorized to do business in this state, its courts would not, in the absence of any further legislation, restrain it from doing any act permitted by its laws to individuals generally, and could not refuse to compel, at its instance, the performance of any contract thus lawfully made with it; and if, under such circumstances, it made a contract with a citizen of this state, to be performed in the state of Michigan, and such contract were authorized by its charter and the laws of the state of its being, it would be enforceable here, although the rate of interest provided for and lawful in Michigan were higher than the legal rate here. But the legislature has given further expression to its will respecting foreign corporations, thus: "Such corporation so complying, shall have the same rights, powers, and privileges, and be subject to the same regulations, restrictions, and liabilities that are conferred and imposed by this and the 52d and 53d chapters of this Code, and by chapter 20 of the Acts of 1885, on corporations chartered under the laws of this state." Section 30, chap. 54, Code. Can there be any doubt that the effect of this provision is to permit foreign corporations to have the same rights, powers, and privileges that are conferred upon domestic corporations, and no greater or different rights, powers, and privileges? If that is not its meaning, what can be the legal effect of the clause, "subject to the same regulations, restrictions, and liabilities that are" imposed upon domestic corporations? Clearly, it must operate as a prohibition upon the exercise by a foreign corporation of any greater or different rights, powers, and privileges than are permitted to domestic corporations. Similar provisions occur in the statutes of several of the states, and in the Constitutions of some of them; but many states have no such provision. It occurs in the Illinois statute in this form: "Foreign corporations and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions, and duties that are or

may be imposed upon corporations of like character organized under the general laws of this state, and have no other or greater powers." [Starr & C. Anno. Stat. 1896, chap. 32, § 26, p. 985.]

In *Stevens v. Pratt*, 101 Ill. 206, the court, in construing the provision, held: "It is simply a law imposing regulations and restrictions, and its meaning is that, where the general laws of this state provide for the organization of corporations, foreign ones of like character, doing business in this state, shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions, and duties." Mr. Justice Scholfeld, in delivering the opinion of the court, said: "The manifest and only purpose was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law." Our statute is equivalent to that of Illinois, and must have the same meaning. That being its effect, a foreign corporation can do no act, make no contract, and exercise no power in this state not permitted to like corporations organized under the laws of this state. The exercise by such corporation of any power not possessed by a similar domestic corporation would be repugnant to the public policy of the state, as expressed in this statutory provision, and for that reason would be restrained by the courts of this state. We only recognize and give effect to the corporate existence of the foreign company, not to all the powers which, by its charter and the laws under which it exists, it has and may exercise in the domiciliary state. It will be permitted to exercise here only such of its powers as are not repugnant to our laws and policy. Such is the effect given the Illinois statute by the courts of that state in determining the rights of foreign building and loan associations.

In *Granite State Provident Assn. v. Lloyd*, 145 Ill. 620, 34 N. E. 142, it is held: "Under § 26, chap. 32, Rev. Stat., where a foreign corporation of any kind comes into this state to transact business it must conform to the laws of this state, if it exists, regulating similar corporations organized under the general laws of this state. Foreign corporations doing business in this state are placed on an equality with domestic corporations to the extent that they shall exercise no greater or different powers, and are made subject to the same regulations and restrictions, and governed by the same rules of law, in these respects. . . . A foreign corporation, doing a homestead and loan business in this state, will be governed by the laws of this state as to the right of a stockholder to withdraw."

In *Rhodes v. Missouri Sav. & L. Co.* 173 Ill. 621, 42 L. R. A. 93, 50 N. E. 998, it is held that, "in order that a foreign building and loan association may enforce in our courts a contract which would be usurious unless within the exemption given by our statute to local building and loan associations, it must appear that the statute under

which such foreign association was organized is identical with, or substantially like, our own statute." In the first of these cases, the Illinois courts compelled the foreign building and loan association to be governed by the statute of that state in respect to its settlement of the withdrawal value of its shares; in the other, the foreign association was denied the character, rights, and powers of a building and loan association, because it appeared from its by-laws that it was not organized and doing business in the method prescribed by the state laws for such associations. Its loan to the resident member was therefore treated as a simple ordinary loan in respect to its settlement, and it was only permitted to take the money advanced, with legal interest, after crediting the money paid into the association by the borrowing member.

In *Freie v. No. 4 Fidelity Bldg. & Sav. Union*, 166 Ill. 128, 46 N. E. 784, the court held: "A corporation created in another state may, upon the principle of comity, exercise within this state the powers conferred by its charter, if not inconsistent with the law or against the public policy of this state. A foreign building and loan association doing business in this state may contract for premiums and fines in addition to legal interest on money loaned on stock, when so authorized by the law of the state of its creation, without violating the usury statutes of this state." In the opinion in this last case it is said: "By the statute of Indiana, under which complainant was organized, it had power to enter into the contract in this case, and it was not contrary to the laws or policy of this state, which permit the organization of like corporations, with the same powers."

Relying principally upon these cases, the law is laid down as follows in § 8797, 7 Thomp. Corp.: "Where a building association undertakes to do business in a state other than that of its creation, whilst a contract made by it in the former state, sanctioned by the statute under which the society was organized, will not be deemed unlawful in the state in which it was made and is sought to be enforced, when it would not be so if made by an association of that state, yet such an association acts and does business in such state (even when duly licensed) subject to its laws and regulations as applied to its own domestic associations by virtue of its statutes and decisions, and will not be permitted to have or exercise any greater or different powers than, but to be held to the same liabilities, restrictions, and duties as, domestic ones. Under this view, moreover, it is deemed legitimate to test the character of a foreign corporation assuming to act as a building association by reference to the laws of the state in which it so assumes to act, and to deny it that character, if, by such comparison, its nature and powers are found to be different from, and in excess of, what the laws and policy of that state recognize as belonging to such associations; with the result that contracts permitted to such associations, but unlawful to

others, will not be accepted as valid when set up by foreign associations not properly classable as building associations according to that criterion."

The same principle has been applied by other courts in other cases. In *Cravens v. New York L. Ins. Co.* 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519, it was held that, although a foreign corporation doing business in the domestic state may by contract, when no domestic statute prohibiting it intervenes, make the law of the state of its incorporation the applicatory law of the contract, yet where the laws of the domestic state prohibit foreign corporations from making certain kinds of contracts they can act only in accordance therewith. 13 Am. & Eng. Enc. Law, 2d ed. p. 841, note. In *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363, it was said: "A corporation of one country may be excluded from business in another country . . . but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation." In that case the question was the validity of a release of a Canadian corporation from part of its bonded indebtedness by a proceeding in the nature of bankruptcy, under legislation of the Canadian Parliament, there being no limitation there upon the right to impair the obligation of contracts.

On the subject of the incorporation of building and loan associations, their methods of business, and their rights, powers, and privileges, this state is not without legislation, and it is insisted that, in seeking the enforcement of its contract with the appellants, the appellee is claiming a right and power not permitted to domestic associations, because it has departed from the requirements of the statute in the nature of the contract it has made. This alleged departure refers to the premium bid for the right of precedence in taking the loan. Section 26, chap. 54, Code, provides that "every such association shall have the power to provide by its by-laws for selling to the stockholders who shall bid the highest premium therefor, the money in the treasury, or in default of bidders at or above a minimum premium, may award to a member the value of any shares held by him less such minimum premium; the minimum premium and the mode of making the award to be fixed by the by-laws. Or such association may charge and receive the premium bid by the stockholder for the priority of right to such loans, in periodical instalments, but the by-laws of every association shall set forth whether the premium bid for the prior right to such loan shall be deducted therefrom in advance, or be paid in periodical instalments."

The by-laws of the appellee, under which the contract in the case at bar was made,

provide that "the amount of premium bid shall be taken out of the amount borrowed, but it is expressly provided that after the 15th of September, A. D. 1891, borrowers competing for loans from this company shall bid as a premium a stated amount per share, payable monthly, on the last Saturday of each month; said stated amount per share per month to be paid each month during the existence of the shares of stock borrowed upon." There is a difference between a premium, the amount of which is ascertained and fixed at the time the loan is made, and then divided into instalments and paid periodically, and a premium of a certain sum, to be paid on each share each month for an indefinite and uncertain length of time. The former arrangement is plainly contemplated and required by our statute; the latter is provided for in the appellee's by-laws, and embodied in its contract with said appellant. When this monthly payment of premium will end depends upon the date of the maturity of stock, and is therefore uncertain. The difference between them is that the amount of premium under a contract authorized by the law is certain in amount, while in the contract here it is uncertain in amount, making a difference in liability on the borrower's part, and involving the exercise of a different power on the part of the association from what are permitted in such cases by the law of this state to domestic associations.

The stock of the association upon which this advance was made is its instalment stock of class B, and the payments on it are "to continue each month, until such shares shall have reached the par value of \$100 each, as shown by the report of the auditing committee," and as long as the shares run the premium must be paid. The time to run being uncertain, the amount of premium to be paid is uncertain also.

The difference between the results under the two systems is said to be slight. In 7 Thomp. Corp. § 8779, it is said: "The essential nature and purpose of the premium are the same in both of these systems, and their practical operation substantially alike. In neither case is the premium paid; the borrower simply promises to pay it. . . . Except where the premium consists simply in an increased rate of interest, it is not contemplated that it shall be paid dollar for dollar by the borrower, in strict conformity with the letter of his undertaking. All he is bound to do is to pay the periodical amounts coming due upon his obligation, and to continue doing so until the shares of the society or series to which he belongs have reached maturity; then his debt and his premium bid are both discharged by relinquishing to the association his credit in the same. Unless the society is unfortunate, this period will be reached a considerable time before the borrower's payments, with interest, shall amount to the aggregate of what he received, with interest, together with what he promised to pay by way of premium. The period for ascertaining the amount of the premium actually paid by the

borrower is the date of the maturity of the shares and distribution of the assets." However, the books say, and courts have held, that, where an association is authorized by statute to operate upon one of these systems respecting the premium, it cannot adopt the other without making the contract unlawful to the extent of the excess of the reservation above the legal rate of interest. *Endlich, Bldg. Asso. §§ 407, 408; Mechanics' & W. Mut. Sav. Bank & Bldg. Asso. v. Wilcox*, 24 Conn. 147; *Mechanics' & W. Mut. Sav. Bank & Bldg. Asso. v. Meriden Agency Co.* 24 Conn. 159; *Birmingham v. Maryland Land & Permanent Homestead Asso.* 45 Md. 541; *Geiger v. Eighth German Bldg. Asso.* 58 Md. 589; *White v. Williams*, 90 Md. 719, 45 Atl. 1001; *Gray v. Baltimore Bldg. & L. Asso.* (W. Va.) 37 S. E. 533. The care which the legislature has taken to state explicitly the plan upon which such associations may operate, and the means it has adopted to compel adherence to it, indicate that the lawmaking power of the state deems it important. The law relating to the subject of building associations is contained in four sections of the chapter, followed by these words: "Every such association shall adopt by-laws, which shall embrace all the provisions of the four preceding sections, and such further provisions for its government, and the management of its business not inconsistent with these sections as it may deem proper." [W. Va. Code 1891, chap. 54, § 29, p. 521.] No departure from the method of doing business thus prescribed is allowed. There can be no question as to the legislative intent to compel absolute adherence and obedience to its plan for conducting the operation of these societies. Further evidence of this is found in the radical change effected in the law by chapter 58, Acts 1883, by which the present law came into existence. Prior thereto the provision relating to premiums was: "Every such corporation is authorized to levy, assess, and collect from its members such sums of money, by stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans, as the corporation by its laws shall provide." [W. Va. Code 1868, chap. 54, § 27, p. 411.] And this change came immediately after the decisions of this court in *Pfeister v. Wheeling Bldg. Asso.* 19 W. Va. 676; *McGannon v. Central Bldg. Asso. No. 2*, 19 W. Va. 726; *Parker v. United States Bldg. Land & L. Asso.* 19 W. Va. 744; *Parker v. United States Bldg. Land & L. Asso.* 19 W. Va. 769; and *Haigh v. United States Bldg. Land & L. Asso.* 19 W. Va. 793,—by which the building association statutes of the state were construed and applied to the transactions of said societies.

Measured by the standard of our statute, this association is found, by the method of its operations and the nature of its contracts, not to have the character of a building association, and cannot, therefore, be permitted to enforce its contract as a building association contract. It is contravened as such by the policy of the state, and is there-

fore not within the law exempting such associations from the usury laws, unless there is some other principle or ground upon which it may be permitted to collect the money for which it has contracted.

Counsel for the appellee insist this contract is made and to be performed in the state of Michigan, and is valid by the laws of that state, and that, therefore, the *lex loci contractus* controls it. This position would be unassailable if the appellee were a natural person, insisting upon the right to enforce a contract solvable in the state of Michigan, and carrying the legal rate of interest of that state. But it is not. It is a building association, a corporation, clothed with special privileges, among which is exemption from the usury laws of its own state. The general law of comity, under which, it is contended, it might have carried such special powers and privileges into, and exercised them in, this state, in the absence of any public policy on the part of this state to which their exercise here would have been repugnant, has been expressly repealed. But the law of comity only permits corporations to do in a foreign state such acts as individuals are permitted to do, and it may well be doubted whether a corporation exempted from the usury laws of its own state could carry that exemption into, and assert it in, the courts of another state,—a thing that is permitted to no individual in any country, and may be deemed, therefore, to be against public policy everywhere.

The cases of *Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Pugh v. Cameron*, 11 W. Va. 523; *Wilson v. Lasier*, 11 Gratt. 477; *Findlay v. Hall*, 12 Ohio St. 610; *Shipman v. Bailey*, 20 W. Va. 140; *John A. Tolman Co. v. Reed*, 115 Mich. 71, 72 N. W. 1104; *Sawyer v. Dickson*, 66 Ark. 77, 48 S. W. 903; *De Wolf v. Johnson*, 10 Wheat. 383, 6 L. ed. 343,—cited by counsel for appellee,—are all cases of contracts payable to natural persons, solvable in foreign states, and conformable to the general laws of those states respecting the matter of interest. In none of them was a special rate of interest permitted by the foreign state, only to a certain class of corporations, whose existence need not be recognized beyond its own territorial limits, recognized or enforced.

Two cases are cited, however, in which the position taken here by the appellee is upheld (*Building & L. Asso. v. Logan*, 14 C. C. A. 133, 30 U. S. App. 163, 66 Fed. 827, and *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684); but in neither of these cases was the fact that the building associations were setting up and claiming, under the law of comity, an exemption from the general laws of their own respective states, and not the laws themselves, special privileges permitted to them by their states, but denied to natural persons. Other cases of the same class might have been cited. *National Mut. Bldg. & L. Asso. v. Ashworth*, 91 Va. 706, 22 S. E. 521; *Ware v. Bankers' Loan & Invest. Co.* 95 Va. 680, 29 S. E. 744; *Baltimore Bldg. & L. Asso. v. Titlow*, 19 Pa. Co. Ct. 518; *Equitable*

Bldg. & L. Asso. v. Hoffman, 50 S. C. 303, 27 S. E. 692; *Turner v. Interstate Bldg. & L. Asso.* 51 S. C. 33, 27 S. E. 947; and *Pollock v. Carolina Interstate Bldg. & L. Asso.* 51 S. C. 420, 29 S. E. 77.

In support of the position taken here, *Morawetz, Priv. Corp.* § 964, is recited. The law there is stated thus: "A corporation has no implied authority to do any act in a foreign state which is not permitted by the laws of the latter to individuals generally. The law of comity merely enables a body of corporators chartered by one state to act in a corporate capacity in another state, subject to all the laws and regulations of the latter." Again (§ 967, same work), it is said: "It is the charter alone which is recognized by the law of comity, and not the general legislation of the state in which the corporation was formed. The word 'charter' is here used to signify the agreement between the shareholders of the corporation, whether this agreement be contained in a special act of the legislature, or in articles of association, or in either of these, taken in connection with certain general laws of the state." In *Bard v. Poole*, 12 N. Y. 495-505, we find this: "It is, of course, implied that the contract must be one which the foreign corporation is permitted by its charter to make, and it must also be one which would be valid if made at the same place by a natural person, not a resident of that state." See also *McGregor v. Erie R. Co.* 35 N. J. L. 115; *Bank of Augusta v. Earle*, 13 Pet. 539, 10 L. ed. 274; *Stetson v. New Orleans City Bank*, 2 Ohio St. 174; *Lewis v. Bank of Kentucky*, 12 Ohio, 132, 40 Am. Dec. 469.

Would the courts of any state permit an individual of another state to enforce a contract in violation of the usury laws of his own state? Comity recognizes only the general laws of the foreign state, not the local exemptions from, or exceptions to, such laws.

But there is another reason why these authorities cannot be accepted here. It does not appear in any of these cases that, in the states in which they were decided, the legislatures have placed foreign corporations under the same regulations, restrictions, and liabilities, and conferred upon them only the same rights, powers, and privileges, that are imposed and conferred upon corporations existing under their own laws. There are either no declarations in those states of public policy forbidding the exercise there by foreign corporations of powers greater than, or different from, the powers permitted to their corporations, as in this state and in Illinois, or the courts have failed to pass upon the very important question whether they shall be applied or not applied. Nor does it appear from these cases that in all instances the building and loan contract involved was in conflict with the domestic law governing such contracts. A contract by such an association of another state, not in conflict with our own building association statute, would be enforced here, not by virtue of the general law of comity, but because our law makes the status of such a foreign association the same as that of our own association.

tions, and gives them the same rights, powers, and privileges and remedies in respect to their contracts, although for many purposes they remain foreign corporations. If the powers they assume to exercise are the same as, or within and not beyond, those permitted to our own associations, they are enforceable; otherwise, they are not.

Another contention against the position taken in this opinion is that the premium reserved in this contract is certain, in a legal sense; that under the Michigan law the stock has a fixed maximum limit for its maturity, *viz.*, such period as will permit the stock dues to equal the face of the shares, but liable to be shortened by application of dividends; and therefore, upon the principle that that is certain which can be made certain, our statute is not violated. In other words, if the monthly dues are 50 cents per share, and the share \$100, the stock must mature in sixteen and two thirds years, without any accumulation of profits, and the period required for maturity will be less than that, according to the amount of the earnings over expenses and losses. Our statute requires no precedent fixtures or certainty as to the stock dues, and in that respect it is like the Michigan statute. But as to the premium it must be so fixed in advance that the borrower can know exactly how many dollars he is to pay on account of premium, and how much of his money is to go into profits or losses of the company, and not become a direct credit upon his loan. He is entitled to credit upon his loan for every dollar he pays in as dues. He will receive credit on his loan for but an infinitesimal part of what he pays in as premium, and, if the concern's losses equal its profits, he receives none of it. That there is no such certainty in this contract is indisputable. That our statute requires such certainty is undeniable, whether in its operation it produces it in all cases or not.

While this contract cannot be enforced according to its terms, it is not so unenforceable because of its want of equity between the borrower and the investor, which is perhaps no greater than might occur in an association conforming to our statute, as we set no limit upon the ratio between dues and premium, from which this inequitable result flows, nor because, under the contract, the amount now due from the appellant is far beyond the amount she borrowed,—an inevitable result in every building association contract in which default continues for a long time; nor because of any improper motives on the appellant's part, or of the agents of the association in entering into it, for there is not a scintilla of evidence of that in the nature of the contract or elsewhere in the record; but simply because it is such a contract as is clearly repugnant to the public policy of the state, plainly written in its legislation, and therefore prohibited as to all building associations.

But the appellant has received \$2,500 from this association, and secured the performance of her said contract by a deed of trust upon her real estate, and she comes in-

to court to have the lien released, offering to pay the principal of the debt, with legal interest thereon, subject to credit for the money she had already paid in. This, together with any sums paid out by the appellee upon taxes, insurance, or other expenses necessary to preserve the property, constitute a lien upon the property, and must be satisfied, as in seeking equity the appellant must do equity.

For the reasons herein stated, *the decrees must be reversed*, and the cause remanded for further proceedings according to the principle herein laid down, and further according to the rules and principles governing courts of equity.

Rehearing denied.

S. T. CHAMBERS

George F. CRAMER *et al.*, Appts.

(.....W. Va.....)

- *1. A blacksmith shop or a machine shop is not a nuisance *per se*.
2. It is a general rule that when the thing complained of is not a nuisance *per se*, but may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere; the presumption being that a person entering into a legitimate business will conduct it in a proper way, so that it will not constitute a nuisance.
3. To warrant the perpetration of an injunction restraining, as a threatened nuisance, the erection of a building proposed to be used for legitimate purposes, the fact that it will be a nuisance if so used must be made clearly to appear, beyond all ground of fair questioning.
4. That erection of building will increase rates of insurance upon neighboring property is not ground for injunction to restrain such erection.

(March 30, 1901.)

APPEAL by defendants from decrees of the Circuit Court for Mingo County enjoining them from maintaining a blacksmith and machine shop. *Reversed*.

The facts are stated in the opinion.

Messrs. H. K. Shumate and John S. Marcum for appellants.

Messrs. Sheppard & Goodykoontz, for appellee:

Private nuisances consist of such things as work irreparable injury to health, trade, or property, or produce interminable litigation from a multiplicity of suits.

4 Barton, Ch. Pr. 2d ed. p. 464; Story, Eq. Jur. §§ 925 *et seq.*; *Blano v. Murray*, 36 La. Ann. 162, 51 Am. Rep. 7, note 10; *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519.

*Headnotes by McWHORTER, J.

NOTE.—For cases in this series as to injunction against prospective nuisance, see also *Pfingst v. Senn* (Ky.) 21 L. R. A. 569, and *Windfall Mfg. Co. v. Patterson* (Ind.) 37 L. R. A. 391.

54 L. R. A.

The disturbance of another's rest is a nuisance.

2 Dan. Ch. Pl. & Pr. 365, and note.

The creation of smoke, when not accompanied with noise or noxious vapors, is a nuisance.

Ibid.

To entitle a party to an injunction, the injury arising from the matter complained of must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it.

Barton, Ch. Jr. p. 466; *Dennis v. Eckhardt*, 3 Grant, Cas. 290; *Wallace v. Ayer*, 10 Phila. 356; *Fish v. Dodge*, 4 Denio. 311, 47 Am. Dec. 254; *Bradley v. Gill*, 1 Lutw. 29; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Gullick v. Tremlett*, 20 Week. Rep. 358; *Tanner v. Albion*, 5 Hill, 123, 40 Am. Dec. 337; *State v. Haines*, 30 Me. 65.

The business of blacksmithing and horse-shoeing may be a nuisance.

Whitney v. Bartholomew, 21 Conn. 213; *Bowen v. Mauzy*, 117 Ind. 258, 19 N. E. 526; *New Orleans v. Lambert*, 14 La. Ann. 244; *Ray v. Lyngs*, 10 Ala. 63; *Whitaker v. Hudson*, 65 Ga. 43; *Faucher v. Grass*, 60 Iowa, 505, 15 N. W. 302; 16 Am. & Eng. Enc. Law, p. 948; *Wood, Nuisances*, 2d ed. § 592; *Sampson v. Smith*, 8 Sim. 272; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

In view of the fact that the evidence was conflicting, the decree should not be disturbed.

Poling v. Parsons, 38 W. Va. 81, 18 S. W. 379; *Smith v. Yoke*, 27 W. Va. 639; *Doonan v. Glynn*, 28 W. Va. 715; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Frederick v. Frederick*, 31 W. Va. 568, 8 S. E. 295; *Reger v. O'Neal*, 33 W. Va. 160, 6 L. R. A. 427, 10 S. E. 375; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Tenant v. Headlee*, 31 W. Va. 591, 8 S. E. 544; *Yates v. West Grafton*, 33 W. Va. 510, 11 S. E. 8; *Reed v. Nixon*, 36 W. Va. 683, 15 S. E. 416; *Reynolds v. Gawthrop*, 37 W. Va. 13, 16 S. E. 364.

McWhorter, J., delivered the opinion of the court:

S. T. Chambers filed his bill in the circuit court of Mingo county against George F. Cramer and J. W. McCready, alleging: That he was the owner of certain valuable real estate in the town of Matewan, in said county, known as "Lot 14," upon which was located a valuable house, which he, with his family, occupied as a residence, and in which he had been keeping a hotel for several years. Said house had cost something like \$1,000, was in good repair and condition, and suitable for the entertainment of guests and the traveling public. He also had on said lot a valuable store building, costing and worth at least \$1,400. That in the hotel plaintiff had valuable personal property, consisting of household and kitchen furniture, worth several hundred dollars. That plaintiff, together with his son, as partners, had a stock of merchandise in the storehouse of value more than \$5,000, in which plain-

tiff had an important and controlling interest. That recently defendants claimed to have purchased a lot in close proximity to plaintiff's property, there being only a small alley of 15 feet width intervening between the two properties. That plaintiff was informed that defendants were going to construct a building on their said lot in which they were going to locate an engine, and conduct what they called a "machine shop and blacksmith shop." That soon afterwards plaintiff served notice in writing upon defendants that they should not construct such a building, nor should they be permitted to keep and maintain any machine shops so close to the property of plaintiff, reciting that such shops and engines would greatly impair the value of plaintiff's property, and endanger it by exposure to fire; that the same would constitute a nuisance, which plaintiff would enjoin. That defendants paid no attention to said notice, and proceeded to the full construction of said building and openly proclaimed their purpose of locating an engine therein and conducting a blacksmith and machine shop thereon, all of which would greatly reduce the value of plaintiff's property. That its location would constitute a great menace and danger to the property of plaintiff and others. That said building was a worthless wooden and cheap affair, and liable and likely to be ignited by sparks emanating from the chimneys of the furnace of said blacksmith shop and the smokestack of the engine, which they were threatening to locate in said shop. That, if allowed to conduct said shops, the noise and confusion occasioned by the workings and equipments of the shops would greatly disturb, annoy, irritate, and confuse the plaintiff, his family living in the hotel, and his guests and servants, as well. That the location of the shops or engine would diminish, not only the value of the property, but the comfort and enjoyment of it. That the nuisance and inconvenience which said shops or engine would occasion would materially interfere with the ordinary comforts of human existence. That it was being so constructed so close to plaintiff's property as to almost darken the windows of his buildings. That, if said shops and engine were allowed to be operated and continued, smoke, effluvia, and cinders from the chimneys of said building and said engine would constitute an offensive, obnoxious, and undesirable element against the comfort and enjoyment of plaintiff's property. That since the construction of said shop the insurance companies had already increased the premiums paid and to be paid by plaintiff on his property, and he had been notified by the insurance companies that if said shops were maintained his insurance would be further increased. Allying that if defendants were allowed to conduct therein a blacksmith shop, or to run machine shops therein, it would comprise a nuisance of such a nature that the continuance of it would cause a constantly recurring grievance; that plaintiff was only able to procure insurance upon a portion of his

said property; and only for a low per cent of its real value, and in case of fire great loss would come to plaintiff, over and above the insurance valuation; that the establishment thereof would be an infringement of the property rights of plaintiff, and, if permitted to be conducted or run or maintained, they would cause irreparable wrong and mischief to plaintiff's property, and, if allowed to be continued, liable to produce immediate injury to plaintiff, for which damage would afford no adequate compensation, for the reason that the life of plaintiff, as well as those of his family, guests, and servants, would be endangered; that J. W. McCready was insolvent and Cramer had no property in this state, except the interest mentioned, worth, perhaps, not over \$400, and, besides, was a nonresident of the state. And he prayed that defendants be perpetually inhibited and enjoined from conducting or maintaining such blacksmith shop, machine shop, or works upon such premises, and from locating any engine thereon calculated to endanger life or property of plaintiff, and for general relief. Plaintiff filed with his bill a map showing location of his property and the proposed building, and the streets and alleys; also the notice served by him on defendants not to construct the building. On the 15th day of March, 1898, a temporary injunction was granted by the judge in vacation, as prayed for in the bill. On the 18th of May, 1898, defendants filed their demurrer, which was set down for argument. Defendants also tendered their joint and separate answer, to which plaintiff filed five exceptions, which exceptions were overruled, and the answer filed. The answer denied all the material allegations of the bill, averring that there would be no extraordinary danger from fire; that the machinery proposed to be put into the shops was of the most improved kind, and almost wholly noiseless. Denied that any smoke, effluvia, or cinders, or anything of the like nature, would constitute any undesirable element against the comfort and enjoyment of the property of anyone, or that it would increase the insurance on any building in the town of Matewan, or that the construction and operation of said plant would in any manner constitute a nuisance of any nature whatever, or cause any wrong or mischief to the property of plaintiff or anyone else. Denied the insolvency of either of the defendants, and the nonresidence of defendant Cramer. Averred: That they proposed to operate in said building two turning lathes, one planer, one shaver, one boarding mill, besides the blacksmith shop, the machinery of which would be put in place and operated by defendant McCready; describing fully the proposed building, how it was to be constructed,—sides covered with sheet iron, the roof made fireproof, the floor of dirt, and that the whole of said building would be as near fireproof as it would be possible to make it. The forge in the blacksmith shop would be of the most improved pattern, and the fire, when put in the forge, which is the only time, even in the

old-pattern forges, there could possibly be any danger, would be what is known as "hooded;" that is, that the smoke, sparks, etc., would be collected in a funnel-shaped smokestack, and carried out of the building through a flue. That they had purchased and paid for over \$2,000 worth of machinery to go in said plant, which machinery had arrived at said town of Matewan before the injunction was granted in this cause, and that the continuance in favor of said injunction was absolutely ruinous to defendants' business and to their property rights. That it was not their intention to injure the property rights of plaintiff or anyone whatsoever, but they merely desired to pursue a lawful, legitimate, and useful business on their own property, and that said business, instead of a nuisance, danger, or menace, was an enterprise badly needed in the town of Matewan.—and again denied each and every allegation of said bill not specifically denied or admitted in the answer, and prayed for the dissolution of the injunction, and that they be allowed to complete their said building and to conduct and maintain their business, and that the bill be dismissed. On the 1st day of June the cause was heard upon a written notice of motion to dissolve the injunction, when it was heard upon the bill and exhibits, the joint and separate answer of defendants, and general replication thereto upon the deposition of witnesses taken and filed in the cause both by plaintiff and defendants, and upon the affidavits filed by plaintiff, when the court overruled the motion to dissolve the injunction, and gave plaintiff judgment against defendants for costs of the motion. Further depositions were taken after this hearing of the motion, and filed in the cause. The cause was heard finally on the 12th day of October, 1898, when the court perpetuated the injunction and rendered judgment against defendants for the costs of the suit, from which decree the defendants appealed to this court, and say the court erred in awarding the injunction on the 15th of March, 1898, and in not sustaining defendants' demurrer to the bill, and in refusing to pass upon the said demurrer, either overruling or sustaining the same, in refusing to sustain the motion to dissolve the injunction made on the 1st day of June, 1898, and in continuing the same in full force and effect, and in refusing to dissolve the injunction on the 12th day of October, 1898, when the case was submitted for final decree, and in entering its decree perpetuating said injunction and striking said cause from the docket.

Should this injunction have been granted, upon the case made out in the bill? The defendants were engaging in a proper and legitimate business in harmony with and in furtherance of the material interests of the town and community,—one of the many useful industries that mark the progress of that rapidly developing section of our state. It would seem that inducements would be offered to encourage the building up of industries of that character. "It is a gen-

eral rule that where the thing complained of is not a nuisance *per se* but may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere. The presumption is that a person entering into a legitimate business will conduct it in a proper way, so that it will not constitute a nuisance; and so where a building in in course of erection, or about to be erected, will not of itself constitute a nuisance, equity will not enjoin it on the ground that it may be used for a purpose which will make it a nuisance. If the building is in fact used in such a manner as to create a nuisance, its use for such purpose will then be enjoined." 14 Enc. Pl. & Pr. p. 1129, and cases cited. In *Hough v. Doylestown*, 4 Brewst. (Pa.) 333, it was held that, in order for equity to enjoin a private nuisance, "the danger must be impending and imminent, and the effect certain, not resting on hypothesis or conjecture, but established by conclusive evidence. If the injury be doubtful, eventual, or contingent, or if the matter complained of is not *ipso facto* a nuisance, . . . an injunction will not be granted. . . . In cases of prospective nuisance a court of equity will not interfere unless the damages to be apprehended will be serious, nor when, upon balancing the inconveniences or injuries, greater injury will be inflicted by granting than by refusing an injunction." The property rights of defendants as well as plaintiff must be considered. The defendants had purchased this ground for the location and conducting of a legitimate business and industry in the line of the progress and growth of the town and community and, according to the evidence, had expended over \$2,000 for the equipment of their business with machinery and appliances of the latest and most improved pattern and make. The testimony taken and filed in the cause of all who pretend to know anything about the machinery proposed to be used by defendants is to the effect that it is almost noiseless and without danger from fire, while the evidence to the contrary is principally by men who know little or nothing about machinery, and base their opinions (and their evidence is almost wholly "opinion evidence") upon their knowledge or observation of the conduct of country blacksmith shops. In *Mygatt v. Goetchins*, 20 Ga. 350, it is held that when the thing complained of will not *prima facie* be a nuisance, and the answer denies that it will be such, the preliminary injunction will be dissolved, and, if injury thereafter results from the alleged nuisance, ample relief can be afforded by the jury at the hearing. *Flint v. Russell*, 5 Dill. 151, Fed. Cas. No. 4,876. And in *Bowen v. Mauzy*, 117 Ind. 258, 19 N. E. 526, it was held that, in order to restrain a person from commencing the operation of a business in itself legitimate, it should be made to appear that the person about to enter into such business threatens and intends to conduct the business in a manner which will constitute a nuisance. And in *Harrison v.*

Brooks, 26 Ga. 537, it is held: A court of equity will only exercise the power to restrain nuisances in the course of erection in cases of necessity, when the evil sought to be remedied is not only probable, but certain; and it will be the less inclined to interfere when the establishment from which the injury is apprehended will have a tendency to promote the public convenience. And in *Atty. Gen. v. Steward*, 20 N. J. Eq. 415: "An injunction will not be granted to restrain the erection of a slaughter house and place for keeping hogs, where by the answer and affidavits it appears the defendants intend to carry on the business so as not to be a nuisance." See also *Keiser v. Lovett*, 85 Ind. 240, 44 Am. Rep. 10; *Shiras v. Olinger*, 50 Iowa 571, 33 Am. Rep. 138; *Dumesnil v. Dupont*, 18 B. Mon. 804, 68 Am. Dec. 750; *Dunning v. Aurora*, 40 Ill. 481. In *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 804, 12 L. R. A. 53, 12 S. E. 1085, which was a suit to enjoin and inhibit a furniture manufacturing establishment from running, as a nuisance to plaintiff in the use and enjoyment of his home and lot as a residence, it was held that "such cases depend in a peculiar degree upon their own facts and surrounding circumstances, so that courts of equity should proceed with great caution in abating or restraining such factory by injunction, and not enjoin unless the fact of nuisance is made in some way to appear clearly beyond all grounds of fair questioning." In *Faucher v. Grass*, 60 Iowa, 505, 15 N. W. 302, the court says: "The conclusion is based upon the ground that a blacksmith shop is not a nuisance *per se*. We know of no authority to the contrary. The shop may be so constructed with a view to deaden the noise of the anvil and other noises, the forges may be so placed, and the smoke and gases may be so conducted away, and the business may be so prosecuted, that the shop would not be regarded by the law as a nuisance." *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463. Livery stable is not a nuisance *per se*. *Kirkman v. Handy*, 11 Humph. 406, 54 Am. Dec. 45. "Injunction to prevent erection of building for manufacturing purposes, on ground of its being a nuisance to an adjoining dwelling house, will not be granted unless a very strong case is made, and one which is marked by some very peculiar features." *Wolcott v. Melick*, 11 N. J. Eq. 204, 68 Am. Dec. 790. "Business which is lawful if carried on reasonably and does not affect health, comfort, or the ordinary uses and enjoyment of property in the neighborhood, cannot be a nuisance in fact or in anticipation, and the courts will not interfere with it." *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221. Equity will not enjoin if injury be doubtful, eventual, or contingent. *Ibid.* Mere diminution in value of property, without irreparable mischief, is not ground for equitable relief by injunction. *Ibid.* That erection of building will increase rates of insurance upon neighboring buildings is not ground for injunction to restrain such erection. *Ibid.* Appellee cites in support of 54 L. R. A.

his contention several authorities, some of which seem to favor him, and yet the most of them do not help his case, *e. g.*, take *Whitney v. Bartholomew*, 21 Conn. 213. It is there held that a blacksmith shop is not a nuisance *per se*; but it was shown upon the trial that the large carriage factory and blacksmith shop had several chimneys, and the shop and chimneys were placed near the dividing line between the lands of the parties, and in consequence of the location and use of the blacksmith shop the cinders, ashes, and smoke issuing therefrom were thrown in large quantities upon the plaintiff's house and land, rendering the water unfit for use and the house nearly untenable. The defendant was held liable. This is a case where an actual nuisance was established. The business was shown to be improperly conducted, making it a nuisance to plaintiff, by destroying his property for residence purposes. Also the case of *Bowen v. Maury*, 117 Ind. 258, 19 N. E. 528, where it was held that the business of blacksmithing and horseshoeing is lawful and not in itself a nuisance, and the presumption is that one about to engage therein will conduct the same in a proper manner. So, in the case of *Ray v. Lynes*, 10 Ala. 63, it is held: "A blacksmith shop in a small village is not, in judgment of law, a nuisance, so as to authorize a court of chancery to interpose by injunction and prevent its erection." Then: "*Quære*: Whether a blacksmith shop might not be so inartificially and improperly constructed as to be peculiarly liable to fire, and subject to be abated as a nuisance in a town." And appellants cite the case of *Faucher v. Grass*, 60 Iowa, 505, 15 N. W. 302, where it was held that "a blacksmith shop is not a nuisance *per se*, and a decree declaring a certain shop to be a nuisance, and restraining its further use as such, should not go so far as to restrain the further use of the lot on which the shop is situated, for such a shop." The judge, in writing the opinion of the court, says: "The shop may be so constructed with a view to deaden the noise of the anvil and other noises, the forges may be so placed, and the smoke and gases may be so conducted away, and the business may be so prosecuted, that the shop would not be regarded by the law as a nuisance. This may be true of a blacksmith shop erected on the site of the present shop, or at any other place upon the lots of the defendants. The cases of *Tanner v. Albion*, 5 Hill, 121, 40 Am. Dec. 337, and *State v. Haines*, 30 Me. 65, cited by appellee, are both for the suppression of bowling alleys, as nuisances, and much of the same character as that of *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241, wherein a skating rink was enjoined as a nuisance. Neither the bowling alley nor the skating rink is of any service to the community where it may exist, and just to the extent it interferes with the enjoyment of any of the residents in the locality, or causes any inconvenience, it is a nuisance, being of no use to the public in any way whatever. The case most favorable to ap-

pellee, cited by him, is that of *Whitaker v. Hudson*, 65 Ga. 43, where it is held that, "though a blacksmith shop may not be a nuisance *per se*, yet the discretion of the chancellor enjoining its erection will not be controlled when the affidavits submitted as to whether the shop, under the circumstances of this particular case, would constitute a nuisance, preponderated in his opinion in favor of complainant." In the opinion the court says: "The granting of this injunction by the chancellor shows that the evidence in his opinion preponderated in favor of the complainant, and that he would allow a jury to pass thereon, and therefore we will not interfere with his judgment. And we will add that if he had refused it we should not have reversed it, but would have allowed the case to have gone before the jury, under the law, and let it be ascertained upon the trial whether, in the enjoyment and exercise of a clear legal right, which is not declared by the law or the courts to be a nuisance *per se*, it is possible that it may be so used as to become a legal injury and an infringement on the legal rights of others, and therefore a nuisance." From reading the opinion in that case, I take it that it was shown conclusively that the allegations of the bill were sustained, which were that the action of the defendants was done to annoy and weary plaintiff and his family, and to force him to purchase the land upon which the shop was

proposed to be erected at double its real value, and it was alleged in the bill and admitted in the answer that defendants had another blacksmith shop in the same village. Appellee seems to rely confidently on the principle that where the depositions are conflicting, and different minds might reach different conclusions upon the facts, upon the testimony, the appellate court will decline to reverse the chancellor, even though the appellate court might have come to a different conclusion had it acted in the first instance, as announced in *Smith v. Yoke*, 27 W. Va. 639, and many cases since. This case cannot come within the rule there laid down. The evidence is not in relation to existing facts and transactions had, but is something of a speculative character,—as to whether the shops can be so constructed and conducted as not to become a nuisance. If after the shops are opened and operated they prove to be a nuisance to plaintiff or others in the comfortable enjoyment of their property, they will be entitled to relief therefrom by the abatement of the nuisance, and the defendants will be held liable for damages.

For the reasons herein given the decrees of June 1 and October 12, 1898, are set aside and reversed, and the bill dismissed, but without prejudice to another suit or action in case the shops, when completed and operated, should become a nuisance to plaintiff.

WYOMING SUPREME COURT.

FIRST NATIONAL BANK OF ROCK SPRINGS, Wyoming, *Plff. in Err.*,

v.

Richard FOSTER.

(.....Wyo.....)

1. A statute providing that three fourths of the jurors sitting in a civil case may concur in and render a verdict, and that such a verdict shall have the same force and effect as though found and returned by all the jurors, is not authorized by Const. art. 1, § 9, which provides that the right to trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, since the legislature is given no power to dispense with the unanimity of a verdict.
2. Failure to object to an instruction that three fourths of the jury may return a verdict does not waive the right to have the validity of the verdict considered on appeal, where the receiving and entering of the verdict are objected to, and an exception

taken to the decision of the court in overruling the objection.

(June 25, 1900.)

ERROR to the District Court for Sweetwater County to review a judgment in favor of plaintiff in an action brought to recover an amount deposited by plaintiff with defendant for which the certificate had been lost. *Reversed.*

The facts are stated in the opinion.

Mr. D. A. Reavill for plaintiff in error.

Mr. John H. Chiles, for defendant in error:

A state may, if it chooses, provide for the trial of civil cases in state courts by some different jury from that known to the common law.

Cooley, Const. Lim. 6th ed. pp. 29, 30; *State v. Bates*, 14 Utah, 293, 43 L. R. A. 33, 47 Pac. 78; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618.

It may be taken into consideration that at the time of framing our Constitution other states of the Union had adopted constitutional provisions encroaching upon the common-law jury.

6 Am. & Eng. Enc. Law, 2d ed. p. 988, notes 1-3.

State legislation is valid unless pro-

NOTE.—As to constitutionality of verdict by less than all the jurors, see, in this series, *Jacksonville, T. & K. W. R. Co. v. Adams* (Fla.) 24 L. R. A. 272, and note; and *Hess v. White* (Utah) 24 L. R. A. 277.

As to number and agreement of jurors necessary to constitute a valid verdict, see *State v. Bates* (Utah) 43 L. R. A. 33, and note. 54 L. R. A.

hibited by the state or by the Federal Constitution.

6 Am. & Eng. Enc. Law, 2d ed. p. 934, note 3.

Unless the Constitution of our state prohibits this act, it is valid.

Re Senate Bill, No. 142, 26 Colo. 167, 56 Pac. 564; 6 Am. & Eng. Enc. Law, 2d ed. p. 988, note 3.

The party must raise objection at the proper stage of the proceedings.

Elliott, App. Proc. § 690.

Erroneous steps in the progress of the case are waived unless excepted to before additional steps are taken.

Jones v. Van Patten, 3 Ind. 107; *Dickson v. Rose*, 87 Ind. 103; *Corey v. Rhineheart*, 7 Ind. 291; *Wheeler v. State*, 8 Ind. 113; *Hornberger v. State*, 5 Ind. 300; *State v. Bartlett*, 9 Ind. 569; *Herman, Estoppel*, § 825; 8 Enc. Pl. & Pr. 162; *Jacobs v. Mitchell*, 2 Colo. App. 456, 31 Pac. 235.

On petition for rehearing.

A man who does not speak when he ought shall not be heard when he desires to speak.

2 Herman, Estoppel, § 824, p. 952; Bigelow, Estoppel, 5th ed. p. 718; Elliott, App. Proc. §§ 874 et seq.; *First Nat. Bank v. Warrington*, 40 Iowa, 528; *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433, 2 N. W. 795; *Bates v. Ball*, 72 Ill. 108; *Hahn v. Miller*, 60 Iowa, 96, 14 N. W. 119; 12 Enc. Pl. & Pr. 267, note 3; 8 Enc. Pl. & Pr. 166, notes 2, 3; *Heacock v. Hosmer*, 109 Ill. 245; 8 Enc. Pl. & Pr. 264d, 271d; 2 Thompson, Trials, §§ 2591, 2725; 1 Thompson, Trials, § 1438, note 2.

A waiver takes place where a man dispenses with the performance of something which he has a right to exact.

Herman, Estoppel, § 825, p. 954; *Morriah v. Murray*, 13 Mees. & W. 52; *Broom, Legal Maxims*, 135; *Taft v. Northern Transp. Co.* 56 N. H. 414; *Crump v. Thomas*, 85 N. C. 272; *Shultz v. Lempert*, 55 Tex. 273; *Hahn v. Miller*, 60 Iowa, 96, 14 N. W. 119; *Stracy v. Blake*, 1 Mees. & W. 168; *Harrison v. Wright*, 13 Mees. & W. 816; *Booth v. Olive*, 10 C. B. 827; *Gosling v. Veley*, 7 Q. B. 455; *Martin v. Great Northern R. Co.* 16 C. B. 179; *Doe ex dem. Child v. Roe*, 1 El. & Bl. 279; *Ferguson v. Landran*, 5 Bush, 230, 96 Am. Dec. 350; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624; *Hodges v. Winston*, 95 Ala. 514, 11 So. 284; *Muetze v. Tuteur*, 77 Wis. 236, 9 L. R. A. 86, 46 N. W. 123; *Farrell v. Hennesy*, 21 Wis. 639; *Wilson Sewing Mach. Co. v. Bull*, 52 Iowa, 554, 3 N. W. 564; *Millett v. Hayford*, 1 Wis. 401; *Barnes v. Perine*, 12 N. Y. 18; *Chicago Driving Park v. West*, 35 Ill. App. 499.

An error, to be available on appeal, must have occurred without the express or implied consent of the appellant.

2 Enc. Pl. & Pr. 516; 6 Am. & Eng. Enc. Law, 2d ed. p. 1090; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325, and note; *Baker v. Braman*, 6 Hill, 47, 40 Am. Dec. 387; *Hansford v. Barbours*, 3 A. K. Marsh. 515; *Barnett v. Barbours*, 1 Litt. (Ky.) 397; Elliott, App. Proc. §§ 630, 674, 690-692. 54 L. R. A.

Messrs. Ben B. Lindsey and Fred W. Parks amici curiæ.

Corn, J., delivered the opinion of the court:

Defendant in error brought suit against plaintiff in error upon a lost certificate of deposit. Under the instruction of the court that three fourths of the jury might concur in and return a verdict, a verdict for the plaintiff was returned signed by ten of the jurors, the other two refusing to concur. The defendant below objected to the verdict being received, for the reason that it was not unanimous, and therefore not a lawful verdict. The objection was overruled, and the verdict entered, and the defendant took its exception. Our Declaration of Rights (art. 1, § 9, of the Constitution) provides: "The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the legislature may change, regulate, or abolish the grand jury system." Rev. Stat. 1899, § 3651, provides that "in all civil cases in any of the courts of the state of Wyoming, which shall be tried by a jury, three fourths of the number of jurors sitting in any such case may concur in and return a verdict in said case, and such verdict shall have the same force and effect as though found and returned by all the jurors sitting in said case; but whenever such verdict is found and returned by a less number than twelve, said verdict shall be signed by each juror concurring therein." The plaintiff in error insists that the statute is in violation of the section of the Constitution above quoted, and this is the only important question presented. No other of the state Constitutions, so far as we are advised, contains precisely the same provision as ours, except that of Colorado. But the general question here involved has repeatedly been before the courts of this country for consideration, and certain propositions which lie at the threshold of the discussion are well settled. It is conceded that in almost all of the states the legislature may lawfully exercise, not only such powers as are specifically enumerated, but that it is invested with the entire legislative power of the state, except as restrained by the provisions of the Constitution. And our Constitution, in line with most of the others (art. 3, § 1), provides that "the legislative power shall be vested in a senate and house of representatives, which shall be designated 'the legislature of the state of Wyoming.'" It is also so well settled as to require no reference to authorities that when the Constitution secures to litigants the right of trial by jury the legislature has no power to deny or impair such right. The courts have uniformly held, also, that the word "jury," as used in our Constitutions, when not otherwise modified, means a common-law jury composed of

twelve men, whose verdict shall be unanimous. As stated by the supreme court of Minnesota: "The expression 'trial by jury' is as old as Magna Charta, and has obtained a definite historical meaning, which is well understood by all English-speaking peoples; and for that reason no American Constitution has ever assumed to define it. We are therefore relegated to the history of the common law to ascertain its meaning. The essential and substantive attributes or elements of jury trial are, and always have been, number, impartiality, and unanimity. The jury must consist of twelve. They must be impartial and indifferent between the parties; and their verdict must be unanimous." *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L. R. A. 437, 68 N. W. 53. An extended list of the cases is given in the note to *State v. Bates* (Utah) 43 L. R. A. 48. It is unquestioned, also, that at the adoption of the Constitution the right existed in Wyoming as at common law; that is, in felonies and in all common-law cases in the district court—our court of general common-law jurisdiction—the right was to an impartial jury of twelve men and a unanimous verdict. It is also conceded that the people of the state had the power by their Constitution to preserve or abrogate the right, or make such modifications of it, and establish such modes of trial, as might be deemed expedient. These general propositions being settled, the question before us is to ascertain to what extent the right of trial by jury, as above defined, is preserved by the section of the Declaration of Rights above quoted. As to the right in criminal cases there is no room for construction. The language is express that it shall remain inviolate; that is, that a person charged with crime has the right, as heretofore, to demand a trial by twelve impartial men, whose verdict must be unanimous in order to support a judgment. In civil cases the language is also express as to the matter of number,—one of the three essentials of a jury trial at common-law,—and the legislature is empowered to provide by law for juries consisting of less than twelve. There is no room for construction. But there is no specific mention in the section or anywhere in the Constitution of the third essential of unanimity. Is it, then, to be deemed a matter unprovided for, a right not preserved, leaving the legislature at full liberty to enact such laws upon the subject as it may deem proper, unrestrained by the Constitution? We do not think so. The whole section must be construed together. The subject of it is the right of trial by jury, and we think the intention of the framers reasonably appears to have been to preserve the right inviolate in criminal cases, and to point out, by way of permission to the legislature, wherein the common-law right might be invaded by statute in civil cases. It is as if the Constitution had said: "With reference to the right of trial by jury it is provided that in criminal cases it shall remain in all respects as heretofore. In civil cases it shall remain

as heretofore, except that the legislature may provide for a number less than twelve to constitute a jury." There is no other reasonable construction; for, if a rule is to be applied that the legislature have power to enact any laws upon the subject unless prohibited in express language, then they may entirely abolish the right and practice of trial by jury in civil cases, for they are not expressly prohibited from so doing. Yet there appears nowhere in the Constitution any intention to abrogate the right or to substitute any other mode of trial. But the form of statement, when viewed in the light of the surroundings, makes it manifest that the intention was to preserve the right. The provision in regard to number is by way of permission, indicating clearly that in the judgment of the framers of the Constitution permission was necessary. It is also stated as an exception, the word "but" being used in its very customary meaning of "except." That it is stated as an exception is also shown by the use of the word "jury" itself. It cannot be supposed that the convention were ignorant of the legal meaning of the word, but they must be presumed to have used it in its correct legal sense of a body of twelve impartial men, whose verdict must be unanimous. And it is evident they did so use it. It is so used in the first clause securing the right inviolate in criminal cases. The provision that the number may be less than "twelve" is clear evidence that the word as used referred to the body universally known to be composed of twelve men. It is permission to the legislature to make a designated change in the common-law jury; to reduce the common-law number, twelve. It is not essential that a prohibition upon the legislature should be in express terms. It may be by implication. *Page v. Allen*, 58 Pa. 345, 98 Am. Dec. 272. It will scarcely be contended that an act would be valid providing for the trial of causes by a jury chosen by the plaintiff, or by the party by whom the jury was first demanded, thus disregarding the element of impartiality. Yet by the argument of counsel there is no prohibition upon such legislation. And it is, indeed, no more prohibited than a disregard of the element of unanimity is prohibited. Neither is prohibited except by the use of the word "jury," the plainly implied provision for "trial by jury" which, as matter of definition, necessarily involve and include both impartiality and unanimity of verdict. This view is fortified by reference to the remainder of the section (Const. art. 1, § 9) in regard to grand juries: "Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the legislature may change, regulate, or abolish the grand-jury system." Here it was deemed necessary, if the grand-jury system was to be changed or abolished by law, that the legislature should have express permission to take such action. But any such permission to change, regulate, or abolish the system of trial by jury is conspicuous by its absence. The reasonable conclusion is that

there was no intention to give it, or to permit any interference with the right to the ancient, customary, and familiar mode of trial except in the one particular pointed out. Some other states adopting Constitutions in comparatively recent years have provided for the change in the jury system attempted in the act under consideration. But in every case, so far as our investigation has extended, the change has been made either by a direct constitutional provision, or by specific authority contained in the Constitution empowering the legislature to make it. Only in Colorado and this state has the attempt been made to accomplish the purpose by legislative enactment without express constitutional sanction. The question has not been directly passed upon by the Colorado court. But in *Huston v. Wadsworth*, 5 Colo. 213, the question was as to the power of the trial court to refer a common-law action without the consent of the parties. And in sustaining the procedure the supreme court of that state says: "Section 23 of the Bill of Rights, referred to in the appellant's brief, secures the right of trial by jury in criminal cases, but imposes no restriction upon the legislature in respect to the trial of civil causes." Subsequently a bill in substance the same as § 3651 of our statutes was pending before the legislature, and, upon its being referred to the attorney general, his opinion was that it was in conflict with the clause of the Constitution above quoted. Upon a further reference to the supreme court for their opinion, they say that the language of the court, as constituted when the decision in *Huston v. Wadsworth* was rendered, supports the constitutionality of the act. But under their rule in such cases they decline either to question or sanction the correctness of that opinion in an *ex parte* proceeding. *Re Senate Bill, No. 142*, 26 Colo. 167, 56 Pac. 564. The most that can be said, therefore, perhaps, is that the question of the constitutionality of the act is undetermined in Colorado. In order to sustain the constitutionality of this section of the statute, it is necessary for this court to say that there is no right of trial by jury in civil cases under the Constitution in this state, but that each succeeding session of the legislature may invent and establish any mode of trial that the whim of the hour or any supposed exigencies of convenience or economy might dictate. Under such a ruling it would be competent for the legislature to provide that the judge of the district should call into court the partisan board of county commissioners, and submit to them for decision by a majority vote all civil causes pending in any county. It is perfectly clear that no such revolutionary destruction of ancient landmarks was ever contemplated. The whole tenor of the instrument makes it plain that the ancient method of trial by jury was not to be abandoned, but was to be retained and preserved except as designated in the Constitution itself, and what the essentials of that method are is not a

matter of construction or conjecture. We think the statute is clearly unconstitutional.

It is further objected that no exception was taken to the instruction of the court that three fourths of the jury might return a verdict, and that the defendant must be held to have waived its right. But the receiving and entering of the verdict were objected to, and exception taken to the decision of the court in overruling the objection. This exception brings the question regularly before this court for its decision, and the most that can be claimed is that the erroneous instruction will not be considered as a ground of reversal.

The judgment will be reversed, and the cause remanded for a new trial.

Potter, Ch. J., and Knight, J., concur.

A petition for rehearing having been filed, Corn, J., on March 12, 1901, handed down the following response:

In the course of the trial in this case, the court instructed the jury that they might return a verdict upon the concurrence of three fourths of their number. The record shows no objection to this instruction by either party, and it seems that none was in fact made. But, upon the return of the jury into court with a verdict signed by ten of their number, the defendant, by its counsel, requested that the jury be polled. From the poll it appeared that only ten of the twelve jurymen concurred in the finding, and defendant then objected to the receiving and entry of the verdict, for the reason that it was not a lawful verdict. The court overruled the objection, and received the verdict, and plaintiff in error excepted.

The defendant in error insists that, by its failure to object to the instruction, plaintiff in error waived its right to object at any future stage of the proceedings to the acceptance of a verdict found by less than the whole number, and a great many authorities are cited in support of the proposition. We have read a large number of the cases cited, and have given a careful examination to those specially relied upon. They establish beyond controversy, if any authority was required, that error may be waived. It may be waived by consent, either express or implied, or by such conduct of the party as will estop him from afterwards objecting. But we fail to find any case holding a party to have consented when the action complained of was objected to before it was taken, and an exception preserved, at the time, to the decision of the court overruling such objection. Indeed, it would be a contradiction in terms to say that there was consent to the action of the court when such action was objected to before it was taken, and the court informed by an immediate exception that the objection would be insisted upon. But, where there has been no consent, illustrations are not wanting where a party, by his conduct or by his silence, loses his right to interpose objections which would otherwise be available. If, for instance, in support of his case, he

introduces incompetent evidence, he cannot afterwards object if his opponent pursues the same line of evidence. He has opened the door. If he has joined in the trial of the cause upon a particular theory, he cannot afterwards be heard to object that it was a false theory. He is held to the theory which he maintained or to which by his silence he assented. But all such cases depend upon the principle that the court or his opponent has been led into error which, but for his apparent assent, it is presumed would have been corrected. And nothing of the kind appears in this case. The instruction to which he failed to object, and which, it is claimed, estops him from objecting to an illegal verdict, was a mere announcement to the jury that they might reach a verdict by the concurrence of three fourths of their number. It announces no principle of law nor any theory of the case. By his failure to object the court was not misled in its procedure, and opposing counsel was not betrayed into any step prejudicial to his own case. It is urged that counsel took an unfair advantage in offering no objection until he ascertained that the verdict was against him. But he took no advantage which was not equally open to counsel on the other side in case a verdict should have been adverse to him. He was not in bad faith with the court; for the court was not proceeding in the matter by consent of parties, but by authority of a void statute.

Moreover, it is the ultimate ruling in any case which constitutes available error. Elliott, App. Proc. § 590. If the jury had finally reached a unanimous verdict, the erroneous instruction would have been harmless to either party, unless, perhaps, actual prejudice could be shown by its influence upon the deliberations of the jury. The time to object and to save an exception is when the irregularity occurs. *Thomp. Trials*, 700. The irregularity complained of in this case was the acceptance of a verdict agreed to by less than the whole jury. The objection was in time for the court to correct its error, and direct the jury to retire for further deliberation.

It would not be practicable to refer to all the authorities cited by counsel, and keep this opinion within reasonable limits. But it may be proper to distinguish some of them from the case under consideration, choosing those which seem to be most relied upon. In *Chicago Driving Park v. West*, 35 Ill. App. 496, the case was tried by the court without a jury, and the appellant insisted in the appellate court that it was entitled to a trial by jury, and had not waived its right. The court disposed of the matter by saying: "If appellant desired a trial by jury, and had objected to the trial by the court, it would have been error to have denied him a jury; but as he was present by his counsel, and failed to interpose any objection of that kind, he waived his right to have the case submitted to a jury." *Barnes v. Perine*, 12 N. Y. 23, decides only that a party having treated the questions as purely legal, and acquiesced in the dis-

54 L. R. A.

posal of them by the court as such, cannot, on appeal, be heard to object that facts were involved which should have been decided by the jury. In *Millett v. Hayford*, 1 Wis. 401, the case was tried in the county court by a jury of six under the act creating the court. Plaintiff in error claimed that the statute was unconstitutional, in so far as it limited the jury to six persons. The court refused to consider the constitutional question upon the ground that the record did not show that the plaintiff in error made any objections to the jury, and that, in the absence of such objection, it must be presumed that he consented to submit his case to a jury, as allowed by the statute. In *Wilson Sewing Mach. Co. v. Bull*, 52 Iowa, 554, 3 N. W. 564, a reversal was asked for upon the ground that the court permitted evidence to be introduced which was not justified by the pleadings. In affirming the judgment, the supreme court said that it was sufficient to say that no such objection was made to the introduction of the evidence in the court below, and that it was not even objected in general terms that the evidence was incompetent. In the case under consideration objection was made to receiving the verdict, the very action of the court which is complained of. In the cases cited the ground of the decision is that no objection was made. It is so evident that they and similar cases cited do not even tend to sustain the position of plaintiff in error that further comment upon them is unnecessary. But counsel insist that *Farrell v. Hennessy*, 21 Wis. 632, is very similar in some of its features to the case before us, and that it sustains counsel's contention. The jury brought in a verdict for the plaintiff, and they were polled upon demand of defendant's counsel. One of the jurymen answered: "It was and is my verdict, but it is contrary to my conscience. I only consent to it because all the rest have given in for the plaintiff." The verdict, however, was received and recorded without any objection by the defendant. He subsequently moved to set it aside, upon affidavits showing the above facts, and, upon his motion being overruled, appealed to the supreme court. Even in the face of the fact that the verdict was received and recorded absolutely without objection, that court say they find no little difficulty in determining what should be the effect of a verdict received under the circumstances disclosed. They finally, however, reach the conclusion that the time to raise an objection of this nature is before the verdict is received, and when an opportunity exists for the jury to reconsider their verdict, and, if the objection is not then taken, it is waived. But they add that, even though no objection was taken at the time by the defeated party, it was clearly the duty of the court, upon its own motion, to have directed the jury to retire and reconsider their verdict. It is a little difficult to see how counsel for plaintiff in error find in this decision any support of their position, when it points out the very method pursued by the defendant in this case as the proper

one, and declares the objection waived by a failure to adopt it. But there is one other decision, in the English case of *Morrish v. Murrey*, 13 Mees. & W. 52, which plaintiff in error claims to be decisive in its favor. The judge was of the opinion that one of the defendant's pleas was a sufficient answer to the action, and that it was proved, and that the judgment must be for the defendant. But he left it to the jury to say what amount of damages the plaintiff had sustained, so that, in the event of the court being of the opinion that the plea was not proved, the plaintiff might enter judgment for the damages so found by the jury. This course was unauthorized by law, and could only be pursued by the consent of the parties; but, neither party offering any objection, the jury returned their verdict assessing plaintiff's damages at one farthing. The court held that the judge was in error in holding the plea sufficient, and the plaintiff insisted that she was entitled to a new trial on the ground of misdirection. But the court held that, having consented to the assessment of the damages contingently,

she was precluded from insisting upon the misdirection, and could only move to enter a verdict for the sum found by the jury. It is perfectly apparent that this case, like the others referred to, is distinguished from the one before us by the essential fact that the unauthorized act of the court was not objected to at the time it was committed.

We have gone into great, and perhaps unnecessary, detail in the discussion of the question presented. But we have done so out of deference to the great earnestness and unquestioned sincerity with which counsel have maintained the correctness of their views. We understand that the request for a rehearing upon the ground that this court erred in holding the statute in question to be unconstitutional, is no longer urged, the supreme court of Colorado having since announced the same conclusion in a very able and exhaustive opinion in the case of *Denver v. Hyatt* (Colo.) 63 Pac. 403.

A rehearing is denied.

Potter, Ch. J., and Knight, J., concur.

NEW HAMPSHIRE SUPREME COURT.

George L. FOOTE, Exr., etc., of Martha J. Nickerson, Deceased, *Appt.*,

v.

Stephen D. NICKERSON.

(.....N. H.....)

1. A man and wife cannot make a valid contract for a separation.
2. The statutes extending the power of husband and wife to contract as to property matters gives them no authority to enter into an agreement renouncing marital rights.
3. If covenants for separation and touching property rights occur in the same agreement between husband and wife, the legal part of the agreement touching the property rights will be upheld if the promises are separate and the consideration is divisible; but if the consideration is entire the whole must fail.
4. A mutual agreement between husband and wife to separate on friendly terms, and to make no future demands upon each other's property, carried out until the wife's death, will not prevent the husband from claiming his rights in her estate.
5. A husband separating from his wife by agreement is not within the terms of a statute depriving of his interest in his wife's estate a man who willingly abandons, absents himself from, or wilfully neglects to support, his wife for a certain time.
6. Disposition by will is not within the terms of a statute permitting the wife of a nonresident to convey her property as though sole.

(March 15, 1901.)

APPEAL by proponent from a decree of the Probate Court for Merrimack County requiring him to file an inventory and give bonds as executor of the estate of Martha J. Nickerson, deceased. *Dismissed.*

Proponent's mother, Martha J. White, was married to Stephen D. Nickerson in Maine, in 1891. On April 18, 1892, duplicate agreements, of one of which the following is a copy, were drawn up and executed by each, and delivered to the other.

Orrington, April 18, '92.

This is to certify that I, Stephen D. Nickerson, husband of Martha J. Nickerson, do mutually agree to separate on friendly terms, and to make no demand (neither me nor my heirs) on her, or her property, after this date.

Stephen D. Nickerson.
Orrington, Maine.

Mrs. Nickerson immediately removed to the state of New Hampshire, where she continued to live until her death, which occurred December 25, 1897. Mr. Nickerson, soon after the separation, published a notice refusing to be responsible for further bills contracted by his wife, and from that date ceased to contribute toward her support.

By her will Mrs. Nickerson left her husband the sum of \$1, stating: "I make this small bequest because of his agreement to live separate from me, and to make no claim upon my estate in any way." The rest of the estate was bequeathed to her son, the appellant in this case.

NOTE.—As to validity of separation agreements between husband and wife, see other cases in this series as follows: *Winn v. Sanford* (Mass.) 1 L. R. A. 512, and *note*; *Clark v. Fosdick* (N. Y.) 6 L. R. A. 132, and *note*; 54 L. R. A.

Galusha v. Galusha (N. Y.) 6 L. R. A. 487, and *note*; *Carey v. Mackey* (Me.) 9 L. R. A. 113, and *note*; *Blank v. Nohl* (Mo.) 18 L. R. A. 350; and *Henderson v. Henderson* (Or.) 48 L. R. A. 766.

Mr. Nickerson waived the provision of the will in his favor, and made a claim for his share of the estate.

The court ordered the proponent as executor to file an inventory and bond, and decreed that Nickerson was entitled to his share of the estate. From this decree the proponent appeals.

Messrs. Sargent & Niles, for appellant: In *Jewell v. McQuesten*, 68 N. H. 233, 34 Atl. 742, it was held that a husband could not be prevented from claiming his distributive share of his wife's estate by proof of an agreement on his part not to claim any right, title, or interest in her property.

In the present case it appears that the property of the testatrix consisted of money belonging to her in her own right at the time of her marriage. And the provision of the contract that neither the husband nor his heirs would make any claim on her property negatives the possibility of interpreting the agreement as relating only to the duration of their married life. The court therefore has an opportunity of considering the question, not involved in that case, of the validity of an agreement of this character.

A question which we are unable to differentiate from this was considered by this court in *Eaton v. Tewksbury*, 41 Atl. 351, *Advance Sheets*. The husband and wife had, before marriage, made an agreement by which each waived all rights in the property of the other during marriage and after the death of either of them. After marriage the husband made a will in which was a legacy of \$1,500 to the wife. He afterwards transferred to her securities of the value of \$1,500, in consideration of which she executed an instrument releasing and quitclaiming to him all interest which she might have in his estate. The court held that, in view of the antenuptial agreement, the only interest which she had in her husband's estate at the time when this release was executed was the prospective legacy, and that her agreement with her husband to release this was binding, and would support a bill in equity by the executors to restrain the prosecution of a suit at law for the recovery of the legacy.

It is a matter of entire indifference whether the contract is treated as a Maine or as a New Hampshire contract. In either state the wife is free to make with her husband contracts affecting her separate estate.

Blake v. Blake, 64 Me. 177; *Albin v. Lord*, 39 N. H. 196; *Alley v. Winn*, 134 Mass. 77, 45 Am. Rep. 297; *Randall v. Randall*, 37 Mich. 563; *Schouler*, Dom. Rel. 5th ed. p. 320.

Contracts made with persons under the special protection of the law, as minors and married women, cannot be avoided by the other party after the contract has been fully executed on the part of the married woman or minor.

Ham v. Boody, 20 N. H. 411, 51 Am. Dec. 235.

The petitioner brings himself within the terms of the statute by having for three years wilfully neglected to support his wife.

Ke Young, L. R. 31 Ch. Div. 174; *State v.* 54 L. R. A.

Clark, 29 N. J. L. 98; *Eagle Twp. Highway Comrs. v. Ely*, 54 Mich. 181, 19 N. W. 940; *Newell v. Whittingham*, 58 Vt. 341, 2 Atl. 172.

N. H. Pub. Stat. chap. 176, § 8, is as follows: "If a woman, the wife of an alien or of a citizen of another state, has resided in this state six months successively, separate from her husband, she may acquire and hold real and personal estate, and convey it the same as if she were sole and unmarried."

The word "convey" is ordinarily used with reference to transfers of real property, but it may also be employed to designate a transfer of personalty.

Leaycraft v. Hedden, 4 N. J. Eq. 512.

A will is, in contemplation of law, a conveyance.

4 Am. & Eng. Enc. Law, p. 133, note 1.

Messrs. Charles Hamlin, Charles J. Hutchings, and Fred H. Gould, for appellee:

The writings of April 18, 1892, between the husband and wife, were not intended to bar each other's statutory rights after decease, etc. They were intended to operate during their separation, or the lives only of the parties, and ceased, at their death, to have any legal effect.

Jewell v. McQuesten, 68 N. H. 233, 34 Atl. 742; *Newton v. Truesdale*, 69 N. H. 634, 45 Atl. 646.

The validity and effect of these writings should be determined by the law of the state of Maine.

Carey v. Mackey, 82 Me. 521, 9 L. R. A. 113, 20 Atl. 84.

There is no statute in Maine whereby, by any writing or agreement, the right of the wife to a distributive share of the personal property of her husband, or the right of a husband to a distributive share in the personal property of the wife, may be barred or released after marriage.

If the covenant not to claim any part of the personal estate could be construed as a release, a release of a claim which has no present existence is inoperative. The contract, being executory, cannot avail by way of estoppel. It could not be broken so as to create any cause of action upon it until after a decree of distribution had been made.

Sullings v. Richmond, 5 Allen, 191, 81 Am. Dec. 742.

The parties were not legally capable of entering into such contract as they seem to have contemplated.

Haggett v. Hurley, 91 Me. 542, 41 L. R. A. 362, 40 Atl. 561; *Rowe v. Hamilton*, 3 Me. 63; *Manning v. Labores*, 33 Me. 343; *Wentworth v. Wentworth*, 69 Me. 252; *Rogers v. Haines*, 3 Me. 363; *Shaw v. Russ*, 14 Me. 432; *Vanos v. Vanos*, 21 Me. 371; *Gibson v. Gibson*, 15 Mass. 109, 8 Am. Dec. 94; *Newby v. Coe*, 81 Ky. 60; *Sullings v. Richmond*, 5 Allen, 191, 81 Am. Dec. 742; 9 Am. & Eng. Enc. Law, p. 793; *Robertson v. Bruner*, 24 Miss. 242.

Peaslee, J., delivered the opinion of the court:

One question presented for decision is

whether the relation of husband and wife is one that the parties can dissolve or modify; whether the married status is so far within the control of the parties that its alteration is a result they can themselves effect, provided they agree upon the terms. It may fairly be said that the question is not settled by the decisions in this state. It has been touched upon incidentally, but in no case has it been directly involved. It therefore becomes necessary to examine the law on the subject elsewhere. Turning to other jurisdictions, it will be found that the question has been the subject of much litigation, and with varied results. Not only do the cases in one state conflict with those in other states, but in the same jurisdiction the views of one generation have often been held to be erroneous in later times. There is disagreement, not only as to what the law is, and what the policy on this subject should be, but also as to the history of the law, and how it was held to be in former times. In order, then, to reach a satisfactory solution of the question, it is essential to examine with some minuteness the historical aspect of the law applicable in this case.

The English cases decided before the Revolutionary War are conflicting, and many of them apparently imperfectly reported. The precise question here involved did not then come directly before the so-called "law courts." All causes concerning marriage and the marital status were tried in the ecclesiastical courts, which also had jurisdiction of the probate of wills and the administration of estates. 2 Bl. Com. 496. While, in a narrow sense, these were not common-law courts, they administered the unwritten law of the realm upon these subjects. Although the inferior judges were appointed by the ecclesiastics, the bishops themselves were nominated by the King. 1 Bl. Com. 280. In all causes an appeal might be taken to the King, who was represented by the court of delegates, appointed by him for that purpose. "This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster and doctors of the civil law." 3 Bl. Com. 66. The law thus administered is a part of the common law of England. *Reg. v. Mills*, 10 Clark & F. 534, 671. To ascertain the state of the English common law as to divorce, suits for nullity, and other matters directly concerning the marital relation, recourse must be had to the decisions of those courts. The doctrine of either total or partial divorce by agreement of the parties found no favor there. They were not permitted to "release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient and sufficiently proved." *Mortimer v. Mortimer*, 2 Hagg. Consist. Rep. 310, 318; 2 Roper, Husb. & W. 267. The rule that separation agreements are wholly void seems to have been adhered to from the earliest times until the court was abolished, in 1857, by the statute of 20 & 21 Vict. chap. 85. *Smith v. Smith*, 2 Hagg. Eccl. Rep. Supp. 44, note; *West-*

moath v. Westmoath, 2 Hagg. Eccl. Rep. Supp. 1; *Barlee v. Barlee*, 1 Addams, Eccl. Rep. 301, 305; *Nash v. Nash*, 1 Hagg. Consist. Rep. 140. There are some very early cases wherein contracts of husbands with a third person concerning the support of their wives were enforced in chancery. In *Seeling v. Crawley*, 2 Vern. 386 (decided in 1700), Crawley, who had separated from his wife, made a contract with her father, Seeling, that the wife and a child should be supported at her father's house. Upon a bill brought by the father, in which the wife joined, performance of the husband's covenants was decreed. The contract did not depend upon a separation agreement. In other cases decided at about the same time the court seems to have proceeded partly upon the theory that in case of wrongdoing by the husband chancery had power to decree separate maintenance. *Ozenden v. Ozenden*, 2 Vern. 493; *Nicholls v. Danvers*, 2 Vern. 671. These cases may have resulted from confused ideas about the respective jurisdiction of the ecclesiastical and chancery courts incident to and following after the abolition of the former during the Commonwealth. 1 Fonblanque, Eq. 97, note n. The early cases in the law and equity courts which really bear upon this question are those wherein the validity of the agreement was incidentally drawn in question.* Of these one of the earliest that is reported is *Lister's Case*, 8 Mod. 22, decided in 1721. A wife, living separate from her husband under an agreement, sued out a writ of habeas corpus to be freed from imprisonment by him in the Mint. The court said: "An agreement between husband and wife to live separate, and that she shall have a separate maintenance, shall bind them both until they both agree to cohabit again; and, if the wife be willing to return to her husband, no court will interpose or obstruct her. But, as to the coercive power which the husband has over his wife, it is not a power to confine her: for by the law of England she is entitled to all reasonable liberty, if her behavior is not very bad." According to this report the decision was put upon two grounds,—that the agreement cut off the husband's rights, and that his rights did not, in any event, entitle him to such means of coercion. Strange reports the case somewhat differently. He says: "And, all this matter appearing, and that he declared he took her into his power in order to prevail with her to part with some of her separate maintenance, the chief justice declared, and all the rest agreed, that where the wife will make an undue use of her liberty, either by squandering away her husband's estate, or go into lewd company, it is lawful for the husband, in order to preserve his honor and estate, to lay such a wife under restraint. But, where nothing of that appears, he cannot justify the depriving her of her liberty: that there was no color for what he did in this case, there being a separation by consent." s. c., *sub nom. Rex v. Lister*, 1 Strange, 478. If the latter report states the opinion correctly, the case is not author-

ity for the proposition that such agreements are valid. It only decides that the husband may lay the wife under restraint when she squanders his property, or goes into lewd company, and that her mere leaving him in accordance with their mutual agreement does not make out a cause for such action. In 1725, *More v. Ellis*, Bunbury, 205, was decided. The wife of Sir Cleave More had a separate estate, payable by trustees to whom she should appoint. She was living apart from him in adultery. Upon his forcibly retaking her, she appointed a portion of the property to him in consideration of his promise to allow her to live separate. The execution of the power was held to be good. There was no discussion of the validity of the agreement to live apart. This case has been somewhat relied upon as upholding separation agreements, but the better opinion is that it merely decides that she might give the property to whom she chose, and that without any consideration. 2 Roper, Husb. & W. 294, note. *Fitzer v. Fitzer*, 2 Atk. 511 (decided in 1742), related to a contract to maintain the wife at a place other than her husband's residence. The decision was that the agreement of the husband to so far perform his marital duty was binding upon him. In 1747, Lord Chancellor Hardwicke said: "I do not find that this court ever made a decree for establishing a perpetual separation betwixt husband and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them; and even upon this unwillingly." *Head v. Head*, 3 Atk. 547. In 1757, a writ of habeas corpus was issued at the instance of John Wilkes to obtain the custody of his wife, who was living with her relatives under a separation agreement. The court held this agreement to be a formal renunciation by the husband of his marital right to seize her or force her back to live with him. *Rea v. Mead*, 1 Burr. 542. In view of the decision in *Lister's Case*, 8 Mod. 22, that he had no such right to renounce, the case cannot be considered a satisfactory authority. "When I see such dicta as occur in the case of *Rea v. Mead* falling from great men, and establishing a course of decision that can be demonstrated to stand upon no principle consistent with the law of the land, I feel great difficulty in deciding upon such authority." Lord Eldon in *St. John v. St. John*, 11 Ves. Jr. 523, 529. Its value is further impaired by a decision of the court of chancery, rendered the same year, dismissing a bill so far as it related to the setting up of an agreement to live separate. *Wilkes v. Wilkes*, 2 Dick. 791. In 1776 it was decided that a married woman living apart from her husband could not be sued as a *feme sole*, "except in the known excepted cases of abjuration, exile, and the like, where the husband is considered as dead, and the woman as a widow." *Hatchett v. Baddeley*, 2 W. Bl. 1079, 1082. The same conclusion was reached in another case, decided two years later. *Lean v. Schutz*, 2 W. Bl. 1195.

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subject (which became the common law of this state, so far as applicable to conditions here) was that as to the settlement of estates, suits of nullity of marriage, and such limited divorce as was then granted, a separation agreement was wholly void. It was refused recognition in chancery, and even in the law courts its efficacy was denied by the later cases. The only case actually deciding that such an agreement was a valid modification of the marriage contract was *Rea v. Mead*, 1 Burr. 542, and this was not followed in the cases in 2 W. Bl. Contemporary judges and text writers understood this to be the state of the law. It was so laid down by Lord Mansfield, who had been chief justice of the King's bench since 1756, and who, shortly after the decision of these cases, thought that the law should be held otherwise because of changed conditions. *Ringsted v. Butler*, 3 Dougl. 197, 203; *Barwell v. Brooks*, 3 Dougl. 371, 373; *Corbett v. Poelnitz*, 1 T. R. 5. The modern English doctrine differs widely from this, and an examination of its origin and development shows that it is a departure from the old law, and not merely an adaptation of recognized principles to changed conditions. It was immediately after the rendition of the decisions reported by Blackstone that changes in the law began to be made. In 1783, Lord Mansfield, while admitting that the common law was otherwise, held that an agreement for separation bound both parties as though they were sole. The point at issue was whether the wife could be sued alone. The fact that these agreements had come into use, and by them separate estates had been given to wives, who, for that reason, ought to be liable to suit, was considered to be of controlling importance. The question of the effect of the decision upon the marital status was not discussed. *Ringsted v. Butler*, 3 Dougl. 197. The object of the decision plainly was to accomplish what has been done here by legislation. It gave married women a limited power to contract and sue and be sued. A similar result was reached the following year. Lord Mansfield said: "The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated and possess separate property, a practice unknown to the old law." *Barwell v. Brooks*, 3 Dougl. 371, 373. In 1794 the new doctrine was affirmed in the leading case of *Corbett v. Poelnitz*, 1 T. R. 5. Lord Mansfield again justified the result by reasoning similar to that just quoted. These cases "introduced a new principle into the English law respecting the relation of husband and wife; but a principle that was familiar to the Roman law, and to the municipal law of most of the nations of Europe." 2 Kent, Com. 159. It was natural that this principle should appeal to Lord Mansfield, whose work is so distinguished for its upbuilding of commercial law. So long as he remained upon the bench these cases were followed. Accordingly, in 1788, Mr. Justice Buller said that separation deeds were valid when fairly en-

tered into, and that courts of equity had jurisdiction to enforce them. *Fletcher v. Fletcher*, 2 Cox, Ch. Cas. 99. In another case he said that it had been decided that by agreement the parties could make the wife a *feme sole* as to everything but the right of remarriage. *Compton v. Collinson*, 2 Bro. Ch. 377. The case went off upon another point, and the cases upon this question are not cited. Acquiescence in the doctrine of *Corbett v. Poelnitz* was by no means uniform. The case "gave rise to great scrutiny and criticism. It was considered as a deep and dangerous innovation upon the ancient law." 2 Kent, Com. 159. Lord Mansfield retired in 1788. His successor, Lord Kenyon, had passed most of his life as a law writer for more successful practitioners, and as a judge of an inferior court in a remote part of the Kingdom. His reverence for the law was as great as Mansfield's devotion to progressive ideas. The effect of the change is plainly traceable in the decisions upon this subject. In 1790 the case of *Compton v. Collinson*, 2 Bro. Ch. 377, having been sent out from chancery for the opinion of the court of common pleas upon the law, Lord Loughborough said that the question of a separated wife's liability to suit was still an open one. *Compton v. Collinson*, 1 H. Bl. 334. In the same year the ecclesiastical court again declared its adherence to the doctrine heretofore noticed. *Nash v. Nash*, 1 Hagg. Consist. Rep. 140. In 1792 the chancery court, following the dictum of Justice Buller in *Fletcher v. Fletcher*, decreed specific performance of articles of separation, in the face of the husband's offer to return and live with his wife. *Guth v. Guth*, 3 Bro. Ch. 614. This case was never considered sound. Soon after its decision Lord Loughborough denied equity jurisdiction of suits involving the marital relation. *Legard v. Johnson*, 3 Ves. Jr. 352, decided in 1797. Again, in 1792, Justice Buller expressed his adherence to the law as held by Lord Mansfield. A writ of habeas corpus was directed, at the instance of J. Greygoose, to bring up the body of his wife. It was alleged that she was detained by the defendant, and living with him in adultery. One defense set up, but not fully pleaded, was a separation contract, and *Rea v. Mead*, 1 Burr. 542, was relied upon. Justice Buller said: "If this case turn out on further examination to be like that in Burrow I am strongly inclined to think that this would be an answer to the writ. But that is not at present made out." *Rea v. Winton*, 5 T. R. 89. The chief justice was absent when this decision was rendered. The question was first considered by Lord Kenyon in 1794, when he declared that, if changes in the law were needed, they must be made by the legislature. The authority of *Corbett v. Poelnitz* was doubted, but the nonliability of the defendant was finally put upon other grounds. *Ellah v. Leigh*, 5 T. R. 679. This was after Justice Buller had retired from the King's bench, to accept a seat upon the common bench. Two years later, when speaking of

the same subject, Lord Kenyon said: "We must not, by any whimsical conceits, supposed to be adapted to the faltering fashions of the times, overturn the established law of the land. It descended to us as a sacred charge, and it is our duty to preserve it." *Clayton v. Adams*, 6 T. R. 604. A decision of his in 1793 has sometimes been referred to as inconsistent with the views expressed in the cases just cited. In a suit for the seduction of a wife the defense was set up that before the commission of the acts complained of the husband and wife had voluntarily separated. It was decided that this went to the merits of the action. *Weedon v. Timbrell*, 5 T. R. 357. The real ground of the decision was that this action is not maintainable by one who has abandoned the right upon which the action is founded. It does not decide that rights had been acquired under a valid contract. In harmony with this view, the same judge held that the fact that the husband was living in adultery was a bar to his suit. *Wyndham v. Wycombe*, 4 Esp. 16. While this decision was erroneous (*Cross v. Grant*, 62 N. H. 675, and cases cited), it is of importance as showing that *Weedon v. Timbrell* was not based upon the proposition that a separation agreement is a valid contract. In 1800 the question involved in *Corbett v. Poelnitz* came before Lord Eldon. He refrained from deciding it, because it was then pending in a case which was soon to be argued before all twelve judges; but he reviewed the cases, and manifestly was of the opinion that the decision of Lord Mansfield was unsound, and that *Rea v. Mead*, 1 Burr. 542, was not an authority for the validity of separation agreements. *Beard v. Webb*, 2 Bos. & P. 93. In the case there referred to the question was fairly presented for decision. It was twice argued before all the judges except Justice Buller, who was incapacitated by the illness of which he died shortly thereafter. All concurred in the opinion of the chief justice, overruling *Corbett v. Poelnitz*. Lord Kenyon said: "If . . . the parties were competent to contract at all, it would then become material to consider how far a compact could be valid which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married, and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out, and it was asked whether, after such an agreement as this, the temporal courts could prohibit if either party were to sue in the ecclesiastical court for the restitution of conjugal rights; whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction; whether they

could be witnesses for and against each other; whether they could sue and take each other in execution? And many other questions will occur to everyone to which it will be impossible to give satisfactory answer. For instance, it may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage while it subsists and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition; or how any power short of that of the legislature can change that which, by the common law of the land, is established as the course of judicial proceedings." *Marshall v. Rutton*, 8 T. R. 545. Chief Justice Eyre of the common pleas, who retired shortly after the first argument of the case, also concurred in this opinion.

It was thus that the law stood until the death of Lord Kenyon, in 1802. During that year a case arose involving the validity of an agreement between George Chambers, his wife, and certain trustees. The husband agreed that in case of a future separation the wife might live where she chose, without molestation from him, and that he would make certain payments to the trustees for her. A separation took place. The payments were not made, and the trustees sued on the covenant. The case was argued upon the general invalidity of separation agreements, and especially upon the point that an agreement looking to a future separation is illegal. Lord Ellenborough, Ch. J., held the contract to be valid, upon the ground that "the question which has been agitated appears to have been laid at rest for a long period by repeated decisions and the uniform practice of the courts." So far as the agreement related to a future separation, he declared it was no worse than others which had been upheld. *Rodney v. Chambers*, 2 East, 283. The case of *Nicholls v. Danvers*, 2 Vern. 671, was relied upon as authority for the proposition. It is true that, taking that case as reported by Vernon, such a holding might, perhaps, be inferred. There was such an agreement between the parties, but the court did not enforce it. Proceedings for cruelty had been had in the ecclesiastical court (1 Fonblanque, Eq. 97, note), and this was merely an application for alimony in accordance with the practice in the chancery courts after the Restoration. Thus, in two years' time, at the first term presided over by Lord Ellenborough, the conservative doctrines laid down by Lord Kenyon were disapproved of, and a decision was rendered of so radical a nature that it finds no support in the cases preceding it, and has not since been followed as an authority. A side light upon this case is seen in the reference to the wife as "the Honorable Jane Rodney," and to the husband as "George Chambers." In the following year Lord Eldon expressed a strong disapproval of *Rodney v. Chambers*, and of the whole doctrine of separation

agreements. He suggested, however, that the practice of upholding them to a limited extent (that is, as to property rights) might have become too firmly established to be overturned. The case went off upon a question of pleading, and was then settled by the parties. *St. John v. St. John*, 11 Ves. Jr. 526. In 1804 the master of the rolls recognized the validity of an agreement to pay an annuity to a separated wife, without discussion of the question. *Cooke v. Wiggins*, 10 Ves. Jr. 191. In 1806 the common pleas, by a divided court, held that an unfulfilled agreement to pay a separate allowance did not free the husband from liability for necessities thereafter furnished to his separated wife. *Nurse v. Craig*, 2 Bos. & P. N. R. 148. Sir James Mansfield, Ch. J., dissented, following the reasoning of Lord Mansfield in the earlier cases. In *Worrall v. Jacob*, 3 Meriv. 256, 268 (decided in 1817), Sir William Grant, master of the rolls, said: "I apprehend it to be now settled that this court will not carry into execution articles of separation between husband and wife. It recognizes no power in them to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution of that contract. It should seem to follow that the court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law." He also quotes from Lord Eldon, as follows: "If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject." *St. John v. St. John*, 11 Ves. Jr. 526. Accordingly, effect was given to an appointment by a separated wife of property deeded by the husband to trustees in consideration of their agreement to save him harmless from his wife's debts, etc. Shortly thereafter the ecclesiastical court again reiterated its adherence to the view that these agreements are void. "These courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenant as insignificant in a plea of bar, and leave it to other courts to enforce them, so far as they may deem proper upon a more favorable view (if they entertain it) of their consistency with the principles of the matrimonial contract." *Mortimer v. Mortimer*, 2 Hagg. Consist. Rep. 310, 318. In 1821 a bill in equity was brought for the cancellation of separation deeds upon the ground

that they were contrary to the policy of the law and void. The bill was dismissed for the reason that, if the plaintiff's contention was sound, it was as good a defense to the deed at law as in equity. Lord Eldon, again considering the question at some length, said: "I perceive that it seems to have struck everyone as extraordinary that such deeds should ever have been supported. . . . It has always seemed to me very difficult to hold these deeds legal. It seems to be admitted that a mere agreement to live separate is one that would not be deemed valid; and it seems strange, as Sir William Grant observes, that, if the primary object be vicious, these auxiliary provisions should be held good, and thereby that which the law objects to should be carried into effect." *Westmeath v. Westmeath*, Jac. 126, 141, 142. Other chancery judges entertained different views. Upon demurrer to a bill brought to recover arrears of an annuity due under a separation agreement, Richards, lord chief baron of the exchequer, said: "The question is, not what the law ought to be, but what it is; and the opinions of judges, however great and learned, are not to be put in competition with decisions determining the point and settling the law." Baron Graham said: "The language of regret is certainly found to be used by many of the judges; but the law is clearly established, and such demands have been constantly enforced." Notwithstanding this declared confidence in the settled state of the law, the chief baron also said that the case involved "a grave question, of too great importance to be disposed of on demurrer." *Ros v. Willoughby*, 10 Price, 2, decided in 1822. Cases following soon after this held that separation deeds are valid, so far as they relate to an annuity for the wife (*Jee v. Thurlow* [1824] 2 Barn. & C. 547; *Wilson v. Mushett* [1832] 3 Barn. & Ad. 743); but invalid if the separation does not take place until a future day (*Hindley v. Westmeath* [1827] 6 Barn. & C. 200). In 1835 the question first came before the House of Lords. A Scotch nobleman had obtained a divorce from his wife in the courts of that country, and one question was whether the wife was within the jurisdiction of the court, and duly served with process. The decision turned upon the fact as to her residence, and, as she was living apart from her husband under a separation agreement, it was argued that she was no longer domiciled where he was. In speaking of the agreement, Lord Brougham said: "What is the legal value or force of this kind of agreement in our law? Absolutely none whatever, in any court whatever, for any purpose whatever, save and except one only,—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach; no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence. So far has the 54 L. R. A.

legal presumption of cohabitation been carried by the common-law courts that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife,—may, even when he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him,—all is utterly insufficient to repel the claim which he makes for the loss of her society, without doing any act either in court or *in pais* to determine the separation or annul the agreement." Lord Lyndhurst said: "The strongest articles of separation may be drawn up and signed with full acquiescence of the husband and wife, yet he may sue her and she may sue him notwithstanding." *Warrender v. Warrender*, 2 Clark & F. 488, 527, 561. In the same year the case of *Waite v. Jones*, 1 Bing. N. C. 656, was decided in the court of common pleas. The plaintiff sued for money agreed to be paid in consideration of his executing a deed of separation from his wife. The defense was that the promise to execute the deed was illegal, and vitiated the whole agreement. The court held that agreements for future separation, or promises of payments to induce the same, are illegal; but that an agreement for a present separation may be valid. It was admitted that a promise to separate in consideration of a sum of money was not binding; but this agreement was upheld because it might be inferred that the separation had already taken place, and it did not affirmatively appear that this promise induced such action. Upon appeal to the exchequer chamber, the decision was affirmed by a divided court. Lord Denman, Ch. J., dissenting, disapproved of separation deeds, and said: "If I could venture to lay down the principle which alone seems to be safely deducible from all these cases, it is this: That when a husband has by his deed acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant." *Jones v. Waite*, 5 Bing. N. C. 341. The judgment was affirmed in the House of Lords, and the contract was upheld in a brief opinion. *Jones v. Waite* (1842) 4 Mann. & G. 1104.

From this time on it seems to have been the law of England that such contracts are enforceable, except as to the one provision, which is of their essence. Courts accept the rule, while acknowledging the lack of reason for it. "It is in vain to regret the perplexities in which the courts have found themselves involved by enforcing the minor and auxiliary parts of the agreement to separate, while they profess to repudiate the principal and essential part and motive of

it." *Frampton v. Frampton* (1841) 4 Beav. 287, 293. In 1848, the House of Lords held unequivocally that a separation agreement is a valid contract, and specific performance of the covenants of the deed was decreed. *Wilson v. Wilson*, 1 H. L. Cas. 538. The case goes solely upon the ground of recent decisions, admitting that the holding is opposed to earlier precedents. The deed was made to settle the wife's suit for nullity in the ecclesiastical court, and the case might have been distinguished on that ground. Shortly after this, Lord Romilly, master of the rolls, enjoined the breach of a covenant not to interfere with the wife, who was living separate. The upholding of separation deeds "in a great number of cases" is the only reason assigned for the decision. *Sanders v. Rodway* (1852) 16 Beav. 207. The doctrine of these later cases was not wholly approved of, and in 1858 the court declared that the very basis of the contract was an agreement which could not be enforced in any court. *Vansittart v. Vansittart*, 2 De G. & J. 249. In most cases, however, the general tendency towards upholding the agreement was followed. *Webster v. Webster*, 1 Smale & G. 489; *Randle v. Gould*, 8 El. & Bl. 457; *Williams v. Baily*, L. R. 2 Eq. 731; *Rowley v. Rowley*, L. R. 1 H. L. Sc. App. Cas. 63; *Gibbs v. Harding*, L. R. 3 Eq. 492. Lord Chancellor Westbury, in 1862, enjoined a suit for restitution which had been begun in the divorce court, contrary to the stipulation of a separation deed. The divorce court had succeeded to the jurisdiction of the ecclesiastical court in 1857 (20 & 21 Vict. chap. 85), and administered the law in a similar manner (Id. § 22). The chancellor justified the decision by reasoning that separation deeds were valid, although the ecclesiastical doctrine was different, because by a statute of Henry VIII. the ecclesiastical law was subordinated to the common law; that the decision of the House of Lords in *Wilson v. Wilson*, 1 H. L. Cas. 538, overruling the earlier cases, must be treated like a statute; and that, while a voluntary separation was an offense against the ecclesiastical law, it was not one against the common law, and therefore, the rights in controversy were only private, and public policy was not involved. *Hunt v. Hunt*, 4 De G. F. & J. 221. The case was appealed to the House of Lords, but no decision was rendered, as Mrs. Hunt died *pendente lite*. See *Brown v. Brown*, L. R. 7 Eq. 185, 191. The reasoning of this case does not seem to have been followed, but its conclusions have been adopted. In 1879, Sir William Jessel, master of the rolls, treated the question as settled by the later cases. "For a great number of years both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that husband and wife should agree to live separate; and it was supposed that a civilized country could not longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy, and other considerations arose, and peo-

ple began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately; and that was the view carried out by the courts when it became once decided that separation deeds were not *per se* against public policy." *Besant v. Wood*, L. R. 12 Ch. Div. 605. In that case the agreement provided that each party should have the custody of one child. Afterwards the father sued for and obtained custody of the one with the mother, the court treating the agreement touching that subject as void. Thereupon the wife sought to renew cohabitation, "but the court deemed that the policy of the law made her agreement for separation controlling over her, and the consideration for it void as to him. This exquisitely refined principle of high honor does not pertain to the laws of so young a people as we are." 1 Bishop, Mar. & Div. § 634a, note. In the same year it was again decided that an agreement not to demand restitution of conjugal rights is a valid contract, and that, since by the judicature act of 1873 all defenses are made available in the divorce courts that would be available in equity, the covenant is a bar to proceedings for restitution. *Marshall v. Marshall*, L. R. 5 Prob. Div. 19. Finally, in 1888, it was decided that a trustee is no longer necessary, and that the parties may make the contract directly with each other. *McGregor v. McGregor*, L. R. 20 Q. B. Div. 529. This decision is expressly put upon common-law grounds, and in no way depends upon statutes enlarging the powers of married women.

It appears that the present position of the English courts has been reached by means of a gradual abandonment of common-law doctrines. It originated in the undoubted proposition that an agreement by the husband to support his wife is not in violation of marital obligation, but a part performance of the duties thereby imposed. From this has come the whole elaborate system of annuities and other property arrangements, each finding its real, if not ostensible, consideration in an agreement to live separate. For a time some other consideration was always shown; as, for example, the promise of a third person to furnish support to the wife. Later this concession to the old law was abandoned; and, while courts acknowledged the inconsistency of their position, they enforced property arrangements that depended solely upon a principal agreement which was declared to be invalid. Nor did fallacious reasoning stop here. The argument next advanced was that, while it was true courts in words denied the validity of these agreements, by judgments enforcing provisions dependent upon them the judges really decided that separation agreements were good contracts. It was not without some vigorous protest that this line of argument was accepted as sound, but it finally prevailed. In one phase after another it

was adopted, until now it seems to be held that as to everything but the right to remarry the parties may divorce themselves. This wide departure from the common law has been induced by conditions which do not exist here. The arrangement of property matters through trustees, which forms so large a part of English conveyancing that half of the property in England is vested in nominal owners (2 Kent, Com. 182), is practically unknown in this state. It is to the conveyancers, and their eagerness in seizing upon each new opportunity for arranging property matters, that the present results are largely due. Running through many of the opinions is found the idea that these conveyances are now so common that the titles to large amounts of property depend upon them, and therefore they cannot safely be disturbed. Another fruitful source of such agreements was that there was practically no divorce from the bonds of matrimony in England. These causes do not exist here. The decisions which were in part induced by such conditions and in part by the notions of the times as to "social policy" (*Wennhak v. Morgan*, L. R. 20 Q. B. Div. 635), are not authority here when in conflict with the common law. The doctrine adhered to by Lord Kenyon, that if changes in the law are needed, they must be made by the legislature, still prevails in this state. The modern English rule has not been generally adopted in this country. Few, if any American courts have ever gone so far as to enforce an agreement to live in separation, or have even sustained covenants incident to such an agreement, except upon facts assumed to be sufficient to avoid a holding that the promise to live apart is valid. In a few states it is declared that these agreements are wholly void. *Collins v. Collins*, 62 N. C. 153, 93 Am. Dec. 606; *Simpson v. Simpson*, 4 Dana, 140, 142. The general doctrine of these cases does not seem to differ materially from that of most of the American authorities, but the application of the rule to contracts in part dependent upon an illegal covenant is more logical and satisfactory. Some of the late decisions in New York approach more nearly to the modern English theory than those in other states. The great number of reported cases in which these agreements are involved in one way or another shows that they have come to be in common use there. As in England, the law supporting them has developed from small beginnings. In 1811, in the case of *Baker v. Barney*, 8 Johns. 72, 5 Am. Dec. 326, it was decided that a husband who had provided suitably for a separated wife was not liable for goods thereafter furnished to her, but that, in the absence of such provision, he was liable for necessities, in spite of her agreement to the contrary. There was no discussion of the validity of agreements to live separate, and the case is disposed of in a brief *per curiam* opinion. Two years later it was relied upon as an authority for the proposition that upon the execution of a separation agreement the marriage union "essentially ceased," and therefore the hus-

band and wife were competent witnesses for or against each other. *Fenner v. Lewis*, 10 Johns. 38. The weight of this case is much lessened by the later opinion of the then chief justice. "The general principle is established that the law does not authorize or sanction a voluntary agreement for a separation between husband and wife. . . . A private separation is an illegal contract, a renunciation of stipulated duties from which the parties cannot release themselves by any private act of their own. . . . Nothing can be clearer or more sound than this conjugal doctrine." 2 Kent, Com. 176, note b. It was next held that a bond for separate maintenance, which was assumed to be based upon a contract to continue to live apart, was valid and enforceable so long as the separation continued. *Baker v. Barney*, 9 Johns. 72, 5 Am. Dec. 326, was relied upon, and no distinction was noted between agreements which do and those which do not depend upon a covenant to live apart. *Shelthar v. Gregory* (1829) 2 Wend. 422. Relying upon these cases, Chancellor Walworth, although joining in Lord Eldon's expressions of regret at the state of the law, held that an agreement for an immediate separation was valid if made through a trustee. *Carson v. Murray* (1832) 3 Paige, 483. The opinion also stated that a return to cohabitation would restore the husband to all his marital rights. The logic by which it is held that the mere agreement to live apart is invalid, and that the covenant as to maintenance can be sustained only through a trustee, leads inevitably to the conclusion that the covenant does not in any way affect marital rights. When it is also held that a return to cohabitation restores such rights, and puts an end to the contract with the trustee, it becomes evident that the true reason which led the court to sustain the agreement in the first instance was not given. If the covenant did not affect marital rights, its rescission could not restore them. If the rescission of the covenant was a necessary accompaniment of the restoration of marital rights, its original execution must have had to do with taking them away. This decision fairly illustrates the course taken in other cases in the court of chancery. *Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84; *Heyer v. Burger*, Hoffm. Ch. 1; *Champlin v. Champlin*, Hoffm. Ch. 55; *Anderson v. Anderson*, 1 Edw. Ch. 380; *People v. Merocein*, 8 Paige, 47. These cases were not always approved of. In *Merocein v. People*, 25 Wend. 64, 77, Justice Bronson said: "It is well worthy of consideration whether all agreements based on the voluntary separation of husband and wife are not contrary to law, and absolutely void." Chief Justice Nelson, in delivering the opinion of the court denying to such an agreement the effect of placing the wife on the footing of a *feme sole* as to suits at law, said that in courts of law the agreement was "condemned as waste paper by the soundest principles of policy, morality, and law." *Beach v. Beach*, 2 Hill, 260, 38 Am. Dec. 584. In many of the later cases agreements for support and as to

property have been upheld, apparently without much regard to whether they in fact depended upon a covenant to continue to live separate (*Carpenter v. Osborn*, 102 N. Y. 552, 7 N. E. 823; *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. 500; *Galusha v. Galusha*, 116 N. Y. 635, 6 L. R. A. 487, 22 N. E. 1114; *Clark v. Fosdick*, 118 N. Y. 7, 6 L. R. A. 132, 22 N. E. 1111, 23 N. E. 136), until the court declared in terms that "it is settled in this state that a contract between a husband and wife who have separated to thereafter live apart is not void on the ground of public policy" (*Duryea v. Bliven*, 122 N. Y. 567, 25 N. E. 908). This proposition is perhaps modified or explained by the very recent opinion in which the court said that "it must be borne in mind that a contract between husband and wife is void at law, and upheld solely in equity, and then not in every case, but only when the provision for the maintenance of the wife or children is suitable and equitable." *Hungerford v. Hungerford*, 161 N. Y. 550, 553, 56 N. E. 117, 118. In some other late cases agreements of this sort are disapproved of. *Poillon v. Poillon*, 49 App. Div. 341, 63 N. Y. Supp. 301; *Whitney v. Whitney*, 4 App. Div. 597, 36 N. Y. Supp. 891, 39 N. Y. Supp. 1136; *Friedman v. Bierman*, 43 Hun. 387.

In Massachusetts, actions to enforce the husband's agreement to pay money to or for a separated wife have been sustained. *Page v. Trufant*, 2 Mass. 159, 3 Am. Dec. 41; *Holbrook v. Comstock*, 16 Gray, 109; *Fox v. Davis*, 113 Mass. 255, 18 Am. Rep. 476. The question of the validity of such an agreement when inseparable from a covenant to continue to live apart arose in *Albee v. Wyman*, 10 Gray, 222. The court considered the English rule to be open to grave objections, and disposed of the case upon other grounds. In a recent case the agreement was sustained because the covenant to pay money for support was separable from others which were objectionable. *Grime v. Borden*, 166 Mass. 198, 44 N. E. 216.

In the United States courts agreements for a separate maintenance are upheld. Whether they would be if they depended upon an agreement to continue to live apart is a question the court was not called upon to consider, and it declined to discuss the subject in any aspect the case did not present. *Walker v. Walker*, 9 Wall. 743, 19 L. ed. 814.

The question was early before the Connecticut court, and gave rise to much discussion. It was finally decided, by a vote of five to four, that a contract for separate maintenance was valid if made for what the court termed "proper cause;" and that, while "there may be cases of separation by agreement, attended with such circumstances and resting on such foul principles that good policy will not support them, when a case is claimed to be of that description it is incumbent on those who claim it so to show it." *Nichols v. Palmer*, 5 Day, 47, 52, 53. A discretionary power of this kind is broad, and somewhat novel. The practical result

of exercising it would be what is set forth in one of the dissenting opinions: "It is true, it has been said, that such separation should be admitted only in cases of the most urgent necessity, and for the strongest reasons; but no line of demarcation can be drawn. This decision proclaims to all who are married that they have the right to separate by mutual consent, as whim, fancy, or passion may dictate." *Id.* 60. The true rule is stated in the dissenting opinion of Judge Ingersoll: "The marriage contract cannot, *ad libitum*, be dissolved by the parties. Nay, I presume in every case application must be made to a forum appointed by law for the purpose, to effect a dissolution. It follows, then, of course, that every agreement the consideration of which is the dissolution, or the intended dissolution, of the marriage contract, is void, and cannot be enforced in a court of justice. What, then, is a dissolution of it? I should suppose an agreement to live separately, and to perform none of the duties to each other, which they solemnly promised to perform when the marriage took place, is a dissolution of the contract, so far as the parties can dissolve it. If this be a just position, every agreement to carry into effect such separation must be against law. The agreement in question, being made to carry into effect such separation, by fair logical deduction, is against law and void." *Id.* 61. In a recent case the court of that state said of these contracts: "The principle upon which they are sustained is, not that the separation should be enforced, nor that it is lawful for the parties to contract to separate, but that when they are living apart for causes rendering such separation reasonably necessary the agreement of the husband to perform his duty to furnish support for his wife should be carried out." *Boland v. O'Neil*, 72 Conn. 217, 44 Atl. 15. "After a marriage is entered into, the relation becomes a status, and is no longer one resting merely on contract. It is the relation fixed by law in which the married parties stand to each other, towards all other persons, and to the state. It continues so long as the parties both live, and is one from which they cannot separate themselves by their own agreement, or by their own misconduct. This status can only be dissolved by the assent of the state, which is ordinarily indicated by the judgment of a competent court. When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair." *Andrews, Ch. J., Allen v. Allen*, 73 Conn. 54, 49 L. R. A. 142, 46 Atl. 242. According to these decisions, the present law of that state is more nearly ex-

pressed in the dissenting opinions in *Nichols v. Palmer*, 5 Day, 47, than in the prevailing ones.

That a contract simply for separate maintenance is valid may be said to be the general American rule. *Randall v. Randall*, 37 Mich. 563; *Henderson v. Henderson*, 37 Or. 141, 48 L. R. A. 766, 60 Pac. 597, 61 Pac. 136; *Emery v. Neighbour*, 7 N. J. L. 142, 11 Am. Dec. 541; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926; *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295; *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171; *Dutton v. Dutton*, 30 Ind. 452; *Robertson v. Robertson*, 25 Iowa, 350; *Carey v. Mackey*, 82 Me. 516, 9 L. R. A. 113, 20 Atl. 84; *Roll v. Roll*, 51 Minn. 353, 53 N. W. 716; *Helms v. Francis*, 2 Bland, Ch. 544, 20 Am. Dec. 402; *Squires v. Squires*, 53 Vt. 208, 38 Am. Rep. 668; *Gaines v. Poor*, 3 Met. (Ky.) 503, 79 Am. Dec. 559; *Chapman v. Gray*, 8 Ga. 341; *McLaren v. Bradford*, 52 Ga. 648; *Garver v. Miller*, 16 Ohio St. 527; *Hutton v. Hutton*, 3 Pa. 100; *Buckner v. Ruth*, 13 Rich. L. 157; *Goodrich v. Bryant*, 5 Sneed, 325; *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399. In most of the cases where the question has been discussed the decisions have been put upon grounds other than that of upholding an agreement to live separate. In a few cases courts have been misled by the fact that an agreement to maintain is valid into supposing that one to live separate is equally so. Even these courts agree that, if there be a covenant for future separation, the whole deed is void. Yet this has no more tendency to promote a method of living not approved by law than an agreement to continue a present separation. The distinction, so far as one exists, originated from the rule that a mere agreement to maintain a separated wife was all that was at first recognized. This was put upon the ground that the husband's agreement was one to do what was a part of his duty. It was not the fact that the agreement depended upon an existing separation, but that it neither depended upon nor induced separation of any kind, either present or prospective, that made it a valid contract. When there was an existing separation, conveyancers were skilful enough to so draw the agreement that it appeared free from objectionable features, and so it would be upheld; but, when there was only a contemplation of separation, this was not so easily accomplished. The real motive and consideration then appeared in the contract, and for this cause it would be condemned by the court. Hence it came to be thought that, if the parties had actually separated, they might make a legal contract to continue to live apart. "Out of these . . . propositions,—namely, that married parties cannot validly contract to live in separation, yet the husband can obligate himself to render her a maintenance wherever she resides—comes the entire doctrine of separation under articles. When we look at the cases we find that they are sometimes discordant, and sometimes the particular decision proceeded on a misapprehension of true legal distinctions; but, on the whole, 54 L. R. A.

the law as adjudicated is plainly so in our country, and it was so in England until of late, however it may be there now." 1 Bishop, Mar. & Div. § 633. This doctrine is the only one which can be sustained if it be conceded that the marital status is one in which the state has an interest, and over which it may exercise a control. No intermediate rule ever has been or can be justified by any process of reasoning. If it be true that the rights involved are only private, why stop at the right of remarriage, or object to decrees of divorce by agreement? If it is good law that by their own act husband and wife may cease to sustain that relation, and may thus become as strangers, what is the principle that forbids one of them to remarry? No answer to these questions has been vouchsafed. The courts which have announced the extreme decisions have thus far refrained from considering the end to which their logic leads. In avoidance of these questions and similar ones asked long ago by Lord Kenyon, it is said that public sentiment has changed, social policy is different, and courts must fashion the law to the demands of the times. However satisfactory this line of argument may be in England, it cannot be followed here. "To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative. One of the fundamental principles of all our government is that the legislative power shall be separate from the judicial." *Dash v. Van Kleeck*, 7 Johns. 477, 498, 5 Am. Dec. 291. The authorities in this state, so far as they have touched upon the question, follow the common law. In *Pidgin v. Cram*, 8 N. H. 350, the husband and wife had separated, and the wife was living with her father, who had covenanted with the husband to support her. It was decided that this agreement did not free the husband from his obligation to support his wife. So long as its covenants were performed, he would not be liable for goods furnished to her, because he was in this way performing his duty. If, however, she should be driven from her father's house by the inmates thereof, the husband would be liable to one who thereafter supplied her with necessaries. Unless she leaves his house against his will, he is bound to support her, and she takes his credit with her. *Rumney v. Keyes*, 7 N. H. 571; *Allen v. Aldrich*, 20 N. H. 63. *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208, was a suit upon a note given in consideration of a promise not to contest a libel for divorce. Justice Wood said: "No such agreement, even if executed, can form a valid consideration for either a verbal or written promise. The great and principal object of the agreement made between the parties was to bring about a dissolution of the marriage contract, and to put an end to the various duties and relations resulting from it. Any contract having any such purpose, object, and tendency cannot be, in law, sustained, but must be regarded as being against sound public policy, and consequently illegal and void. The marriage relation is one to be encouraged

and maintained when formed. Such is the well-settled policy of the law; and its dissolution or determination is not to be left to depend upon the caprice of the parties. If determined, it must be done in accordance with some positive enactment of law, and in due course of judicial proceedings. The good order and well-being of society require . . . this." The then recent cases upholding separation agreements were reviewed, but no opinion of their soundness was expressed beyond the suggestive statement that "in this state, at least, a separation *a vinculo* can only be effected through a decree of the courts of law." From this it may well be inferred that the court did not consider those cases as in harmony with the law here. Similar views of the nature of the status have been expressed in other cases. *Clark v. Clark*, 10 N. H. 380, 34 Am. Dec. 165; *Cross v. Cross*, 58 N. H. 373; *Cross v. Grant*, 62 N. H. 675. So far as the English ideas are outgrowths of the early form of divorce *a mensa et thoro*, they are not applicable here. Limited divorces were never granted in this state. *Parsons v. Parsons*, 9 N. H. 309, 317, 32 Am. Dec. 362. As early as 1791 absolute divorces were here granted for the causes for which limited divorces were granted under the English practice. Act Feb. 17, 1791; Laws 1806, p. 280. In no reported case in this state has an agreement to live separate been passed upon favorably. What has been said upon the subject has uniformly been opposed to the validity of such a contract. The theory that marriage is only a civil contract is also disapproved of. "It is an institution of society, having its foundation in civil contract." *Cross v. Grant*, 62 N. H. 675, 684. The whole doctrine is summed up by Chief Justice Doe in a single sentence: "The marriage contract may be broken by either party, with or without the consent of the other; but it cannot be rescinded or modified by them." *Ferren v. Moore*, 59 N. H. 106.

It is not necessary to now consider how far the statutory power of husband and wife to contract as to property matters extends, or whether their agreement to release prospective rights in each other's estates could, in any event, be enforced. Compare *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282, with *Reed v. Blaisdell*, 16 N. H. 194, 41 Am. Dec. 722; *Cutter v. Butler*, 25 N. H. 343, 57 Am. Dec. 339, and *Hayes v. Seavey*, 69 N. H. 308, 46 Atl. 189. Conceding that the right extends to the release of every property interest, present and prospective, it cannot avail this plaintiff. Modern legislation enlarging the rights of married women as to contracts and torts has not destroyed the marital status, as defined by the common law. "There is nothing in the series of statutes by which her rights and privileges have gradually approximated an equality with those of her husband that abrogates the marital rights of trust and confidence incident to the relation in all stages of society. . . . The obligations, the disabilities, and the privileges inherently consequent upon the

marriage union remain unchanged. . . . While unjust disabilities of the wife have been removed, there are implied stipulations of the contract which each party remains justly disabled to violate." *Laton v. Bacon*, 64 N. H. 92, 95, 96, 6 Atl. 37, 39, 40. "The incidental changes of conjugal rights and duties are such only as are reasonably and necessarily implied." *Cross v. Grant*, 62 N. H. 675, 685. "These statutes have not taken away the right of either party to the marital contract to have the affection, society, and aid of the other." *Ott v. Hentall* (N. H.) 51 L. R. A. 226, 47 Atl. 80. An agreement renouncing marital rights is void. An agreement touching property rights may be valid. If covenants of each kind occur in the same agreement, its validity must be determined by the ordinary rules. If the promises are separate, and the consideration is divisible, the legal part of the contract is upheld, but, if the consideration is entire, the whole must fail. *Bisby v. Moor*, 51 N. H. 402. Applying this test to the agreement in the present case, the result is at once apparent. The husband agreed to separate on friendly terms, and to make no demand on the wife nor her property after that date. The wife made a similar agreement on her part. The agreement to live separate is not distinct from that as to property. There is no separate promise, upon separate consideration, as to the legal and illegal parts. They are blended together without discrimination. The wording of the writing and the facts surrounding the separation all tend to show that the dissolution of the marriage relation was the object the parties had in view. All other matters were merely incidental to this main purpose. The agreement was an attempt by a husband and wife to do that which the court could not have done, either upon the application of one of the parties or with the consent of both. They were desirous of dissolving the marital relation; and, although no cause for divorce existed, they entered into this agreement, whereby each attempted, not only to release all the rights then held as against the other, but also to absolve the other from all duties attendant upon the married state. It is not an agreement made up of distinct parts, but a harmonious whole, the main object of which is the dissolution of the marriage tie. It had its inception in the wife's declaration of her intention to leave her husband's house. The agreement as to property is merely incidental, while anything in the nature of a provision for the support of the wife is wholly lacking. It is hardly open to doubt that, if they had intended to continue to live as husband and wife, they would not have contracted as to property rights. In any event, it does not appear that there would have been such a contract, or that the agreement on that subject is independent of the illegal promise to separate. "Whether the illegality extends to the whole or only a part of the consideration is immaterial. The contract was entire, and in such case the whole is void if tainted with illegality in any part." *Weeks v. Hill*, 38 N.

H. 199, 203; *Hinds v. Chamberlain*, 6 N. H. 225, 227. The executor also contends that his first reason for appeal (that the defendant has no interest in the estate) is well founded, because the husband "willingly abandoned his wife, and has absented himself from her, or has wilfully neglected to support her . . . for the term of three years next preceding her death." Pub. Stat. chap. 195, § 18. The object of this statute is to deprive a wrongdoer of certain rights which he would otherwise possess. It applies to a "deserting husband" (*Martin v. Swanton*, 65 N. H. 10, 11, 18 Atl. 170, 171), and there is no desertion where there is a separation by agreement (*Moores v. Moores*, 16 N. J. Eq. 275, 280; 1 Bishop, Mar. Div. & Sep. § 1662). There was here no abandonment and no wilful neglect to support, in the sense in which those terms are used in the statute. There was no denial by the husband of any right which the wife desired to enjoy. She was not abandoned, but merely permitted to go the way

of her own choosing. She was not wilfully neglected, but was left to her own resources at her own request.

It is also contended that the defendant's rights are cut off because in certain cases the wife of a nonresident may convey her property as though sole. Pub. Stat. chap. 176, § 8. The object of this statute is to allow the wife, in such a case, to manage her property as she chooses. It looks wholly to transactions during life. Its objects would not be promoted by a construction which would include a disposition of property by will. The language used aptly expresses the purpose; for while, in a technical sense, a will may be said to be a conveyance, the ordinary rule is that it is not included when that term is used. *Jenckes v. Smithfield Probate Ct.* 2 R. I. 255, 256; *May v. Slaughter*, 3 A. K. Marsh. 509.

Appeal dismissed.

All concur.

KENTUCKY COURT OF APPEALS.

John DICKINSON, *Appt.*,
v.
William P. JOHNSON *et al.*

(.....Ky.....)

1. Public officers receiving no more than \$5,000 per year for their services should not, on grounds of public policy, be required by the courts to set apart any part of their salaries for the payment of their debts.
2. Investments of salary by a public officer in real estate are not exempt from the claims of antecedent creditors, even though the conveyance has been taken in the name of his wife.

(March 6, 1901.)

NOTE.—*Exemption of officer's salary from claims of his creditors.*

- I. Creditors' bills and supplementary proceedings.
 - II. On the ground of public policy.
 - III. Statutory provisions.
 - IV. School teacher's salary.
 - V. Officers of municipal corporations in Kentucky.
 - VI. Summary.
- I. Creditors' bills and supplementary proceedings.

In *DICKINSON v. JOHNSON*, which was a proceeding in aid of execution, it was held that the clerk of a county court could not be required to set apart from time to time a portion of his salary for the payment of the claims of his creditors. This was on the ground that, as the Constitution prohibits any officer except the governor from receiving a greater compensation than \$5,000 per year, it would be contrary to public policy to subject his salary to the claims of his creditors. But it was held that salary invested in real estate could be subjected to the creditor's claim. The court said that they had

A PPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendants in an action to subject property belonging to them to the payment of a judgment which had been recovered by plaintiff against William P. Johnson. *Reversed.*

The facts are stated in the opinion.

Messrs. W. W. Thum and Stanley E. Sloss, for appellant:

Under the Kentucky Civil Code of Practice, § 439, the salary of a public officer, even though he be an officer of the state or county, and even though his salary is not liable to attachment or garnishment, may be sequestered by the court, and applied in satisfaction of the judgment against him.

decided that investments of pension money could be subjected to the claims of creditors for an antecedent debt. "And it would be entirely inconsistent with such a rule to hold that officers' fees or salary invested in real estate should be exempt from antecedent debts, even if we were deciding—which we do not—that an officer's fees or salary are exempt by statute from the debts of the officer."

This action appears to have been an effort to anticipate future salary, as the case does not indicate that there was any money due at the time. The ruling in this case does not seem to have been on the ground that a creditor cannot require his debtor to labor and thus pay the debt, but on the ground that "public policy demands that the courts refuse to require any officer to set apart any part of his salary for the payment of his debts." If the salary had been earned the ruling might have been different. In this state the cases hold that a school teacher's salary and jailer's fees cannot be garnished, but that municipal officers' salaries may be.

There is some conflict of authority in regard to whether an officer's salary that has been earned is subject to the claims of his creditors in proceedings in aid of execution or in supplementary proceedings.

Singer & T. Stone Co. v. Wheeler, 6 Ill. App. 225; *Pendleton v. Perkins*, 49 Mo. 566; *Dill. Mun. Corp.* 101, and notes; 2 Shinn, *Attachm.* § 501; *Luthy v. Woods*, 1 Mo. App. 171; *M'Dermutt v. Strong*, 4 Johns. Ch. 690; *Lyell v. St. Clair County*, 3 McLean, 580, Fed. Cas. No. 8,621; *Furlong v. Thomassen*, 19 Mo. App. 364; *Tarbell v. Griggs*, 3 Paige, 208, 33 Am. Dec. 790; *Browning v. Bettis*, 8 Paige, 568; *Smith v.*, 4 Edw. Ch. 653; *McCoun v. Dorsheimer*, Clarke, Ch. 144; *Hadley v. Peabody*, 13 Gray, 200; *Riggin v. Hillard*, 56 Ark. 476, 20 S. W. 402; *Knight v. Nash*, 22 Minn. 452; *Whidden v. Drake*, 5 N. H. 13; *Bray v. Wallingford*, 20 Conn. 416; *Newark v. Funk*, 15 Ohio St. 462; 5 Enc. Pl. & Pr. pp. 393, 409, 446; Ky. Civil Code of Practice, § 439; *Heiatt v. Barnes*, 5 Dana, 222; *Samuel v. Ellis*, 12 B. Mon. 483; *Samuel v. Salter*,

3 Met. 260; *Farmers' Bank v. Morris*, 79 Ky. 157; *Robion v. Walker*, 82 Ky. 61; *Coakley v. Underwood*, 13 Ky. L. Rep. 654, 17 S. W. 7; *Johnson v. Elkins*, 90 Ky. 163, 8 L. R. A. 552, 13 S. W. 448; *Hudspeth v. Harrison*, 6 Ky. L. Rep. 304; 3 Barbour's Digest, p. 547, § 23; *Rodman v. Musselman*, 12 Bush, 354, 23 Am. Rep. 724; *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 45 L. R. A. 246, 33 S. E. 516; *Roe v. Scanlan*, 98 Ky. 24, 32 S. W. 216; *Hinsdale-Doyle Granite Co. v. Tilley*, 10 Fed. 799; *Teeter v. Williams*, 3 B. Mon. 562, 39 Am. Dec. 485; *Kennedy v. Aldrich*, 5 B. Mon. 141; *Speed v. Brown*, 10 B. Mon. 108; *Sinking Fund Comrs. v. Northern Bank*, 1 Met. (Ky.) 182; *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215; *New Orleans v. Fisher*, 34 C. C. A. 15, 63 U. S. App. 455, 91 Fed. 574.

The real estate standing in Mrs. John-

In *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661, holding that a body politic and corporate cannot be required to answer as to its indebtedness in a proceeding supplementary to execution, and that the wages, fees, or salaries of a county auditor, due from the county, cannot be subjected, in the hands of the county, to the payment of his debts under proceedings supplementary to execution, it was said: "All the cases we have consulted upon these questions seem to rest their decisions upon a branch of the great public principle which exempts an ambassador, a foreign minister, charge d'affaires, consul, members of a legislature, or other public functionaries, while in office and in the public service, from civil arrest or other legal embarrassment at the suit of a private party. Without such a rule, it would frequently be in the power of an individual to endanger the public interests, or even check the wheels of government, which would be a far greater public evil than the occasional delay, or even sacrifice, of a private right. The exemption is not given to the person for a private advantage, but granted to the office from public necessity." It was claimed that there could be no exemption unless it was specifically claimed. The court said: "In an equitable proceeding, like the present, seeking specific property, when the finding is that the defendant is a resident householder, and shows that he had no property subject to execution over the amount exempt by law, the court will not grant the plaintiff relief, against which it is apparent that the defendant, in another or further proceeding, has a good defense at law. The court having jurisdiction of the whole matter grants the entire relief."

And in *Roeller v. Ames*, 33 Minn. 132, 22 N. W. 177, it was held in proceedings supplementary to execution that a receiver would not be appointed, nor would the defendant be required to assign to the receiver a warrant directed to be drawn for his past salary. It was also held that the fact that the mayor was out of office would not change the rule, as public policy would forbid that such salary be subjected to creditors. In this case it was said that numerous authorities hold that municipal corporations are exempt from garnishment; but it has also often been held that the salary of a public officer, due him from a municipal corporation, cannot be intercepted by his creditors on the grounds that officers are public servants; that the public have a right to fill those offices; that these officers are usually dependent on their salary for their support, and that the efficiency of their services may depend upon the 54 L. R. A.

prompt payment of their salaries. The court said that the doctrine rests upon an entirely different reason from that assigned for exempting municipal corporations from garnishment, and is independent of the question where the corporation or its officers are made parties to the proceedings, and that frequently these reasons have been confounded by courts and in the citation of authorities.

In *Driscoll v. Kelly*, 5 Ohio N. P. 243, in proceedings in aid of execution, it was held that under the Ohio statutes the necessary earnings for three months were exempt. See subd. III., *Statutory provisions*.

Under lord's act, 32 Geo. II. chap. 28, § 13, providing that a prisoner before he is discharged shall deliver in a schedule of all his estates, real or personal, or which he or any person in trust for him is interested in or entitled to, the creditors cannot compel an officer to include his half pay in his schedule as bankrupt. *Flarty v. Odium*, 3 T. R. 681. In this case Kenyon, Ch. J., said: "It would therefore be highly impolitic to permit them to be assigned, for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty." Buller, J., said: "If the question had been whether or not the pay which was actually due might be assigned, I should have thought it, like any other existing debt, assignable; but that does not extend to future accruing payments."

In *Es parte Butler*, 1 Atk. 210, 1 Amb. 73, where an application was made for the sale of the office of under-marshal for the benefit of creditors, under the bankrupt law, the question was whether the office is of such a nature that the creditors can lay hold of the salary belonging to it. It was held that the assignees could sell the office of under-marshal of the city of London as it is not within the statute of Edw. VI., which concerns the execution of justice, and that if the bankrupt refused to comply with the order substituting the purchaser he would be committed to the Fleet until he complied. The Lord Chancellor said that he had no doubt but that he had the power to lay his hands upon the pay of an army officer for the benefit of his creditors, if he should become bankrupt. The effect of this decision had been overruled in *Flarty v. Odium*, 3 T. R. 681.

But after an official was out of office and had sued the municipal corporation for fees and emoluments, it was held that whatever of exemption may have inhered in his original claim had been lost in this new and radically different form which it had assumed at his instance, and as the result of hostile litigation instituted by him,

son's name was really bought with the defendant's (W. P. Johnson's) money, and the attempt to put the title in her should be adjudged fraudulent, and the property sold to satisfy this debt.

Iavelle v. Clark, 18 Ky. L. Rep. 754, 38 S. W. 481; *Allen v. Russell*, 78 Ky. 108; *Adams v. O'Kear*, 80 Ky. 129; *Dohoney v. Dohoney*, 7 Bush, 217; *Brady v. Briscoe*, 2 J. J. Marsh. 212; *Trimble v. Ratcliff*, 9 B. Mon. 511; *Enders v. Williams*, 1 Met. (Ky.) 346; *Duhme v. Young*, 3 Bush, 343; *Lewis v. Taylor*, 96 Ky. 556, 29 S. W. 444; *Hurd v. Bickford*, 85 Me. 217, 27 Atl. 107; *Southworth v. Edmands*, 152 Mass. 203, 9 L. R. A. 118, 25 N. E. 106; 2 Pom. Eq. Jur. 749; *Trefethen v. Lynam*, 90 Me. 376, 38 L. R. A. 190, 38 Atl. 335; *Bogges v. Richards*, 39 W. Va. 567, 26 L. R. A. 537, 20 S. E. 599; *Edelmuth v. Wybrant*, 21 Ky. L. Rep. 929,

53 S. W. 528; *O'Kane v. Vinnege*, 21 Ky. L. Rep. 1551, 55 S. W. 711.

The salary of even a state officer may be reached by a proper proceeding.

Though the salaries of officers are not liable to attachment, they can yet be reached by creditor's bill.

Speed v. Brown, 10 B. Mon. 108; *Newark v. Funk*, 15 Ohio St. 462; *Pendleton v. Perkins*, 49 Mo. 565; *Furlong v. Thomssen*, 19 Mo. App. 364; *Singer & T. Stone Co. v. Wheeler*, 6 Ill. App. 225; *Browning v. Bettis*, 8 Paige, 568; *Kingman v. Frank*, 33 Hun, 471; *McCoun v. Dorsheimer*, 1 Clarke, Ch. 144; *Thompson v. Nixon*, 3 Edw. Ch. 457; *Smith v. ———*, 4 Edw. Ch. 653; *Clark v. Bert*, 2 Kan. App. 407, 42 Pac. 733; *Riggin v. Hillard*, 56 Ark. 476, 20 S. W. 402.

Baird v. Rogers, 95 Tenn. 492, 32 S. W. 630. In this case the court said: "He stands now on the same level with creditors of the corporation whose judgments rest on general indebtedness. And, as to one of these, we do not think it could be maintained that he could successfully insist upon this exemption for his protection in the event an effort was made to reach his judgment by one of his creditors. It may be that the corporation might do so for its own relief, upon the authority of the cases before referred to, but, if so, it is clear that this right would be one personal to it, and one which the defendant debtor could not call into activity, of his own motion, for his own defense."

And in *Mays v. Frazer*, 3 Tenn. Ch. 413, it was held that a judgment creditor may upon the return of an execution "No goods," file a bill in chancery to reach money in the hands of the present clerk of the supreme court, collected for the judgment debtor, being fees due for services rendered by him as former clerk of the supreme court. The bill in this case was held not demurrable as it did not show that the money was held by the present clerk by virtue of his office, nor subject to the orders of the court. The court said: "It may be that the money is held by the defendant by virtue of his office, and subject to the orders of the court, but the bill does not directly aver the fact, nor state such a case as fairly implies the fact."

And where all services to entitle a Federal marshal to his salary had been rendered at the time of filing complainant's bill for a receiver, it was held that such salary may be reached by the creditor, although it had not become actually payable when the bill was filed. *Browning v. Bettis*, 8 Paige, 568. In this case it was said: "But the complainant had no right to reach by this bill the compensation to which the judgment debtor might thereafter become entitled, under the laws of the United States, when he should have completed the census and made a return thereof to the marshal. In the case of *Carr v. Kirby*, which came before this court upon an appeal from a decision of the vice chancellor of the first circuit, and was decided here March 7, 1837, the complainant in a creditors' suit was permitted to reach the salary of a schoolmaster which had been wholly and completely earned by the performance of all the services required to entitle him to the same, before the filing of the bill, although by the terms of the agreement with his employers the salary was not payable until four days afterwards. In that case the court decided that the quarter's salary was an existing debt at the time of the filing of the bill, though payable in futuro. But in the subsequent case of *Wood-*

worth v. Gillespie, in chancery, May 7, 1839, this court decided that a creditors' bill could not reach a compensation to become due to the defendant at a future time, for the performance of services not yet completed, and where he would have no legal or equitable right to demand payment for the services performed at the time of filing of the bill in case he should thereafter neglect to complete the services which had not then been rendered."

In *McCoun v. Dorsheimer*, Clarke, Ch. 144, on a bill in equity after a judgment and return of execution, it was held that an injunction would be granted to restrain the defendant from collecting the salary earned as postmaster in order that the same should be placed in the hands of a receiver. But as to future salary it could not be reached by a creditors' bill.

And in *Campbell v. Genet*, 2 Hilt. 290, it was said that on proceedings supplementary a salary not yet earned could not be reached; but a salary assigned to the official before the filing of the bill, though not payable, could be reached.

The surplus of the half-pay of a lunatic officer of the government having reached the beneficiary, and being in the hands of his committee and not needed for the lunatic's subsistence, may be applied with the sanction of the court for the payment of his debts. *Elwyn's Appeal*, 67 Pa. 367. In this case the court said: "It may be admitted that the half-pay of an officer of the government is not liable to be taken by creditors under any form of process—by levy, sale, attachment, or sequestration. The authorities cited are to this effect. Being intended as a means of subsistence, it will not be permitted to be diverted. . . . But when the half-pay has reached the beneficiary, and has lost its distinctive character, and when as money it is in a proper sense, as here, a distributable fund lying in the hands of the law, it is to be governed by the direction of the law. . . . The same reasons dispose of the claim set up under the \$300 law. The allowance to the creditor here is the act of the court by the hands of its committee, and not a seizure by adverse process."

II. On the ground of public policy.

In the absence of statutory provisions it seems that, on the ground of public policy, the accrued salary of a public officer cannot be subjected to the claims of his creditors by garnishment or attachment. Unearned salary cannot be subjected. The reasons usually assigned are that it might cripple the public service; that it might drive the official out of office; that it might prevent him from earning a living; and that public interests and public convenience

Messrs. Kohn, Baird, & Spindle for appellees.

Guffy, J., delivered the opinion of the court:

The appellee William P. Johnson is, and has been for several years, clerk of the Jefferson county court, entitled to a salary, payable by the state, amounting to \$5,000 per annum. The other appellee is his wife. Some time prior to the institution of this action the appellant obtained a judgment in the Jefferson circuit court against the said William P. Johnson for the sum of \$3,313.12 with interest from August, 1897, upon which judgment execution was issued to the proper county, which was returned by the sheriff, in substance, "No property found." The object of this action is to enforce the collection of said judgment. The

two principal funds or items of property sought to be subjected are a reasonable portion of appellee's salary and certain real estate in Jefferson county which is alleged to have been purchased and paid for to the extent that it has been paid for at all, by the said William P. Johnson, but that the same was conveyed to the wife, Emma Johnson, for the purpose of delaying, hindering, and defrauding the creditors of the said William P. Johnson. It is also alleged in the petition that William P. Johnson, Jr., a son of the said appellee, and a minor, is working for a salary of \$2,000. The prayer of the plaintiff, in substance, is for an attachment against the property of said William P. Johnson, and that he be compelled to make a discovery of any money, choses in action, or legal and equitable interests, or any other property, and the amount

would suffer. There are some exceptions to this rule, as in Kentucky, holding that salaries of municipal corporation officers may be attached. But in that state the salaries of state officers, jailers, and school teachers cannot be subjected to the claims of their creditors while in the hands of the public disbursing officer.

The fees of the surveyor general for the performance of his official duties are not subject to attachment. *Sexton v. Brown*, 72 Minn. 371, 75 N. W. 600. In this case the court said: "The decisions in those cases do not rest upon any question as to the character of the garnishee, or as to the source from which the officer receives his fees, but upon the ground that it is against public policy to permit the salary or compensation of a public officer for the performance of his official duties to be intercepted by garnishment or other legal process before the money reaches his hands, for the reason that it would tend to impair the efficiency of the public service."

And in *Bank of Tennessee v. Dibrell*, 3 Sneed, 379, it was held that the salary of state treasurer could not be garnished. In this case the court said: "Every consideration of policy would forbid it. No government can sanction it. It would be very embarrassing generally, and, under some circumstances, might prove fatal to the public service, to allow the means of support of the servants of the government to be intercepted in the hands of the distributing agents. If the funds of the government, thus specifically appropriated for the support and maintenance of its agents, were allowed to be devested by process of attachment in favor of creditors, or otherwise, from their legitimate object, the functions of the government might be suspended."

And the salary of an employee of a municipal corporation is exempt from garnishment on the ground of public policy. *Tenn. Code*, §§ 50, 3087, 3478, giving a remedy by garnishment and defining "persons" to include "corporations," is construed to mean private corporations, and not public or municipal corporations. *Memphis v. Laaki*, 9 Heisk. 511, 24 Am. Rep. 327.

In *Stewart v. Taylor*, 9 Lea, 352, holding that fees due a clerk and master of the chancery court do not pass to his widow as exempted property, the court said: "While it has been held, on ground of public policy, as well as for other reasons, that the salary of an officer, as well as fees accruing to an officer, were not subject to attachment, or process of garnishment, at the hands of his creditors, and the rule uniformly adhered to since the case of *Bank of Tennessee v. Dibrell*, 3 Sneed, 379, it has never been held that these fees or a salary came

within the language or spirit of our law exempting certain specific articles from execution. These articles so exempted are deemed necessities for support and maintenance of the family of the citizen, and are exempted in view of a sound public policy. The articles so exempted are specifically enumerated in § 2107a, of the Code and subsequent sections, but no exemption of fees of office is found in their provisions. In fact, no such exemption, in the nature of the thing, would likely be found in such statutes, as they are not property, or liable as such to execution or attachment."

And the salary of deputy sheriff, who is paid a compensation for his services instead of fees allowed by law, is not subject to garnishment. *Oliver v. Athey*, 11 Lea, 149. In this case the court said: "The deputy sheriff is an officer provided for by law, and equally within its protection with any other. His services are necessary in carrying on the machinery of government in one of its departments, and his compensation, although received by way of a fixed salary instead of the fees allowed by law for specific services, or a part of them, is in lieu of the perquisites to which he would otherwise be entitled, and is equally necessary for his support, and the reason of the exemption on account of public policy is the same in the one case as the other."

In *Baird v. Rogers*, 95 Tenn. 492, 32 S. W. 630, it was said that the same public policy which protects a state from being harassed by litigants that seek to subject the fees due its officers or employees will also protect a municipal corporation from like imposition, and this rule of exemption may be invoked by the employee when his creditor seeks to reach his salary or emoluments.

The earned fees of a registering officer for a city election are not subject to garnishment. *Sanger Bros. v. City of Waco*, 15 Tex. Civ. App. 424, 40 S. W. 549. In this case the court said: "Whether an officer's compensation be fees or salary, it is not collectible until the service is rendered; and if, when it falls due, it is subject to garnishment at the instance of creditors, the officer might not be free from the cares of making provision for his own support and that of his family during the term of office, because as often as his compensation fell due it might by garnishment proceedings be applied to the demands of creditors."

This case conflicts with *Thompson v. Cullers* (Tex. Civ. App.) 35 S. W. 412, and is a later decision, but does not refer to that case. The difference in the cases is that in the *Sanger Bros.* case the city was garnished, while in the *Thompson* case an individual who owed the fees

of same, and to disclose when and in what sums and how the salaries of himself and son are collected, and that so much of the said property be subjected to the satisfaction of plaintiff's claims as is necessary, and that the real estate and improvements be adjudged the property of said William P. Johnson, and that the same be subjected to the satisfaction of his debt, and that out of his salary he be required to provide for and pay this judgment, and for all proper and equitable relief, general and special. The answer of the appellees, after denying that either Johnson or any of his family are living upon or occupying the ground or premises described in the petition, states, in substance, that the title to the property was not placed in the said Emma for the purpose of delaying creditors, and that appellee William should not be required to set apart any

of his salary for the payment of plaintiff's debt. The answer further avers, in substance, that the salary is paid to him for services as clerk of the Jefferson county court, and that he has no interest or right over any part of the salary paid to his son William P. Johnson, Jr., or that he exercises or ever has exercised any right to said salary, and that he would not have any right so to do. It is then further stated that, long before the giving of the note upon which the judgment was rendered, he was indebted to his wife in the sum of more than \$20,000, and long before the transfer of the land; that he is now county clerk as aforesaid, and that under and by virtue of the laws of Kentucky the said salary is exempt from execution, attachment, or garnishment; that, in part satisfaction of his indebtedness to the said Emma, he did assign and transfer

for weighing was garnished. But neither case places the decision on such ground, and neither case notices the constitutional provision set forth in *Highland v. Galveston*, 1 Tex. App. Civ. Cas. (White & W.) § 623, p. 335. See subd. III., *Statutory provisions*.

And in *Blair v. Marye*, 80 Va. 485, it was said that the salary of an attorney general is of constitutional grant and of public official right, and is not liable to attachment nor to be garnished, and, upon principles of public policy, it has absolute immunity from detention for debt or counterclaim.

The salary of a police magistrate is exempt from attachment. *Central Bank v. Ellis*, 20 Ont. App. Rep. 364. In this case MacLennan, J., said: "But I also think that the police magistrate is a police officer connected with the administration of justice, whose salary is exempt from attachment, on the ground of public policy. He is appointed by the Crown during pleasure. His salary is fixed by the legislature. It is attached to the office, and its payment is made obligatory on the municipality, and is not matter of contract between the latter and the officer. I think any interference with such a salary would be an interference with the office, and with the efficient discharge of the duties connected with it, which might be detrimental to the public service; and that the case therefore comes within the rule of protection."

In *Troy Laundry & Machinery Co. v. Denver*, 11 Colo. App. 368, 53 Pac. 256, it was said: "It has been uniformly held that by reason of high considerations of public policy the salary of a public official, whether state, county, or municipal, was not subject to garnishment, not because of any exemption right to which the officer was entitled, but because the interests of the public demanded it."

In *Mobile v. Rowland*, 26 Ala. 498, holding that a city could not be garnished to subject the salary of a policeman, it was said: "Aside from this the city corporation, which is a government for the city, invested with certain attributes of sovereignty delegated to it by its charter, is entitled to fill its offices by a selection of suitable persons from among the whole community. This privilege would exist but in name, if those who depend upon their salaries for a livelihood could be deprived of such salaries by garnishment, and thus cut off from the means of subsistence. The result would be, that only those who were free from debt, or who could subsist without their salaries, could fill such offices, and the public service might suffer for want of persons to accept or hold them." A subsequent statute changed this rule. See subd. III., *Statutory provisions*.
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In *Montgomery v. Van Dorn*, 41 Ala. 505, the case of *Mobile v. Rowland*, 26 Ala. 498, was distinguished, the court saying that the object of the statute of 1863 was to overthrow the doctrine of that case.

In *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276, it was said: "The salary of a public officer is, in no fair sense of the word, wages. Such salaries were not exempt under acts exempting 'wages.' They were not, in the technical sense, exempt at all, but for the convenience and protection of the public, the corporation was not liable to garnishment for the salaries of its officers. The protection was not to the officer, but to the public, and was intended to prevent confusion and petty litigation, and to secure to the public the faithful and diligent performance of official duties by its officers."

Fees and allowances due to a jailer cannot be attached in the hands of the sheriff. *Webb v. McCauley*, 4 Bush, 8. This was on the ground that it would be contrary to public policy, as such officials could not procure the necessary supplies unless they pledged their fees and charges against the county to secure them, and if they could be subjected it would result disastrously to the public interests.

In *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448, it was said that, "from considerations of public convenience, the courts have long since decided that attachments would not lie against the salaries of public or municipal officers."

But in *Thompson v. Cullers* (Tex. Civ. App.) 35 S. W. 412, it was held that the earned fees of a cotton weigher were subject to garnishment. The court said: "It is clearly implied from these authorities and the others cited in appellant's brief that when the official services are performed, and the salary or fees earned and due, public policy does not prohibit their assignment. *Greenhood*, Pub. Pol. 151. As such policy does not prohibit their assignment, we see no reason why they should not be subjected by garnishment to the debts of the officer."

Sanger Bros. v. City of Waco, 15 Tex. Civ. App. 424, 40 S. W. 549, *supra*, which is a later decision, conflicts with this case. See *Roeller v. Ames*, 33 Minn. 132, 22 N. W. 177. See also subd. I., *Creditors' bills and supplementary proceedings*.

III. Statutory provisions.

The following cases sustain an attachment or garnishment of an officer's salary on the ground that a municipal corporation is liable to be garnished, under the proper construction of a statute applying to corporations.

The wages of a "policeman" may be garnished

the salary to be paid to him to her, the said Emma, and out of said salary so transferred the said Emma made the payments that have been made on the property, etc. It is also claimed that they have been occupying the same as a home, and only temporarily absent. The reply may be considered a complete traverse of all the matters relied on as a defense. Upon final hearing the court adjudged in favor of the appellees, and from that judgment this appeal is prosecuted.

It is the contention of appellee that under no state of case could he be required to set apart any part of his salary for payment of the debt in question. He also contends that he had received, many years before he incurred the debt sued on, a large amount of money from his wife, and that he had a right to pay the same to her, either by an assignment of the salary, or by having the

land in question conveyed to her. The appellant contends that, after allowing the said appellee Johnson a sufficient amount of the salary to support himself and family in a style commensurate to his surroundings and social position, he should be required to set apart annually, or from time to time as his salary is paid, the surplus, to be applied to the payment of the judgment sued on. Appellant further contends that the money received by appellee from his wife was not an indebtedness of appellee, and that the payment for the real estate in question was in fact and law paid for by or with appellee's money, and therefore the real estate is liable or ought to be subjected to the payment of plaintiff's claim. It is further contended by appellant that the question involved as to the salary has never been passed upon by this court; that the

in the hands of the municipal corporation, and subjected to the payment of a judgment against such policeman, under Ala. act February 22, 1866 (Rev. Code, § 2895), providing that upon all judgments and decrees in any court of this state the plaintiff shall have process of garnishment against any municipal corporation, supposed to be indebted to the defendant, upon a compliance with the law in other cases of garnishment. *Montgomery v. Van Dorn*, 41 Ala. 505.

And the salary of a city marshal due from a city may be subjected to garnishment to the payment of a judgment, under the provision of Ohio Code Civ. Proc. § 458, providing that an action may be brought to subject to the payment of a judgment any claim or choses in action due or to become due to the judgment debtor, and all money, goods, or effects which he may have in the hands of any person, body politic or corporate. *Newark v. Funk*, 15 Ohio St. 462. But see *Driscoll v. Kelly*, 5 Ohio N. P. 243, on a later statute.

And the salary of a deputy sheriff is subject to attachment, under Mont. Code Civ. Proc. § 189, providing that all persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, shall be liable to the plaintiff, and Gen. Laws, § 202, providing that the word "person" may be applied to bodies politic and corporate. *Waterbury v. Deer Lodge County*, 10 Mont. 515, 26 Pac. 1002. In this case, discussing the application of public policy to cases of this kind, the court said: "The debtor's earnings for thirty days prior to the levy of a writ are exempt from seizure. The servant of the county is thus secured in his support, if he earns it, and the county is not liable to lose the services of competent officers. Indeed, it has never been observed that a county has difficulty in obtaining employees to do its work, and the county may surely obtain as good service from those who pay their debts as from those who avoid such payment, and are protected in the avoidance by the unsatisfying doctrine of public policy."

In *Wilson v. Lewis*, 10 R. I. 285, where a salary due a police sergeant from a city was attached, it was held, under R. I. Rev. Stat. chap. 125, § 1, chap. 183, § 6, and chap. 853, § 2, authorizing corporations to be garnished, that a municipal corporation was not exempt from this process.

In the following cases it was held that the general attachment act was held not to exempt 54 L. R. A.

the salary of an officer after the payment to his agent, nor the fees of jurors:

Money received from the public treasury by an officer through an agent for services is subject to attachment in the hands of the agent. *Kennedy v. Aldridge*, 5 B. Mon. 141. In this case it was said: "The objection that the act authorizing the attachment and subjection of the debtor's choses in action does not include his debts due from the state does not therefore apply in this case, and we think the policy of securing the intended compensation to the public agents of the state cannot, without violating the provisions of the act just referred to, be carried farther than to protect from attachment the claim of the officer or agent upon the state. When, by his authority, it comes into the hands of an individual it is no longer a debt from the state, but becomes a debt from an individual, which cannot be properly distinguished from any other individual debt or demand, and is a chose in action, liable to be subjected to the debt of the person entitled to it."

In *Webb v. McCauley*, 4 Bush, 8, the case of *Kennedy v. Aldridge*, 5 B. Mon. 141, was distinguished, as in this case the money was, at the institution of the suit, in the hands of the agent of the county court, and not in the hands of Webb, and in the *Kennedy* case the money was paid by the state to the agent of its creditors.

Under N. H. Gen. Stat. chap. 230, § 28, providing that if it appears that the trustee had in his possession, at the time of the service of the writ on him, or at any time after, any money, goods, chattels, rights, or credits of the defendant he shall be adjudged chargeable therefor, the fees of a juror due him from a county are held to be moneys, rights, or credits, and are attachable on trustee process. *Wardwell v. Jones*, 58 N. H. 305.

In the following case the general attachment act was held not applicable to salaries of officers other than municipal:

Under Ala. Rev. Code, § 2948, authorizing money to be attached in the hands of an attorney at law, sheriff, or other officer, the salary of a tax assessor cannot be reached by garnishment. *Pruitt v. Armstrong*, 56 Ala. 306. In this case the court said that "the exemption the statute intends to remove is that which, under some circumstances, originated from the relation of the garnishee as a public officer. That he is a public officer does not relieve him from subjection to garnishment. The exemption to which the appellee is entitled originates from the character of the fund it is sought to condemn. . . . The compensation of the assessor, and the salary of the governor, and the

decisions heretofore rendered where parties sought to garnish fees or salaries of officers have no application to the question involved in this case. It is not contended that the plaintiff could attach salaries in the hands of the state or its officers, and require the money to be paid directly to the plaintiff, but it is contended that the court may lawfully require the appellee to pay into court or to its receiver, in instalments, so much of the salary as is not necessary for his support as aforesaid. Many authorities are cited by appellant.

We are not aware of any decisions of this court in which the precise question here presented has ever been passed upon, nor do we find any statute expressly providing that officers' fees or salaries shall not be subjected to the payment of debts against them. But it is very earnestly contended

for appellee that various decisions of this court announce the doctrine that it is contrary to public policy to so subject the fees or salaries of officers. But, as before intimated, the appellant contends that no such rule or doctrine is contained in any of the decisions in this court, and refers us to many decisions which, as he assumes, sustain his contention. We will now proceed to notice some of the authorities from states other than Kentucky relied on in support of appellant's contention: *Pendleton v. Perkins*, 49 Mo. 505, is cited. The court in that case held that, notwithstanding municipal corporations are exempt by statute from creditors' bills or garnishment, nevertheless money due the defendants in the city treasury might be subjected by proceedings in equity for the payment of plaintiff's claim. But from the opinion in this case we find

compensation of all public officers, is free from seizure under legal process, not on any technical inquiry as to whether there is a legal remedy for its recovery, or the form of the remedy, but on high considerations of public policy."

In the following cases salary was held to be exempt under the exemption act:

The salary, under \$500, of a municipal officer cannot be garnished, under Ga. act 1850 (Cobb, 1888, § 2), providing that all banks, banking companies, and other corporations in this state, except municipal corporations, shall be liable to be garnished for the salaries of its officers, in all cases where the salary exceeds the sum of \$500. *Holt v. Experience*, 26 Ga. 118. In this case it was said that by proper construction of this act the salary would be exempt whether it amounted to \$500 or not.

And the salary of an officer cannot be seized and sold for a debt, under La. Civ. Code, art. 1987, providing that there are also rights which are merely personal that cannot be held liable to the payment of debts. "These are the rights of personal servitude to money due for the salary of an officer, or wages or recompense for personal services. *Wild v. Ferguson*, 23 La. Ann. 752.

And under La. Civ. Code, art. 1987, the salary of a city assessor is exempt from execution, he being the officer of a political corporation. *Chaudet v. De Jong*, 16 La. Ann. 399.

In proceedings in aid of execution the wages or salary of a superintendent of a county infirmary, earned within three months,—he being the head of a family,—are "personal earnings," and, as such, exempt from execution if the same are necessary for the support of himself and family, within the meaning of Ohio Rev. Stat. § 5430, providing that every person who has a family, and every widow, may hold the following property exempt from execution, attachment, or sale for any debt, damage, fine, or amercement: "The personal earnings of the debtor,"—when it is made to appear that such earnings are necessary for the support of such debtor or of his or her family, except the debt is for necessities, and then only 90 per cent of the earnings are exempt. *Driscoll v. Kelly*, 5 Ohio N. P. 243.

In *Catlin v. Ensign*, 20 Pa. 264, it was said that Pa. act April 15, 1845, § 5, provides that the wages of any laborer, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer.

In *Highland v. Galveston*, 1 Tex. App. Civ. Cas. (White & W.) § 623, p. 335, it was said that Texas Constitution, art. 16, § 28, provides that no current wages for personal services shall 54 L. R. A.

ever be subject to garnishment, and that in cases arising since its adoption a municipal corporation cannot be garnished for wages due an employee.

This case and the constitutional provision are not referred to in *Thompson v. Cullers* (Tex. Civ. App.) 35 S. W. 412, and *Sanger Bros. v. City of Waco*, 15 Tex. Civ. App. 424, 40 S. W. 549. See subd. II., *On the ground of public policy*.

But fees were held not to be wages in the following case:

In *Porter v. Cobb*, 4 Lea, 482, where a commissioner was appointed by the county court to partition land, and his fees were collected as costs and held by the sheriff, who applied the money to the payment of an execution in his hands against the commissioner, it was held that the same was not exempt under Tenn. Acts 1870-71 (Thompson & S. Code, § 2107a), providing there shall be exempt from execution, attachment, or garnishment \$30 of the wages of mechanics or other laboring men. In this case, the case of *Bank of Tennessee v. Dibreil*, 3 Sneed, 379, to the effect that salaries of public officers are exempt, was held not to apply to costs taxed in favor of the commissioners for partition.

A county is chargeable in trustee process for compensation due to a messenger in charge of its courthouse, under appointment of the county commissioners at a fixed salary ordered to be paid from the county treasury. *Adams v. Tyler*, 121 Mass. 380. In this case it was said that the salary of a messenger having charge of a courthouse constituted a contract, and differed from the case of *Williams v. Boardman*, 9 Allen, 570, which held that a county was not chargeable as trustee for the fees of a jurymen, as that decision was on the ground that a juror's services were not rendered on any contract and the compensation is allowed by the court, and is neither goods, effects, or credits, within the meaning of the statute. The court further said: "The fact that the legislature, in adopting Rev. Stat. chap. 109, § 6, struck out a provision recommended in the commissioners' report, excepting counties, towns, parishes, and religious societies from liability to be summoned as trustees, is a plain manifestation of their intent that all those corporations should be so liable. That provision of the Revised Statutes is substantially re-enacted in Gen. Stat. chap. 142, §§ 1, 10."

IV. School teacher's salary.

A school teacher is not what is properly called a public officer, but his employment is in a public

that the debtor was not an officer. And it seems that, even in the absence of such statute, it has been held that towns and cities could not be garnished for a sum due an officer as part of his salary. *Fortune v. St. Louis*, 23 Mo. 230; *Hawthorn v. St. Louis*, 11 Mo. 59, 47 Am. Dec. 141. The court further said: "Public policy forbids creditors from thus stepping in between the city and its public servants; and the statute, in seeking to prevent any future attempt in that direction, went much further, and included all kinds of liabilities, so that a debtor's funds, if in the hands of a municipal corporation, are placed beyond the reach of his creditors by statutory garnishment." The court, however, held in this case that the funds of the debtor were not exempt simply because the same are placed in the city treasury, or under the control of

capacity, and he is treated in some cases as a public official, and in others he is not. The authorities are not uniform as to exemption of his salary from attachment and garnishment.

Where a school teacher's wages were garnished, it was held that it is not consistent with public policy to subject the stipends of persons in public employment to be suspended or reached in that way. It was further held, under Mich. Comp. Laws 1871, § 6508, providing that no person shall be adjudged a garnishee by reason of any money in his hands as a public officer for which he is accountable merely as such officer to the principal defendant, that the salary due from a school district could not be garnished. *School Dist. No. 4 v. Gage*, 39 Mich. 484, 33 Am. Rep. 421.

In *Allen v. Russell*, 78 Ky. 105, holding that the compensation of a common-school teacher cannot be attached on the ground that the officers of the state are not subject to garnishment, it was further held that "the commonwealth has undertaken to establish and carry on at public expense a system of common schools, and cannot permit the wages of teachers to such schools to be intercepted, whereby it may be deprived of their services, and the efficiency of the system may be impaired."

The salary of a teacher in the employ of the board of education of a city, payable at the expiration of each month, is not subject to garnishment, under Ga. Code, § 3564, providing that all journeymen, mechanics, and day laborers shall be exempt from the process and liability of garnishment on their daily, weekly, or monthly wages, except for those for provisions or board. *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273. In this case the court said the defendant was employed by the board of education as a teacher to promote the public interests as contemplated by the act of general assembly of the state, at a salary which was by the contract to be paid at the end of each month. "If their wages on which they and their families are dependent for support is liable to process of garnishment the public will be deprived of their services because they cannot afford to engage in a business, which must necessarily, if they perform their duty, occupy their whole time, and they cannot labor in their vocation without meat and bread and wherewithal to be clothed."

But in *Bates v. Bates*, 74 Ga. 105, it was held that a teacher's wages might be garnished for alimony, where the record did not show whether his wages were to be paid daily, monthly, or weekly. It was further held, as the defendant could have been imprisoned for nonpayment of alimony, and so deprived of all means of sup-

porting himself, that this claim occupied a different position from an ordinary debt. A district-school teacher is not a public officer whose salary cannot be attached. *Seymour v. Over-River School Dist.* 53 Conn. 502, 3 Atl. 552. In this case the court said: "A teacher is not an officer in the ordinary sense of the word. He is not usually elected or appointed, but is employed—contracted with. He has duties to perform incident to his employment, but they are not official duties, and he is not under oath. We see no good reason why his salary should not be liable for his debts, in the same way as the compensation of others employed by the district."

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V. Officers of municipal corporations in Kentucky.

The salaries of officers of municipal corporations in Kentucky seem to be placed on a different footing from those of state officers, jailers, and school teachers. In that state the creditor may attach the salary due to an officer of a municipal corporation. This is on the ground that a city may be sued at law or in equity.

Salaries of officers of towns and cities may be attached and subjected to the payment of their debts, where the salary is earned and set apart. *Speed v. Brown*, 10 B. Mon. 108. But it was said that a bill in anticipation of future salary to become due for services to be rendered in future could not be sustained as it would result in expelling the debtor from public service. In this case the case of *Divine v. Harvie*, 7 T. B. Mon. 439, 18 Am. Dec. 194, which held that money due the auditor from the commonwealth could not be attached, was distinguished, on the ground that a city may be sued at law or in equity.

The salaries of officers of towns and cities may be attached and subjected to the payment of their debts by the coercive process of the law. But the salary of a state officer cannot be attached because the state, being a necessary party, cannot be sued. *Rodman v. Musselman*, 12 Bush, 354, 23 Am. Rep. 724. In this case the court said: "A town or city, being a municipal corporation, is as subject to suit for what it owes as is a private individual, and any fund due from it to a debtor is as subject to attachment or garnishment while in its hands as if it were a private individual. Nor do we believe that the coercive appropriation of the salary of an officer of one of our towns or cities to payment of his debts conflicts with public policy. The provisions of the 474th section of the Code are general, and apply to all debtors,

case at bar. In *Lyell v. St. Clair County*, 3 McLean, 580, Fed. Cas. No. 8,621, the plaintiff sought to subject certain bonds, mortgages, and assets under the control of defendants for payment of two judgments at law recovered against them. The court below sustained a demurrer, but the supreme court reversed the judgment, and, after a discussion of the questions involved, from which it appears that under the statute of Michigan the county might be sued, said: "The county being made subject to a suit, no serious objection is perceived against reaching the rights in question by the ordinary exercise of chancery powers, independently of statutory provisions." It appears from the opinion in *Furlong v. Thomssen*, 10 Mo. App. 364, that the court held that a debt due by a municipal corporation to its creditor may, by a creditors' bill, be subjected to the satisfaction of judgment against the latter. In this case it appears that the debt due Thomssen was for erecting an engine house for the city. In *Browning v. Bettis*, 8 Paige, 568, it is, in substance, held that the salary or compensation to become due at a future time for the performance of services which had not been completed at the time of filing the bill could not be reached by a creditors' bill. But where all the services to entitle defendant to his salary or compensation had been rendered at the time of filing the complainant's bill, such salary or compensation may be reached by the creditor, although it had not become actually payable when the bill was filed. It seems that the defendant in this case was a census taker. It was decided in *McCoun v. Dorsheimer*, 1 Clarke, Ch. 144, that the unearned salary of an officer cannot be reached by creditors' bill, but so much of the salary as is earned and due at the time of the filing of the bill may be subjected. The same doctrine announced in the case *supra* is reaffirmed in *Smith v. _____*, 4 Edw. Ch. 653. The object there sought was to subject one quarter's salary of one of the judges of New York city. It may be inferred from the decision in *Hadley*

v. Peabody, 13 Gray, 200, that the supreme court of Massachusetts sustains the doctrine announced in the foregoing opinions. The supreme court of Arkansas decided in *Riggin v. Hillard*, 56 Ark. 476, 20 S. W. 402, that (we quote from the syllabus), "while a county is not subject to the ordinary process of garnishment, yet, in equity, when the interest of the public will not be injuriously affected, the claim of an insolvent creditor of the county may be subjected, by sale or compulsory assignment thereof, to the payment of his debts." The demand sought to be subjected was a debt due from the county to the defendant for repairing the courthouse. The court, in the opinion, said: "The courts commonly concur in holding that public policy forbids any interference between the county and its contractor under such circumstances if the work is still in progress, for the interference would tend to retard the occupancy of the building." The court, in discussing the fact that the county could not be sued, recognized the doctrine to be that a county was not subject to garnishment, and in referring to the case of *Boone County v. Keck*, 31 Ark. 387, said: "It was a suit directly against the county. The plaintiff's judgment debtor was not a party to it, and the only relief asked was against the county. In the case at bar the plaintiff's debtor is the party against whom relief is sought, and the county is not sued. Therein lies the cardinal difference between the cases. The complaint states a cause of action against Hillard, and shows a right in the plaintiff to subject the debt due by the county to the satisfaction of his demand. That can be accomplished under proper orders of the court,—as by a sale or compulsory assignment of the debt for the purpose of applying the proceeds to the satisfaction of any judgment which the plaintiff is entitled to recover." In *Knight v. Nash*, 22 Minn. 453, the supreme court of Minnesota held (quoting from the syllabus) that "a debt due from a municipal corporation to a judgment debtor, even though denied by the corporation, may be reached by a final or-

and render all equitable estates liable to their provisions, unless the same are exempt by law from the payment of indebtedness. In the case of *Speed v. Brown*, 10 B. Mon. 109, this court decided that the salary of the marshal of the city of Louisville was subject to the payment of his debts, and that the same could be attached on the return of no property found, and applied to the payment of his judgment creditor. This decision was rendered in 1849, and has been acquiesced in without legislative or judicial change ever since, and must now be regarded as the law of this state. We see no sound public policy that this rule of law contravenes."

And the amount due by a city or set apart to the officer by the city's authority for services performed or about to be performed so that the officer has the right to demand and receive it, is a proper subject of garnishment and can be subjected to the satisfaction of debts due by the officer as any other chose in action; but wages or salary not due at the commencement of suit, but which may be earned by a city officer after the suit is commenced, cannot be attached

or subjected to the payment of the officer's debts. *Bridgeford v. Keenehan*, 8 Ky. L. Rep. 268.

VI. Summary.

An attempt to subject officers' salaries to the claims of their creditors is met in three several ways: First, that the state or municipality is not subject to garnishment. This is a general rule and is not within the scope of this note. Second, that the salary is protected from garnishment on the ground of public policy. This is the general rule in the absence of statutory provision. Third, that the exemption of salary is within the statutory exemption. This is controlled by the construction placed upon the various statutory and Code provisions.

See further, as to creditor's bill against a municipal corporation to reach money due from it to the judgment debtor, *Addyston Pipe & Steel Co. v. Chicago*, 170 Ill. 580, 44 L. R. A. 405, 48 N. E. 967. As to garnishment of county, see note to *State ex rel. Summerfield v. Tyler* (Wash.) 37 L. R. A. 207. I. T.

der upon disclosure, directing the transfer of the claim, and appointing a receiver to collect it for the benefit of the creditor. The rule that a debt due from a municipal corporation cannot be reached by process of garnishment has no application to an order of this character." The debt sought to be subjected in this case was not due as salary or fee. We fail to see that the case of *Whidden v. Drake*, 5 N. H. 13, has any application to the case at bar. The supreme court of Connecticut, in *Bray v. Wallingford*, 20 Conn. 416, held that a town is subject to the process of attachment in a suit brought against its creditor. The supreme court of Ohio, in *Newark v. Funk*, 15 Ohio St. 462, decided that salaries of officers of incorporated cities, due and unpaid, might be subjected by judgment creditors of such officers to the payment of such judgments, under the provisions of the Code of Civil Procedure. The Code provision referred to is substantially the same as the provision of the Kentucky Code in regard to the enforcement of judgments. 2 Shinn, *Attachm.* § 501, is cited by appellant, but the doctrine there announced does not seem to be different from that announced in the opinions *supra*.

This action is assumed to be authorized by § 439, Ky. Civil Code of Practice, which we deem it unnecessary to quote. The appellant refers us to numerous decisions of this court in support of his contention, which we have carefully examined, but deem it unnecessary to refer to in detail, but will only refer to such as we think necessary. It was held in *Field v. Chipley*, 79 Ky. 200, 42 Am. Rep. 215, that a contract by which the clerk of the Louisville chancery court transferred and assigned to a trustee, for the benefit of appellant, in consideration of a debt due him, all the fees and emoluments of his office in the future, until the debt was paid, with conditions to pay deputies, etc., was void. It is against public policy that such contracts should be enforced. That the auditor has, under the statute, the right to look to the clerk for taxes on suits collected by him. The trustee will not be recognized as the person to receive them. In *Johnson v. Elkins*, 90 Ky. 163, 8 L. R. A. 552, 13 S. W. 448, it was held that when pension money was invested in land the land was subject to the debts of the pensioner. This proposition has been so often and so recently decided that any further reference to the same is unnecessary. It may be remarked that it was decided by this court in *Hudspeth v. Harrison*, 6 Ky. L. Rep. 304, that pension money is exempt only until it reaches the hands of the pensioner. In *Rodman v. Musselman*, 12 Bush, 354, 23 Am. Rep. 724, it was held that salaries of officers of towns and cities may be attached and subjected to the payment of their debts; but the salary of a state officer cannot be attached, because the state, being a necessary party, cannot be sued. It is otherwise as to a town or city. *Stone v. Mayo*, 21 Ky. L. Rep. 1559, 55 S. W. 700, is referred to. The opinion in this case holds 54 L. R. A.

that the auditor might withhold money due a circuit clerk on account of the clerk's official indebtedness on account of unconstitutional payment made to him as clerk during a former term of office; the action of the auditor being based upon § 4701, Ky. Stat. It was said in the opinion that there seemed to be no reasons of public policy which would preclude the auditor from so withholding the former indebtedness of the clerk to the commonwealth. It may be conceded that this court, in *Teeter v. Williams*, 3 B. Mon. 562, 39 Am. Dec. 485, in substance decided that the plaintiff, by the aid of the chancellor, could attach whatever might be due his debtor for labor already performed, and he might attach whatever might become due upon an existing contract for his future labor. But neither the creditor nor chancellor could compel him to work out his part of the contract, so as to earn the promised reward for the exclusive use of his creditor. In the case of *Kennedy v. Aldridge*, 5 B. Mon. 141, it appears that Robinson, by the authority of Kennedy, had drawn \$50 as his compensation, as one of the commissioners of Garrard county, for taking in the lists of taxable property. The court below held that the money in Robinson's hands was subject to the attachment. In passing upon this question, this court said: "It is contended, on the authority of the case of *Divine v. Harvie*, 7 T. B. Mon. 439, 18 Am. Dec. 194, that the fund now in question, being the compensation payable by the state to a public officer or agent, should be protected until it reaches the hands of the officer or agent. But this case differs essentially from the one referred to, in the fact that in that case the money attempted to be appropriated to the satisfaction of the creditor's demand remained in the treasury, whereas in this it has been paid to the authorized agent of the person entitled to receive it from the state. The objection that the act authorizing the attachment and subjection of the debtor's choses in action does not include his debts due from the state does not, therefore, apply in this case." We have examined the case of *Spced v. Brown*, 10 B. Mon. 108, but the doctrine therein announced is in accord with other decisions noticed; hence we need not restate the same proposition.

The appellees cite numerous authorities in support of their contention, which we have examined at great length. It may be taken as well settled that in the case of jailers, school commissioners, and school teachers, their salaries should not be subjected to the claims of creditors, for reasons given in the several opinions. The opinions chiefly rest upon the ground of public policy,—that the salaries are necessary to enable those officers to discharge the duties resting upon them. It is not the contention of appellant that he can, by an ordinary attachment or garnishment, subject the salary of appellee, nor appropriate the whole of it to the payment of his claim. It is the contention of appellant that the proof in this case shows conclusively that \$3,000 per

annum is amply sufficient to support the appellee in the style in which he moves and sufficient for an ample support commensurate with his social position; and it is argued that a court of equity has the power, and that it ought, by appropriate orders, to compel the appellee to set aside from time to time a reasonable portion of his salary for the payment of plaintiff's claim. It may be conceded that there is some conflict of authority upon this question. It does not seem to have been directly passed upon by this court. Nor do we deem it necessary to now decide as to the power of a court of equity to make such orders as are contended for by appellant. Undoubtedly, one of the objects in allowing to officers fees or salaries is for their support, and to enable them to discharge the duties of office; but we are not inclined to the opinion that it was the intention of the lawmakers to limit such compensation to the actual necessities of life, but, rather, that it was intended to allow such officers compensation commensurate with the official duties and responsibilities devolving upon them. And inasmuch as most men desire to accumulate something, and the public commends such desire, we think it not unreasonable that the lawmakers intended that the officers might have like opportunities. Under our present Constitution, no officer except the governor is allowed a greater compensation than \$5,000 *per annum*. This being true, we think public policy demands that the courts refuse to require any officer to set apart any part of his salary for the payment of his debts. The judgment of the court below is therefore affirmed in respect to this question.

It is, however, earnestly contended for appellant that the real estate mentioned in the petition should be held subject to plaintiff's claim, while it is equally as earnestly contended for appellee that he has a right

to assign his salary to his wife, or to have the land in question deeded to her, and especially so for the reason that he had received large sums of money from her in the past, and that he desired to pay the same. That he did receive such large sums of money from her is clearly proved in this case. We have already referred to the decision holding the assignment of fees to be void and against public policy. It has been repeatedly decided by this court that pension money received by a pensioner and invested in real estate can be subjected to the demand of an antecedent creditor, and it would be entirely inconsistent with such a rule to hold that officers' fees or salary invested in real estate should be exempt from antecedent debts, even if we were deciding—which we do not—that an officer's fees or salary are exempt by statute from the debts of the officer. It is further suggested for appellee that, even if the debt due his wife was barred by the statute of limitation, he had a right to waive that statute and pay the debt, which he undoubtedly did have, if such a debt existed, and its payment was not prejudicial to the rights of another. After a careful consideration of the law and facts, we have reached the conclusion that the relation of creditor and debtor did not exist between the appellees at the time of the purchase and conveyance of the real estate in question. It therefore follows that the conveyance to Mrs. Johnson was without consideration and void as to creditors, and that the court erred in refusing to subject the same to the payment of plaintiff's claim.

The judgment to that extent is therefore reversed, and the cause remanded, with direction to adjudge the real estate subject to plaintiff's claim, and for proceedings consistent herewith.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Lillie CAMPBELL

v.

SUPREME CONCLAVE IMPROVED ORDER HEPTASOPHS, *Plff. in Err.*

(.....N. J.....)

***Suicide will not defeat recovery** upon a contract of life insurance not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms.

(*Magie, Ch. J., and Van Syckel, Gummers, Hendrickson, Adams, and Vroom, JJ., dissent.*)

(June 18, 1901.)

*Headnote by COLLINS, J.

NOTE.—For a case in this series holding that a policy of life insurance taken with the intent to commit suicide is void, although there is no provision in the policy against suicide, see *Ritter v. Mutual L. Ins. Co.* (C. C. App. 3d C.) 42 L. R. A. 583, Affirmed in 169 U. S. 139, 42 L. ed. 54 L. R. A.

ERROR to the Supreme Court at Circuit in Salem County to review a judgment in favor of plaintiff in an action brought to enforce payment of the amount pledged to be due on a mutual benefit certificate. *Affirmed.*

Statement by COLLINS, J.:

This cause was tried at the Salem circuit before the late Justice Ludlow and a jury. The declaration was upon a benefit certificate issued January 25, 1897, by a fraternal order incorporated in Maryland, to Dr. John G. Campbell, of Elmer, New Jersey, a member of a subordinate conclave located in that town, wherein it promised, upon satisfactory evidence of his death and surrender of the certificate, provided he should be in good

603. See also *Ætna L. Ins. Co. v. Florida* (C. C. App. 8th C.) 30 L. R. A. 87.

As to effect of suicide upon policy taken out in good faith, and in which there is no provision against suicide, see *Seller v. Economic Life Assn.* (Iowa) 43 L. R. A. 537.

standing in the order at the time of his death, and the certificate should not have been surrendered by him, and another certificate issued at his request, in accordance with the laws of the order, to pay to his wife, Lillie Campbell, out of its benefit fund, the sum of \$3,000. Issue was joined on pleas—First, of non assumption; and, second, that on December 20, 1898, said John G. Campbell, being in sound mind, did terminate his life by suicide. But the entire controversy at the trial was under the second plea. There was evidence to warrant a finding by the jury that Dr. Campbell intentionally killed himself by a pistol shot just after his arrest on a charge of forgery, made as he was returning home from professional calls as a physician. The trial justice directed a verdict for the plaintiff after refusing various requests to charge presented by the defendant, the most comprehensive of which was as follows: "(5) That although the by-laws of the defendant, as also the benefit certificate sued on, are silent as to suicide, there is an implied condition in the contract that, if the event upon which the risk was assured—the death of the said Campbell—was brought about by his own deliberate act while in sound mind, there can be no recovery." Exception was duly sealed on the refusal of this request. If it was properly refused, the direction of verdict was right; otherwise, there should be a new trial.

Messrs. Alfred S. Badgley and Olin Bryan for plaintiff in error.

Mr. Jonathan W. Acton for defendant in error.

Collins, J., delivered the opinion of the court:

It has been considered by some that benefit societies are *sui generis*, as respects the payment of death benefits to dependents of their members, and that the uniform denial of the defense of unexcepted suicide in suits to recover on their benefit certificates is to be placed on grounds peculiar to the character of such societies. There is no doubt that such defense has never been allowed. Bacon, Ben. Soc. § 337, and cases cited. But those societies have no such peculiar status. Their benefits stand on the footing of all death claims. I shall treat this case, therefore, as within the general range of life insurance. In the words of the author of a treatise on that subject published in the year 1891: "If performance by an insurer is, in general terms, conditioned on the death of the insured, there seems no valid reason why death by committing suicide should not be included; and such is the general doctrine." Cooke, Life Ins. § 41. Contrary judicial dicta will be found in a few decisions in England and in this country, but no direct adverse adjudication until the *Ritter Case*, hereinafter mentioned. The case of *Supreme Commandery K. of the G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332 (A. D. 1882), is sometimes cited as such an adjudication; but, on a careful reading of the report, it is evident

that the opinion of the court, declared by Chief Justice Brickell with much ability from his standpoint, was not necessary to the decision of the cause. The application of the doctrine has always happened to be in cases where the insurance was effected for some designated beneficiary other than the insured; and, to that extent, no state court has departed from it, as will be seen on examination of the cases cited in the most recent publications. 3 Am. & Eng. Enc. Law, 2d ed. p. 1016; Joyce, Ins. § 2653; May, Ins. 4th ed. A. D. 1900, § 324, note a; 4 Berryman, Ins. Dig. (A. D. 1901) 1530 *et seq.* It should be understood, of course, that I have not been speaking of insurance procured with the intention of committing suicide. That, all courts concede, is voidable because of fraud. The *Ritter Case* arose in 1892, was decided in 1895, 42 L. R. A. 583, 17 C. C. A. 537, 28 U. S. App. 612, 70 Fed. 954, and affirmed by the United States Supreme Court in 1898. *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300. There were several policies in suit, all alike in tenor, and all payable to the insured, his executors, administrators, and assigns. The real contracts, as evidenced by the applications for them, excepted death by suicide within two years, which time had not elapsed; but by virtue of a statute of Pennsylvania, where the contracts were made, the trial court had ruled out the applications because not attached to the policies, which themselves expressed no such exception. The proof was plenary that the insurance was procured with the intent to commit suicide, but as the trial court had expressly charged the jury that there could in no case be recovery if the insured had taken his own life designedly while of sound mind, the general question was necessarily involved. The decision was that because the verdict established that Runk, the insured, had committed suicide while sane, his executor could not recover. The supreme court, speaking through Mr. Justice Harlan, held (p. 160, 169 U. S. p. 700, 42 L. ed., and p. 307, 18 Sup. Ct. Rep.) that the death of the insured, "if directly and intentionally caused by himself when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit." Diligent research has led to a discovery of no other reported case directly adjudging that suicide will bar recovery upon a policy not excepting it in express terms, and not procured with the intention of committing suicide, except the later one of *Hopkins v. Northwestern Life Assur. Co.* 94 Fed. 729, where a United States circuit court, being bound by the *Ritter Case*, extended, and, I think logically extended, the bar against recovery to a policy taken out by the insured for the benefit of his wife. The judgment was affirmed, however, upon other grounds. 40 C. C. A. 1, 99 Fed. 199.

I will consider first the proposition that sane suicide, though unexcepted in express terms, is not a risk intended to be covered by a life insurance contract. In the early

life policies, death by suicide was excepted from the liability of the insurer; and in some cases this was expressed to be so, whether the insured was sane or insane at the time of the act. In a note to the case of *Borradaile v. Hunter*, 5 Mann. & G. 639, decided in the year 1843, there appears a list of the varying forms of the exception as appearing in the policies customarily issued by eighteen of the leading companies of England. Adjudication in this country, contrary to that in England, that the condition of sanity was implied in a general exception of suicide, led to the common expression in subsequent policies of a contrary intent. Later, as such stringency was seen to be unwise, it was relaxed, and still later, as the outcome of contest over sanity showed any exception to be futile, and as such an exception discouraged insurance, it came to be omitted altogether, or made of very short duration. The history of insurance makes difficult the argument that the exception is not now expressed because necessarily implied. The contrary has been the course of evolution in the analogous case of death resulting as a punishment for crime. In an early English decision,—*Amicable Society v. Bolland (Fauntleroy's Case)* 4 Bligh, N. R. 194, A. D. 1830,—such a death was held to be an implied exception; but the effect of the raising of the question, notwithstanding its decision favorably to the insurer, was to lead to the general introduction into policies of an express exception. Chief Justice Brickell, of Alabama, was alive to this situation when he expressed a strong, though not deterrent, reluctance "to introduce, by construction or implication, exceptions into such contracts, which usually contain special exceptions." *Supreme Commandery K. of the G. R. v. Ainsworth*, 71 Ala. 436, 447, 46 Am. Rep. 332, 337. Of course, the question is an open one, and the views of so influential a tribunal as the Supreme Court of the United States deserve most careful consideration. The reason for implying the exception is thus stated by Judge Harlan (109 U. S. 153, 42 L. ed. 698, 18 Sup. Ct. Rep. 306): "In the case of fire insurance it is well settled that although a policy in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured, and stipulating for the payment of a named sum to himself, his executors, administrators, or assigns, that the company should be liable if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance—that is, the life of the assured—shall not be intentionally and directly, with what-

ever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay was intended to be left to his option. This view is against the very essence of the contract." The conclusion stated is a plain *non sequitur*. Suicide is only one of many ways that may determine the event of death. Insurance rates are based upon an average expectancy of life derived from experience tables embracing suicide as well as all other causes of mortality. Many intelligent persons believe that suicide self-evinces a morbid state of mind, and insurers, in a large volume of business, may well offset the natural love of life against the infrequent impulse of self-destruction. The supposed analogy to other insurance is not new. In *Moore v. Woolsey*, 4 El. & Bl. 243, 254, Lord Campbell said, *obiter*: "If a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover on the policy if within the year he causes her to be sunk." The reasoning is specious and the analogy is false. It is quite right that wilful and unnecessary destruction of the subject of fire or marine insurance should at the same time destroy the insurer's liability. The courts therefore imply in such a case an exception from the general terms of the contract, because that must have been intended. But the case of life insurance is not parallel. Strict insurance is indemnity. Voluntary and unnecessary destruction of the property insured is inconsistent with the basis of the contract, but the basis of that which by a misnomer is called "insurance upon life" is altogether different. That is an arbitrary agreement to pay a fixed sum upon the happening of an inevitable event, to wit, the death of the insured, without regard to the value of his life or the loss sustained by the assured. That a contract of life insurance is not a contract of indemnity was decided in the exchequer chamber in 1854. *Dalby v. India & L. Life Assur. Co.* 15 C. B. 365, overruling *Godsall v. Boldero*, 9 East, 72. There is no force in any argument derived from contracts of indemnity. Another reason not expressly stated by Judge Harlan, but frequently assigned in judicial *dicta* for the implication declared by him, is that without it the insured would be deriving a benefit from his own wrongful act, which will never be presumed to be within the intention of contracting parties. For example, recovery on a life-insurance policy assigned by the insured to his creditor, who afterwards murdered him, has rightfully been denied. *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877. Granting the inherent wrongfulness of suicide, which is matter for the moralist rather than the judge, this doctrine fails when applied thereto. No one in this world can derive a benefit by his own death. By that final event all earthly profit ends for him to whom it comes. He is for this life equally beyond gain and

loss, and as to him the rules that govern mundane intercourse become no longer applicable. Those who derive the benefit will have done no wrong. But it is said that suicide is a fraud on the insurer. To procure insurance with intent to commit suicide is a fraud on the insurer that should defeat recovery at the option of the insurer, and, with all the incidents of a rescission, will avoid the contract, even as against beneficiaries or assignees. *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197. But to argue that suicide, not previously intended, is such a fraud as to defeat recovery, is to beg the very question of what is the contract; and the argument assumes that insurance rates are fixed upon a basis excluding death by suicide, while, as we have seen, the contrary must be the case, for the experience tables include all forms of death. Moreover, it would be next to impossible to fasten the fraudulent intent. The motives for suicide are difficult to fathom, and are usually complex. In the case in hand, Dr. Campbell doubtless took his life through overwhelming chagrin due to arrest on a criminal charge. It is highly improbable that he thought at all of his insurance. To submit to a jury in each case the intent of the act would be practically fruitless. A general imperative rule in all cases must be established, and such seems to be the view of Judge Harlan; for he says that intentional self-destruction, with whatever motive, is impliedly excepted from the contract. As a mere matter of construction, it is of no importance what rule is to govern future contracts; but, in view of the historical aspect of the subject, the reading into contracts of life insurance this unexpressed exception will be sure to work great hardship. Many policies are being carried by creditors or others interested without a formal assignment, or the possibility of compelling one, except by consent of the insurer. These persons have rightly felt secure against recklessness or malignity extending even to suicide, and their investments should not be imperiled.

Lastly to be considered is the proposition that intentional suicide when in sound mind is not a risk which can legally be covered by insurance. This rests upon a postulated public policy. Judge Harlan says: "A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment. If, therefore, a policy taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns, expressly provided for the payment of the sum stipulated when or if the assured in sound mind took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those depend-

ent upon him or to whom he was indebted." We are not concerned with an express contract to pay in case of suicide, but with a normal life-insurance policy. Payment is to be made upon the event of death, and the risk of death by suicide, as applied to the volume of insurance, is almost infinitesimal. The real question is whether it is against sound public policy for the insurer to assume the risk. It is urged that parties may not contract for even a possible obligation resting on criminality. Doubtless such is the law. *Amicable Society v. Bolland (Fauntleroy's Case)*, 4 Bligh, N. R. 194, rests upon that principle; and it has recent illustration in the state of Massachusetts, where the supreme court denied insurance because the death of an insured woman resulted from a criminal abortion. *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541. But suicide is not criminal in New Jersey. Punishment is of the essence of crime, and suicide is not punishable here. Blackstone defines a crime or misdemeanor to be "an act committed or omitted in violation of a public law either forbidding or commanding it." 4 Rl. Com. 5. A recent writer more tersely says, "A crime is an act or omission [or commission] punishable as an offense against the state." McClain, *Crim. Law*, § 4. At common law suicide was both criminal and felonious, although the punishment, except that of anticipatory dread, was of necessity visited upon the innocent, unless insensate clay can be said to have been punished by the burial in the highway and the driven stake. But in this country, generally, there is neither forfeiture of goods nor other penalty attached to suicide, which is therefore "little more than the shadow of a crime." *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 118, 42 L. R. A. 253, 75 N. W. 980. This case decides that suicide does not fall within the usual exception in a life-insurance policy of death resulting from a violation of law. The opinion of Winslow, J., well merits study on all the phases of the subject now *sub judice*. It is a model of terse, logical reasoning, but, like most judicial utterance since the *Ritter Case*, which is evidently disapproved, it is confined to cases where the insurance is payable to a beneficiary. In New York, also, it has been held that death by suicide does not result from violation of law, although by an exclusive penal Code an unsuccessful attempt to commit suicide is there a crime, while suicide is not. *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495, 22 N. E. 1093. In New Jersey neither suicide nor attempt to commit suicide has, since 1796, at least, been criminal. This results from the enactment in that year that no conviction or judgment for any offense against the state shall make or work forfeiture of estate. *Paterson's Laws*, p. 221, § 75, continued to the latest revision of our criminal procedure act (P. L. 1898, p. 919, § 153).

As to the abstract immorality of suicide generally, opinions may differ, but all will

admit that in some cases it is ethically defensible. Else, how could a man "lay down his life for his friend?" Suicide may be self-sacrifice, as when a woman slays herself to save her honor. Sometimes self-destruction, humanly speaking, is excusable, as where a man curtails by weeks or months the agony of an incurable disease. It will not do to resort to the argument that in such cases there is no "felonious intent." As to direct suicide, all that the common law required to make one a *felo de se* was that he should be of years of discretion and in his senses, and should mean to kill himself. 4 Bl. Com. 189; Hale, P. C. 411. Extenuation could only be considered by the King, who would "execute judgment in mercy." Judge Harlan has not yet yielded to this argument; for, "with whatever motive" self-destruction is accomplished, it, in his view, defeats recovery. Inquiry into an intent, formed after procuring insurance, to defraud the insurer by suicide, has seemed to me impracticable. Inquiry into any other evil intent seems just as impracticable. On whom would rest the burden of proof, and how could complex motives be unraveled? Some general rule must control this question of public policy. Cases cannot be individualized. As to the public good requiring the discouragement of suicide, there may be also two opinions. The paternal theory of government does not here prevail. The common law condemned suicide, according to Hale and Blackstone, *ubi supra*, not only for religious reasons, but for the temporal one that the King has an interest in the preservation of all his subjects, and doubtless the same is true of an organized commonwealth and its citizens; but I cannot see that the public good is more concerned to prolong a life that may be worthless to the public than to secure to creditors their just demands, or to afford a maintenance to wife and children. Insurers may guard their interests in their contracts. I know no public policy more useful than that which holds contractors to performance. That opinions of what is sound public policy upon this subject are not all alike is shown by that which has been declared in the great state of Missouri by its legislature. For many years no defense of suicide in a suit to collect life insurance has been permitted unless it is shown to the satisfaction of the court or jury at the trial that the insured contemplated suicide at the time of application for the policy, and any contrary provision in a policy is made void. Mo. Rev. Stat. 1889, § 5855. If it be public policy to interfere with contracts in order to discourage suicide, then ought the contract of a creditor insuring the life of his debtor, or a wife insuring the life of her husband, to be defeated by the suicide of the insured, for the same motive of self-destruction for the benefit of the assured will be impelling in such cases as in a case where the contract is directly with the insured; yet it has never been suggested that one having an insura-

ble interest in another's life may not at his own cost himself contract insurance on that life, or take an assignment of an existing policy, without the risk of forfeiture by the suicide of the insured. Indeed, it has been held otherwise even in England, where suicide is criminal. *Cook v. Black*, 1 Hare, 390; *Moore v. Woolsey*, 4 El. & Bl. 243, 254. The fact that the insured pays the premiums and purchases insurance for a designated beneficiary, or for the benefit of his estate, can make no difference in his mental attitude. He can gain nothing by his death, and normally his estate will go either to his creditors or to his widow and next of kin. I see no sensible reason to affirm the contract in one case and disallow it in the other. I have said that no adjudged case has permitted suicide as a defense against a beneficiary other than the insured. This is true, with one exception, even where the decision in the *Ritter Case* has been recognized as sound or controlling. Judge Harlan himself was very careful to go no further than the case required. The exception to which I have alluded is the *Hopkins Case*, above cited, but to my mind the extension in that case was logical. What difference does it make whether a man contracting insurance designates in the contract the beneficiary, or leaves that designation to the law or his last will and testament. The contract is with him, and it is no more consistent with public policy that he should be allowed to contract that his suicide should not forfeit the right of a beneficiary named in the policy to receive the insurance money, than that he should be allowed to contract that such suicide should not forfeit the right of those who otherwise would receive it as creditors, distributees, or legatees of his estate. The decisions, since the *Ritter Case*, denying suicide as a defense to silent policies, must, logically, either reprobate that case, or distinguish it only on the ground that, as against a beneficiary named, the exception of the death of the insured by suicide cannot be constructively implied.

I conclude that in no case should the suicide of an insured person defeat recovery upon a contract of life insurance not procured by him with the intention of committing suicide, unless the contract so provides in express terms. Presumably the contract in this case was consummated in New Jersey, but if we look to Maryland, the state of the defendant's incorporation, for the law which is to govern, it will be found no different. In a very recent decision of the court of appeals of that state, in a controversy with this same defendant, after full consideration of both the grounds of objection to recovery that I have been discussing, the same conclusion, and for substantially the same reasons, has been reached. *Supreme Conclave, I. O. of H. v. Miles*, 92 Md. 613, 48 Atl. 845.

The direction of verdict for plaintiff was correct, and the judgment is affirmed.

Garrison, J., concurring:

The opinion of Mr. Justice Collins holds that to procure insurance with intent to commit suicide is a fraud on the insurer that should defeat recovery, but that suicide with an intent to defraud the insurer, if formed after getting the insurance, is not such a fraud as should defeat recovery. I think that the same result should follow in either of the above instances of fraud. The burden of proving the fraudulent intent in either event is upon the insurer. This burden was not borne at the trial. My failure to concur in the opinion of the court, therefore, does not lead to my dissent from the judgment of affirmance pronounced by it.

Magie, Ch. J., and Van Syckel, Gum-
mere, Hendrickson, Adams, and Vroom,
JJ., dissent.

Van Syckel, J., dissenting:

This is an action by Lillie Campbell, the beneficiary named in a certain benefit certificate issued by the plaintiff to her late husband, John G. Campbell, by virtue of his having become a member of the said subordinate conclave, a fraternal organization located in this state. Neither the benefit certificate nor the by-laws of the order contained any provision whatever with reference to suicide. On the trial of the cause there was testimony tending to show that John G. Campbell committed suicide, and also that he was irresponsible mentally at the time of his self-destruction. At the conclusion of the testimony the court directed the jury to render a verdict for the plaintiff, although the defendant requested the court to charge the jury that, if the said Campbell committed suicide while he was of sound mind, there should be a verdict for the defendant. The bill of exceptions and the assignment of errors present the question whether the request of the defendant was properly refused.

Campbell named the plaintiff, who was his wife, as the beneficiary on the certificate, but he had the right at any time to change the beneficiary without her consent. It seems clear, therefore, that the plaintiff had no vested interest in the certificate, and so the cases hold. *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Hellenberg v. District No. 1 of I. O. of B. B.*, 94 N. Y. 581; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125. The case, therefore, turns upon the question whether the plaintiff was entitled to a verdict if Campbell, while of sound mind, committed suicide. In the recent case of *Ritter v. Mutual L. Ins. Co.* reported in 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300, this question is discussed with much ability. Mr. Justice Harlan, who delivered the opinion of the court, said: "It is contended that the court erred in saying to the jury, as in effect it did, that intentional self-destruction, the assured being of sound mind, is in itself a defense to an action upon

a life policy, even if such policy does not in express words declare that it shall be void in the event of self-destruction when the assured is in sound mind. But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life intentionally precipitates the event upon the happening of which such liability was to arise? . . . If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event the assured at any time during the continuance of the contract committed self-destruction, being at the same time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction whilst the assured was in sound mind, but only death occurring in the ordinary course of life. . . . In the case of fire insurance it is well settled that although a policy in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators, or assigns, that the company should be liable if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay was to be left to his option. That view is against the very essence of the contract. There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the par-

ties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract the tendency of which is to endanger the public interests, or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment. If, therefore, a policy taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns, expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. Is the case any different in principle if such a policy be silent as to suicide, and the event insured against—the death of the assured—is brought about by his wilful, deliberate act when in sound mind?" Justice Harlan fortifies his conclusions by reference to many cases cited and discussed in his opinion. I concur in the views he has so forcibly expressed. Death, in its commonly understood acceptation, does not include death by one's own hand. Additional words must be used to convey the fact that it was death by self-destruction. It is not necessary for the defense in this case to impart additional words into this contract, or in any respect add to its terms. In property insurance the recognized defense that the assured wilfully set fire to the subject of the insurance does not write any new condition in the policy. Its correct construction as written forbids recovery upon it. So the reasonable and just interpretation of the language used in the benefit certificate in this case precludes the idea that the death of Campbell by his own hand while of sound mind was the death to which the insurance applied. Such insurance, if expressed in the certificate, I think, could not be a legal basis of action; and, if unexpressed, it can have no greater legal value. In my judgment, the *Ritter Case* was decided in accordance with the correct rules of interpretation, and with well-recognized legal principles. It is a general rule that a man cannot make a profit or gain an advantage by his own wrongful act, and a right of action to a third person who had no vested interest in the contract should not be permitted to arise out of the wrongful act of the insured. Recovery in this case is, to some extent, an encouragement of suicide.

My conclusion is that the questions whether the assured committed suicide, and whether he was of sound mind at the time, should have been submitted to the jury. The trial court erred in directing a verdict for the plaintiff, and therefore the judgment should be reversed. The Judges who voted to reverse concur in this opinion.

54 L. R. A.

Samuel B. TUTTLE and Wife

v.

ATLANTIC CITY RAILROAD COMPANY,
Plff. in Err.

(.....N. J.....)

*1. A woman, seeing a car which had been derailed while a flying drill was being made coming out of the limits of a freight yard and across a public street at great speed towards the place where she was standing, in fright ran for safety, and fell, injuring herself. Held, that she was entitled to recover damages for such injury.

*2. Where one by negligence puts another under a reasonable apprehension of personal physical injury, and, in a reasonable effort to escape, the latter sustains physical injury, a right of action arises to recover for the physical injury and the mental disorder naturally incident to its occurrence.

(June 17, 1901.)

ERROR to the Supreme Court at Circuit in Camden County to review a judgment in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. Willard Morgan and Charles V. D. Jelline, for plaintiff in error:

There was no imminent danger, and the case should, for that reason, have been taken from the jury.

Jewett v. Paterson R. Co. 62 N. J. L. 431, 41 Atl. 707.

It was plaintiff's duty to look carefully. She acted on impulse. Nor was her fright, resulting in the giving out of her knee, the proximate, reasonable, or natural result of the car crossing the street.

Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 44, 14 L. R. A. 666, 23 Atl. 340.

The accident, if at all, was occasioned by fright.

Ward v. West Jersey & S. R. Co. (N. J. L.) 47 Atl. 561; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354.

The weakness of the knee was the result of a nervous shock caused by fright of an anticipated event which never happened. It resulted from the constitution and circumstances of the individual. Damages, therefore, are too remote.

Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 225.

*Headnotes by VROOM, J.

NOTE.—For earlier cases in this series as to injury in attempting to escape from sudden danger caused by another, see *Cody v. New York & N. E. R. Co.* (Mass.) 7 L. R. A. 843; *Mitchell v. Southern P. R. Co.* (Cal.) 11 L. R. A. 130; *Vallo v. United States Exp. Co.* (Pa.) 14 L. R. A. 743; *Blackwell v. Moorman* (N. C.) 17 L. R. A. 729; *Lincoln Rapid Transit Co. v. Nichols* (Neb.) 20 L. R. A. 353; and cases in note to *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. on page 195.

The damage must be the natural and reasonable result of the defendant's act,—such a consequence as, in the ordinary course of things, would flow from the act.

The Notting Hill, L. R. 9 Prob. Div. 105; *Victorian R. Comrs. v. Oultas*, L. R. 13 App. Cas. 225; 8 Am. & Eng. Enc. Law, 2d ed. p. 687; *Spade v. Lynn & B. R. Co.* 168 Mass. 287, 38 L. R. A. 512, 47 N. E. 88; *Husley v. Berg*, 1 Starkie, 98.

One may be bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty of unintentional negligence. The general rule limits damages in such cases to the natural and probable consequences of the acts done.

Mitchell v. Rochester R. Co. 151 N. Y. 109, 34 L. R. A. 781, 45 N. E. 354; *Spade v. Lynn & B. R. Co.* 168 Mass. 287, 38 L. R. A. 512, 47 N. E. 88; *Lehman v. Brooklyn City R. Co.* 47 Hun, 355; *Fox v. Bortey*, 128 Pa. 164, 17 Atl. 604; *Husley v. Berg*, 1 Starkie, 98; *Ewing v. Pittsburgh, O. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340.

The court erred in holding that the mere happening of the accident showed negligence.

Baldwin v. Atlantic City R. Co. 64 N. J. L. 232, 45 Atl. 810; *Essex County Electric Co. v. Kelly*, 57 N. J. L. 100, 29 Atl. 427; *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *Fenderson v. Atlantic City R. Co.* 56 N. J. L. 708, 31 Atl. 767.

Messrs. Henry S. Seovel and William T. Boyle, for defendants in error:

The facts clearly show that the doctrine of *res ipsa loquitur* is applicable.

Trenton Pass. R. Co. v. Cooper, 60 N. J. L. 219, 38 L. R. A. 637, 37 Atl. 730; *Newark Electric Light & P. Co. v. Ruddy*, 62 N. J. L. 505, 41 Atl. 712.

A person placed in a position of danger by the negligent conduct of another is not guilty of contributory negligence in not choosing what afterwards may prove to have been the best method of escape.

Cannon v. Pittsburg Traction Co. 194 Pa. 159, 44 Atl. 1089; 7 Am. & Eng. Enc. Law, 2d ed. p. 399.

The injury complained of was a bodily one caused by plaintiff's fall while running. There is no allegation that fright produced the physical suffering complained of.

Defendant's act caused plaintiff to fall by compelling her to seek a place of safety.

Buchanan v. West Jersey R. Co. 52 N. J. L. 265, 19 Atl. 254; *Ellick v. Wilson*, 58 Neb. 584, 79 N. W. 152; *Coulter v. American Merchants' Union Exp. Co.* 56 N. Y. 585; 8 Am. & Eng. Enc. Law, 2d ed. p. 665.

Vroom, J., delivered the opinion of the court:

The writ of error in this cause brings up the record of a suit brought in the supreme court and tried at the Camden circuit court. The defendant, the Atlantic City Railroad Company, maintained a freight yard on the south side of Mechanic street, in the city of Camden; and on the 25th day of September, 1899, while a flying drill was being made, one

of the cars was derailed, and dashed across Mechanic street over two curbstones and two trolley tracks, and broke through the front of the house opposite No. 293, belonging to a Mrs. Brennan. At the time of the accident, Mrs. Tuttle, one of the plaintiffs, was on the sidewalk near the Brennan house, and, looking, she saw the car coming across the street at full speed. Becoming frightened at the noise, she started to run, and, when three or four doors below, fell, and injured her left knee. At the close of the plaintiff's case a motion for a nonsuit was made on the part of the defendant upon the ground that, if any negligent conduct had been proved on the part of the defendant by reason of this car having gotten away from where it belonged, the plaintiff was guilty of contributory negligence in going away from a place of safety to a place of insecurity; that she was at a safe distance from the car, and there was no occasion for her to remove from it. The testimony, however, of the plaintiff was that she was in front of Mrs. Brennan's door, or had just passed it, when she saw the car coming over; and it was further disclosed by the testimony that this car, in coming across the street was not running on any track. Is it reasonable, even, to suppose that the plaintiff could have had any means of knowing the direction the car would take? She was rightfully on the street, and the unusual sight of a car crashing across the street at full speed precluded any possibility of reflection as to the best thing to do. Acting under the impulse of fear, she ran, and, just as the car crashed into the Brennan house, she fell. The motion to nonsuit was denied, and the trial resulted in a verdict for the plaintiffs. The real question in issue in the case and to be determined by the jury was whether the plaintiff Mrs. Tuttle, seeing the car approaching at great speed across this street, was justified in running to escape from what she supposed was an imminent danger. In the case of *Stokes v. Saltonstall*, 13 Pet. 189, 10 L. ed. 120, which was an action brought to recover damages sustained by the wife of the plaintiff by the upsetting of a stage coach in which she was a passenger, the question was whether the stage was upset by the negligence of the driver or by the act of the plaintiff and his wife in rashly and improperly springing from it. The court held that, "if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover, although the jury may believe from the position in which the stage was placed from the negligence of the driver the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset, and although they also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage." And in the case of *Jones v. Boyce*, 1 Starkie, 493, which was an action against a coach proprietor for so neg-

ligerly conducting the coach that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken, Lord Ellenborough held: "To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach. It is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at a certain peril. . . . On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury he sustained is to be attributed to rashness and imprudence, he is not entitled to recover." The doctrine is concisely stated in 1 Shearm. & Redf. Neg. § 89: "If one is placed, by the negligence of another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance." The contention of the defendant company was that the plaintiff was in a safe place, and that, while it was true that the sight of a car coming as this one did was unusual, still that there was nothing attendant upon it which should lead one in a safe position precipitately to leave it. The counsel for the defendant at the trial requested the judge to charge that, "if the jury believe that Mrs. Tuttle was at a safe location before the injury complained of, and was afterwards injured by removing from such safe place, she cannot recover; but this matter was correctly disposed of in the charge that 'safe place' is a term which is not easy to define. To charge that in this case she was 'in a safe place' would be to charge that the circumstances which brought about this fright and terror under which she seems to have acted were not sufficient to warrant her in removing from that spot, and seeking another, which, in her judgment,—and perhaps a mistaken judgment,—she might have deemed safer. There is hardly enough evidence in this case to know whether it was exactly safe where she stood. It turned out afterwards to have been a safe place. But who could tell beforehand how many splinters from this car would fly in all directions, how many cobblestones or other things would fly around? You do not know, when you see a car coming, just what the end will be, and would naturally seek, possibly, a safer place than you think you occupy, although, after it is all over, you may find that where you stood was a safe place." This is not a case involving the question whether an action can be sustained for mental anguish or injury unaccompanied by injury to the person. That this would not afford a ground of action is well settled. In *Canning v. Williamstown*, 1 Cush. 451, it was held that there could be no recovery for risk and peril which caused fright and mental suffering, but those elements could be considered when there was bodily injury, however slight. And in *Vic-*

torian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222, where, by a negligent act of the defendant, a collision with a railway train at a local crossing became imminent, but actual collision was avoided, nervous shock or mental injury, caused by fright at the occurrence, was held to be too remote a consequence of the defendant's act to be a ground of damage. Mr. Justice Gummere, in *Ward v. West Jersey & S. R. Co.* (N. J. L.) 47 Atl. 561, clearly states the rule when he says: "It seems to be universally conceded that mere fright, from which no subsequent physical suffering results, affords no ground for action;" and he subsequently holds that, "where personal injury, as well as fright, is produced by the wrongful act, the rule is entirely settled that the jury is entitled, in fixing the damages, to consider the mental agitation as well as the physical injury." This harmonizes with the decisions in *Consolidated Traction Co. v. Lamberton*, 59 N. J. L. 297, 36 Atl. 100, and *Buchanan v. West Jersey R. Co.* 52 N. J. L. 265, 19 Atl. 254. It is not perceived that the question of recovery for peril causing mere fright unaccompanied by physical suffering is in the remotest sense presented in this case. The injury sustained by the plaintiff and for which recovery is sought, was not the result of fright, but was due to the falling down of the plaintiff and the injury to her knee. She was placed in peril by the negligent act of the defendant, and in her effort to escape from danger she fell, and was injured. Does it require any stretch of imagination to believe that everyone in the neighborhood of this derailed car was frightened? And it would be extraordinary, indeed, if they attempted to escape, and were injured, that they should be without remedy. I think the point decided in *Buchanan v. West Jersey R. Co.* governs this case. There a woman was lawfully on the railroad platform of the defendant. A piece of timber projected from one of the cars of a train so as to reach the platform, and, in order to avoid being struck, she was obliged to throw herself upon the platform. By reason of the shock to her nervous system, her health was seriously impaired. A verdict in her favor was sustained by the supreme court, Beasley, Ch. J., saying: "The suit was not on the single ground that the plaintiff had been frightened. There was a basis for the action in the carelessness of the company which compelled the plaintiff to throw herself upon the platform, as such carelessness leading to that result was *per se* actionable. The fright was an incident to such cause of action, and a mere aggravation of the tort." See also *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268. In the case under consideration the negligence of the defendant in permitting the derailling and escape of the car is too plain for argument, and it was such negligence as caused the plaintiff in error to attempt to escape the peril by running, and in so doing she fell, and was injured. The true rule governing cases of this character may be stated as follows: That if a defendant, by negligence, puts the plaintiff under a reasonable appre-

bension of personal physical injury, and plaintiff in a reasonable effort to escape sustains physical injury, a right of action arises to recover for the physical injury and the mental disorder naturally incident to its occurrence.

The case below was properly submitted to the jury, and the judgment below should be affirmed.

Andrew THOMPSON, *Plff. in Err.*,
v.

Lillian B. TAYLOR, Impleaded, etc.

(.....N. J.....)

- *1. The written promise of a married woman domiciled in New Jersey, to pay a sum of money to the order of her husband, signed by her at her domicile, and carried by him, with her acquiescence, to New York, and there indorsed, and delivered in exchange for other notes of like import, is a contract made in the state of New York; and the capacity of the wife to bind herself by a contract of suretyship is to be determined by the law of that state.
2. Such a contract, if valid in the state of New York, may be enforced against the married woman in this state, although such contract, if made here, would be void.
3. The statute of New Jersey that regulates the right of married women to make contracts of suretyship is not a declaration of a public policy that closes the courts of this state to rights of action arising in other jurisdictions where the law is different.

(*Magie, Ch., and Krueger and Vroom, JJ., dissent.*)

(June 17, 1901.)

ERROR to the Circuit Court for Bergen County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by **Garrison, J.:**

This action was brought in the circuit court upon a note, of which the following is a copy:

\$422.29. Englewood, N. J., Oct. 10, 1898.

Three months after date I promise to pay to the order of W. Bernard Taylor four hundred twenty-two 29/100 dollars, at 44 Broad St., New York City; value received.

Lillian B. Taylor.

Indorsed: "W. Bernard Taylor, 44 Broad St."

The note was signed by Lillian B. Taylor

*Headnotes by **GARRISON, J.**

NORM.—As to what law governs in determining married woman's capacity to make contract, see *Ruhe v. Buck* (Mo.) 25 L. R. A. 178, and note; *Polson v. Stewart* (Mass.) 86 L. R. A. 771; *Freeman's Appeal* (Conn.) 87 L. R. A. 452; and *Walling v. Christian & C. Grocery Co.* (Fla.) 47 L. R. A. 608.

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at the time and place of its date, she being then the wife of the payee. She signed it at her husband's request, and solely for his accommodation, and delivered it to him without any express limitation on the use he might make of it. The husband at once took the note to New York city, and there transferred it, with his indorsement, to the plaintiff, to take up two similar notes held by him, and then past due, aggregating, with interest, the amount of this note; which two notes the defendant had signed under the same circumstances, and which her husband had transferred to the plaintiff in the same manner for cash. The plaintiff knew that the payee and maker were husband and wife, but had no further notice, outside of the notes themselves, of the circumstances under which they had been signed.

The husband and wife have been during all the time above referred to, and still are, domiciled in New Jersey.

Since 1892 the statutes of New York have provided that "a married woman may contract with her husband or any other person, to the same extent, with like effect, and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary." Laws 1892, chap. 594, § 1.

Deeming the case one of doubt and difficulty, the Bergen county circuit court certified the foregoing facts to the supreme court for its advisory opinion on the question whether, on those facts, the plaintiff is entitled to judgment against Lillian B. Taylor for the sum mentioned in the note and interest.

The supreme court, after hearing argument, advised the circuit court that the plaintiff was not entitled to judgment against Lillian B. Taylor upon the note in suit. 46 Atl. 567. Judgment in accordance with this advisory opinion was thereupon entered by the circuit court against the plaintiff, who, by writ of error, removed that judgment into this court.

Mr. R. P. Wortendyke, for plaintiff in error:

When a note is made payable at a particular place it is to be treated in all respects as if made there, without regard to the place where it is dated or delivered.

Ball v. Consolidated Franklins Co. 32 N. J. L. 102; 2 Am. & Eng. Enc. Law, p. 331.

Since payment of a note or bill is performance of the contract evidenced thereby, the instrument is governed by the law of the place where payable.

Story, Promissory Notes, § 172; *Murphy v. Collins*, 121 Mass. 6; *Allen v. Bratton*, 47 Miss. 119; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Campbell v. Nichols*, 33 N. J. L. 81; *Bright v. Judson*, 47 Barb. 29; *Randolph, Com. Paper*, § 24, p. 21; *Bell v. Packard*, 69 Me. 105.

If a place of performance is expressed it is presumed that the contract was made with reference to the law of that place.

1 Edwards, Bills & Notes, § 217; 2 Parsons, Notes & Bills, 320; Story, Promissory Notes, § 105; 1 Dan. Neg. Inst. 840; *Short v. Traub*, 4 Met. (Ky.) 299; *Arnold v. Potter*, 22 Iowa, 194; *Newman v. Kershaw*, 10 Wis. 333; *Martin v. Martin*, 1 Smedes & M. 170; *Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413; *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Allen v. Bratton*, 47 Miss. 119; *Mason v. Dousay*, 35 Ill. 424, 85 Am. Dec. 368.

It is also presumed that this law was known to the contracting parties.

2 Parsons, Notes & Bills, 326; *Freese v. Brounell*, 35 N. J. L. 287, 10 Am. Rep. 239.

And this rule applies to commercial paper. The law of the place of payment governs the validity, nature, obligation, and interpretation of such paper.

Byles, Bills, 402; 2 Parsons, Notes & Bills, 345; Story, Promissory Notes, § 165; *Robinson v. Bland*, 2 Burr. 1077, 1 W. Bl. 256; *Rothschild v. Currie*, 1 Q. B. 43; *Allen v. Kemble*, 6 Moore P. C. C. 314; *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264; *Vansandt v. Arnold*, 31 Ga. 210; *Soudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245.

The contract of the maker of a note or the drawer of a bill of exchange is governed by the place where it is made payable.

1 Edwards, Bills & Notes, 228; 2 Parsons, Notes & Bills, 335; Story, Promissory Notes, § 172; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Allen v. Bratton*, 47 Miss. 119; *Thompson v. Ketcham*, 4 Johns. 285; *Davis v. Clemons*, 6 McLean, 622, Fed. Cas. No. 3,630; *Campbell v. Nichols*, 33 N. J. L. 81.

Not only does the place of payment determine the place of making the contract, but so, also, does the place of delivery.

Randolph, Com. Paper, § 24, p. 20; Dan. Neg. Inst. 831; 2 Parsons, Notes & Bills, 327; *Freese v. Brounell*, 35 N. J. L. 285, 10 Am. Rep. 239; *Campbell v. Nichols*, 33 N. J. L. 81; *Hyde v. Goodnow*, 3 N. Y. 266.

The fact of the promissory note being signed in New Jersey, where the defendant claimed her domicile, does not affect the legality of the contract based upon it, as it only came into existence upon its delivery in the state of New York. It was a contract, in form, between husband and wife, but could not be enforced until the right of some third party intervened.

Bouvery Nat. Bank v. Sniffen, 54 Hun, 394, 7 N. Y. Supp. 520; *Queens County Bank v. Leavitt*, 56 Hun, 426, 10 N. Y. Supp. 193; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251.

The contract entered into was a contract of the state of New York, and not of New Jersey, and the fact of the note being signed in New Jersey, where the defendant claims her domicile, does not affect the enforcement of the contract in the courts of this state.

Randolph, Com. Paper, § 21, p. 17; Byles, Bills, 402; 2 Parsons, Notes & Bills, 320; Story, Promissory Notes, § 155; Story, 54 L. R. A.

Conf. L. 242; 1 Dan. Neg. Inst. 828; *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180, Affirmed in 43 N. J. L. 451; *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 11 S. W. 38; *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138; *Milliken v. Pratt*, 125 Mass. 374; *Baldwin v. Gray*, 4 Mart. N. S. 192, 16 Am. Dec. 169; *Saul v. His Creditors*, 5 Mart. N. S. 569, 16 Am. Dec. 212; *Andrews v. His Creditors*, 11 La. 464.

Mr. George Whitefield Betts, Jr., for defendant in error:

The defendant, Lillian B. Taylor, and her husband, being domiciled in the state of New Jersey, her capacity to contract with her husband, or to act as surety or accommodation maker or indorser of a note, is governed by the laws of the state of New Jersey, in an action brought in this state.

Story, Conf. L. § 51; 1 Henry, Foreign Laws, p. 31; *Garnier v. Paydras*, 13 La. 177; Dicey, Conf. L. Rule 146, p. 543; Wharton, Conf. L. § 20; *Petrie v. Voorhees*, 18 N. J. Eq. 285.

The status of a married woman and her capacity to carry on business in a foreign state are determined by the law of her domicile.

3 Am. & Eng. Enc. Law, p. 575; *Hill v. Pine River Bank*, 45 N. H. 300; *Ossio v. De Derales*, 1 Car. & P. 266; Pothier, Traité des Obligations, chap. 6, § 3, p. 2; 1 Félix, 188, No. 89; Savigny, Obligations, 137; Brounhois, 437; *Matthews v. Murchison*, 17 Fed. 760; *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 17 S. E. 14; *Johnston v. Gautry*, 11 Mo. App. 322; *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319; *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 11 S. W. 38; *Strawbridge v. Robinson*, 10 Ill. 470, 50 Am. Dec. 420; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180, 43 N. J. L. 451.

The enforcement of the note against the defendant, being matter of remedy, should be governed by New Jersey law as the law of the forum.

Harker v. Brink, 24 N. J. L. 334; *Wood v. Malin*, 10 N. J. L. 208; 3 Am. & Eng. Enc. Law, p. 575.

The law of New Jersey and that of New York being in conflict, the law of the forum should be applied, to wit, the law of New Jersey.

Runyon v. Groshon, 12 N. J. Eq. 86; 3 Am. & Eng. Enc. Law, p. 578; *Taber v. Brentnall*, 18 N. J. L. 262; *Union Locomotive & Eng. Co. v. Erie R. Co.* 37 N. J. L. 23.

The note, having been signed and dated in New Jersey and delivered by the defendant to her husband there, should be governed by New Jersey law.

Pine v. Smith, 11 Gray, 38; *Re Dodge*, 9 Ben. 480, Fed. Cas. No. 3,948; *Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711; *Union Nat. Bank v. Chapman*, 7 App. Div. 450, 39 N. Y. Supp. 1051; *Ball v. Consolidated Franklinite Co.* 32 N. J. L. 102; *Felt v. Felt*, 59 N. J. Eq. 606, 47 L. R. A. 546, 45 Atl. 105, 49 Atl. 1071; *Vliet v. Eastburn*, 64 N.

J. L. 627, 46 Atl. 735, 1061, Affirming 43 Atl. 741, 63 N. J. L. 450; *Harper v. O'Neil*, 194 Pa. 141, 44 Atl. 1065.

Garrison, J., delivered the opinion of the court:

The note in suit was not a New Jersey contract. The parties to it in this state were husband and wife. By force of § 14 of our married women's act, there is in this state no law to enable husband or wife to contract with each other, excepting as at common law. 2 Gen. Stat. p. 2015; *Woodruff v. Clark*, 42 N. J. L. 198; *Turner v. Davenport* (N. J. Eq.) 47 Atl. 766.

Hence the written promise of the wife to pay a sum of money to the order of her husband, signed by her and delivered to him in the state of New Jersey, did not constitute a contract. When, therefore, the note left this state no legal contract was in existence. *Rahway Nat. Bank v. Brewster*, 49 N. J. L. 231, 12 Atl. 769. In New York the above-mentioned feature of the common-law rule has been expressly superseded by an enabling act that empowers a married woman to contract with her husband to the same extent and in the same form as if unmarried.

The husband, therefore, having in his possession, in the state of New York, his wife's note, intrusted to him under the circumstances certified in this case, had the means of making for her a contract of suretyship that would be valid by the law of the place where it came into legal existence and where it was to be performed. By his indorsement and delivery of the signed note, the wife was as effectually bound to the payee as if she had personally executed the note in the state of New York.

Where a note is signed in this state, but is passed away, and comes first into legal existence in the state of New York, in contemplation of law it was made in the latter jurisdiction. *Campbell v. Nichols*, 33 N. J. L. 82. The note, therefore, is a contract made in the state of New York, upon the facts certified, without reference to the legal rule that a note made payable at a particular place is to be treated in all respects as if made at that place, for which abundant authority is cited in the brief of the plaintiff's counsel.

To the next proposition of the plaintiff, *vis.*, that such a contract, made in New York, and valued by its laws, will be enforced by the courts of New Jersey, two objections are raised: First. That the incapacities of a wife under the common law, if not removed by the statute law of her domicile, follow her wherever she goes; so that, if at home she be unable to bind herself as surety, she may nowhere bind herself by such a contract. Secondly. That the retention in our law of so much of the common law as prevented married women from becoming sureties is a declaration by the legislature of a public policy to which the courts should give effect by refusing to enforce obligations of this nature incurred by its citizens in other states where this disability no longer exists.

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Both of these points are taken in the brief of counsel for the defendant, and each of them receives some support from the opinion delivered in the supreme court, although the actual decision of the case is rested upon the second ground, *vis.*, that of public policy.

It will be necessary, therefore, to consider each of these propositions. The first claim is that the capacity of a married woman to make a contract of suretyship is governed by the law of her domicile, and not by the law of the place where the contract is made and where it is to be performed; in other words, that capacity to contract is governed by the law of domicile, and not by the *lex loci contractus*. The discussion of this question by the civilians and in early judicial writings occupied much space, and received the closest attention from Mr. Justice Story as one in which the doctrines of the civil law could not be made to harmonize with the commercial rule upon the subject. It is rarely worth while to search back of Story upon such a question, especially if he have decided against the civil-law rule. In his Commentaries upon the Conflict of Laws, after a comprehensive review of the authorities, Judge Story reached the conclusion that, in regard to the incapacities incident to coverture and other personal disabilities to contract, "the law of the domicile of birth or the law of any other acquired and fixed domicile is not generally to govern, but the *lex loci contractus aut actus*,—the law of the place where the contract is made or the act done." Story, Conf. L. § 103.

In the course of his consideration of this and kindred questions, Mr. Justice Story quotes so frequently from the civilians that upon a hasty reading the opinions of those jurists may be taken for his own; but there can be no question as to the commentator's final summary, *vis.*, that, "although foreign jurists generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract, yet that the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern." Story, Conf. L. § 241.

With respect to another American commentator,—Chancellor Kent,—it is both interesting and important to observe that while, in some parts of the text of his Commentaries, he seems to favor the arguments of the foreign jurists, yet in his later notes he unequivocally states the rule to be: "The state and condition of the person according to the law of his domicile will generally, though not universally, be regarded in other countries as to acts done, or rights acquired, or contracts made in the place of his native domicile; but as to acts, rights, and contracts done, acquired, or made out of his native domicile, the *lex loci* will generally govern in respect to his capacity and condition." 2 Kent, Com. 233, note c.

To the same effect is the opinion of Chief Justice Gray of Massachusetts delivered in the case of *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, where, after considering the whole question, he decides that "the va-

lidity of a contract [even as regards the capacity of the parties], is to be determined by the law of the state in which it is made."

I have no difficulty in reaching the conclusion that the capacity of Mrs. Taylor to enter into a New York contract in New York was governed by the laws of New York, notwithstanding her domicil was in New Jersey; and that the contract into which she there entered was valid, and binding upon her.

If we pass to the reason assigned in the advisory opinion, we shall see that it rests upon the doctrine of our courts that a contract valid elsewhere will not be enforced if it is inconsistent with the public policy of the jurisdiction the aid of whose tribunals is invoked for the purpose of giving it effect.

The decisive portion of the opinion of Mr. Justice Gummere is in these words: "When the legislature has declared the policy of the state in relation to a given subject-matter, it is the duty of the court to give effect, so far as possible, to that policy;" citing *Felt v. Felt*, 59 N. J. Eq. 606, 47 L. R. A. 546, 45 Atl. 106, 49 Atl. 1071, and *Union Locomotive & Eng. Co. v. Erie R. Co.* 37 N. J. L. 23. There can be no doubt as to the duty of our courts under the condition thus predicated. The question in the case is whether the legislation referred to in the opinion is a declaration of public policy. Briefly summarized, that legislation confers upon married women rights to contract as if unmarried, save as to contracts of suretyship, from which no benefit is obtained for their separate use. 2 Gen. Stat. p. 2017, § 26.

In my judgment, this and kindred acts of legislation, constituting together our married women's act, and passed under the titles of "An Act for the Better Securing of the Property of Married Women," and "An Act to Amend the Law Relating to the Property of Married Women," are to be regarded as regulations rendered necessary by the abrogation of the principles of the common law concerning coverture; and that what is indicated by this legislation as a whole is the abandonment of a public policy upon the subject, and the future regulation of it by acts of legislative discretion.

The distinction between regulative legislation and the adoption of a principle of public law is too important to be lost sight of. To declare, as the common law did, that the welfare of society required that wives be incapable of making contracts, is an illustration of the adoption of a principle which, so long as it was adhered to, constituted a rule of public policy. When, however, civilized states became satisfied that the welfare of society was not best served by the maintenance of this principle it was abandoned by the recognition of its opposite, *viz.*, that married women possessed capacity to contract. The questions that then arose, *viz.*, what contracts may they make, and what may they not? while calling for the exercise of legislative discretion based upon considerations that affected a large class of individuals, did 54 L. R. A.

not, either in theory or in fact, involve any principle upon which the general welfare of the body of citizens of the state was assumed to rest. With the abandonment of the political principle the matter was broken up into discretionary exercises of legislative regulation in the course of which different bodies, or the same legislative body at different periods, might lay down varying rules without destroying that comity that is so essential to commercial confidence and intercourse. Thus, in the case certified it appears that the state of New York, having abandoned the principles of the common law, as we ourselves have done, has gone further in its enabling legislation; or, what is the same thing, has retained less of what the common-law rule compelled; but equally and in either case the only principle involved has been abandoned. The respective regulations of the subject equally rest upon the common ground that women have a capacity to make contracts, subject to legislative control. If this be so, comity requires that we mutually give effect to these discretionary acts by recognizing the validity of the resulting contracts, and enforcing them in our courts, even when they are in opposition to our own declared discretion upon the subject. This, as I read in the case of *Wright v. Remington*, 41 N. J. L. 51, 32 Am. Rep. 180, has been categorically decided in our supreme court. In that case a wife signed two notes as surety for her husband in Illinois, where the common law had been abrogated to that extent. Suit was brought in our circuit court to enforce these contracts against the wife. Upon a case certified the supreme court held that comity required the enforcement of the notes in question.

In delivering the opinion of the court, Mr. Justice Reed said: "There can . . . be no question but that the contract was valid by the law of Illinois. It is therefore the duty of the courts of this state to recognize and enforce it, unless it appears injurious to the interests of the state or of our citizens. But nothing approaching this result can be deduced solely from the fact that the foreign statute confers upon a married woman the power to make a contract of suretyship. . . . Whatever may be our opinion of the policy of legislation beyond our state, we are bound by the principles of comity to recognize its validity, unless it clearly contravenes the principles of public morality, or attacks the interests of the body of the citizens of our state."

Objection upon this point was apparently not renewed upon the writ of error in this court, for the judgment was here affirmed without again referring to it. *Remington v. Wright*, 43 N. J. L. 451.

This case, upon the point now in controversy, states the correct rule of law so definitely that it should have been followed in the supreme court.

If, as was suggested upon the argument, the device of providing a place of performance in a foreign jurisdiction, or even of making the actual contract in a place where the wife was empowered to contract direct-

ly with her husband, should be urged as a ground for sustaining such a contract here, or for enabling the husband to sue thereon in our courts of law, a different question would be presented. It may well be that such a proceeding would run athwart the settled policy of our law with respect to the supervision exercised by equity over the engagements of married persons, which is retained in our system of jurisprudence by the

14th section of the married women's act. With respect to this question, no opinion is expressed.

For the reasons given, the judgment of the Circuit Court, entered in accordance with the advisory opinion of the Supreme Court, is reversed.

Magie, Ch., and Krueger and Vroom, JJ., dissent.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York *ex rel.*
John P. LEARY, *Appt.*,
v.

Charles H. KNOX *et al.*, *Resp'ts.*

(166 N. Y. 444.)

1. Promotion of a police officer for acts of personal heroism is not prohibited by a constitutional provision that promotions shall be made, when practicable, upon competitive examination.
2. A statute authorizing municipal authorities to promote police officers for personal heroism is not repealed by a general statute regulating appointments and promotions in the civil service, which provides that the statute shall not take from any policeman any right or benefit conferred by law or existing under any lawful regulation of the department in which he serves.

(*Parker, Ch. J., and Landon and Vann, JJ., dissent.*)

(April 16, 1901.)

A PPEAL by relator from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County granting a peremptory writ of mandamus to compel respondents to certify upon the pay roll of relator that he had been promoted from patrolman to roundsman in the department of police of the city of New York. *Reversed.*

The facts are stated in the opinions.

Messrs. James, Schell, & Elkus, for appellant:

At the time the relator was appointed patrolman on the New York police force details or permanent assignments of patrolmen to duty as roundsmen could be made for heroic and meritorious services, without a competitive examination.

Laws 1882, chap. 410; Laws 1883, chap. 354; Laws 1884, chap. 410; Laws 1894, chap. 354; Laws 1895, chap. 569.

NOTE.—The above case seems to be one of first impression as to the effect of the constitutional provision in question upon the right to promote a police officer for personal heroism, without any competitive examination.

For constitutionality of civil service laws, see *People ex rel. Akin v. Kiple* (III.) 41 L. R. A. 775, and cases in footnote thereto.

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The New York city consolidation act (Laws 1882, chap. 410, § 271) provided: "Promotions of officers and members of the police force shall be made by the board only on grounds of meritorious police service and superior capacity, and shall be as follows: Sergeants of police shall be selected from among patrolmen assigned to duty as roundsmen. . . ."

This section unquestionably gave the police board the power to promote for heroic and meritorious service.

People ex rel. Schell v. Knox, 48 App. Div. 477, 62 N. Y. Supp. 940.

At the time of, and prior to, the relator's appointment to the force the civil service laws did not require a competitive examination before the promotion or assignment of patrolmen to duty as roundsmen.

Laws 1883, chap. 354, § 8; Laws 1884, chap. 410, § 2; Laws 1895, chap. 569, § 3.

Subsequent legislation fully protected the relator's rights to be promoted from the position of patrolman to that of roundsman for heroic and meritorious service, without a competitive examination.

Laws 1897, chap. 378, § 274.

Civil service rules cannot affect relator's right to promotion, because the laws pursuant to which said rules were prepared expressly provided: "The authority by this section conferred (i. e., to make rules, etc.) shall not be so exercised as to take from any policeman . . . any right or benefit conferred by law or existing under any lawful regulation of the department in which he serves."

People ex rel. Schell v. Knox, 48 App. Div. 477, 62 N. Y. Supp. 940.

Messrs. James M. Ward, Theodore Connolly, and Terence Farley, with *Mr. John Whalen*, for respondents:

A consideration of the legislation affecting the police department in this city before consolidation, and the various civil service statutes of this state, will demonstrate that no promotion can be made for heroic conduct, without an examination.

The civil service statutes constitute a general system of statute law applicable to appointments and promotions in every department of the civil service of the state, with such exceptions only as are specified in the statute itself.

People ex rel. McClelland v. Roberts, 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082;

Re Sweetley, 12 Misc. 174, 33 N. Y. Supp. 369; *Chittenden v. Wurster*, 152 N. Y. 345, 37 L. R. A. 809, 46 N. E. 857; *People ex rel. Sweet v. Lyman*, 157 N. Y. 368, 52 N. E. 132.

A man's "superior capacity" cannot be determined without a mental examination, and thus the necessity of a civil service examination before a promotion can be made.

People ex rel. Sweet v. Lyman, 157 N. Y. 368, 52 N. E. 132.

O'Brien, J., delivered the opinion of the court:

The relator, on the 21st day of January, 1897, was appointed a patrolman on the police force of the city of New York, and after the new charter went into effect, on the 1st day of January, 1898, he continued to serve in that position as a member of the police force of the present city. On the 1st day of June, 1900, the police board, by a resolution duly passed and approved by the mayor, promoted him from the position of patrolman to that of roundsman because of meritorious and heroic conduct in the performance of his duties as such patrolman. The heroic or meritorious act for which this promotion was made was exhibited on the occasion of the fire which destroyed the Windsor Hotel on the 17th of March, 1899. It appears from the moving papers that on that occasion he went to the second floor of the burning building, and rescued four women who were imprisoned in the fire escape. Going up to the fifth story, he met a man with his clothes on fire, and extinguished it, and then passed the man down the ladder to the street. Next he found a woman on the fifth floor of the hotel, helpless and badly burned, and, with the assistance of a brother officer, he placed her upon his back, and at the risk of his life carried her to the second floor, and then down a burning staircase, in safety to the street.

It may be assumed that the determination of the police board, promoting the relator by reason of this meritorious and heroic conduct in the performance of his duty, is a promotion from a lower to a higher grade in the police force, at least in the sense that the relator became entitled, if the promotion was legally made, to a larger salary. It appears from the moving papers that the treasurer of the police department refuses to pay the relator the salary of roundsman without a certification by the respondents as commissioners constituting the municipal civil service commission of the city of New York, on the ground that such a certificate is required by § 19 of chapter 370 of the Laws of 1899. The court at special term, upon the relator's application, granted a peremptory writ of mandamus commanding the respondents to forthwith certify upon the pay roll of the relator that he was promoted to the position of roundsman according to law and the rules made in pursuance of law, and was entitled to pay as a roundsman from the 1st day of June, when promoted, at the rate of \$1,500 per annum. The appellate division, by a divided court, 64 L. R. A.

reversed the order, and from that decision this appeal has been taken.

The question in the case involves the construction of various statutes existing prior to the enactment of the new charter, some of the provisions of the charter itself, and at least one general statute subsequently enacted. It is quite possible that a very strict construction of these numerous statutes would justify the decision of the court below. But we think that the system of statute law upon which the relator's rights depend should not be subject to any narrow or illiberal construction. The various statutes should receive a fair construction, and the intention of the legislature, when ascertained, should, of course, control. It is clear beyond dispute that at the time the relator entered the service as a policeman, and for many years before, the police board possessed and exercised the power of promoting individual policemen for special and exceptional acts of heroism in preserving human life. The board attempted to exercise that power in this case upon a state of facts as to which there is no dispute, and leaves no doubt as to the character and merit of the service which the relator performed. The policy of the statute in conferring power upon the police board to promote a member of the force for special and particular acts of heroism was to furnish inducements for the performance of duty, even when confronted with great personal danger. The possibility of obtaining such rewards and honors was held out to every individual entering the service as a means of promoting its efficiency. It is analogous in some sense to the inducements which the government furnishes to the soldier who, in the discharge of his duty, is distinguished for bravery or some particular heroic act. When a policeman or a soldier has by his conduct earned the promotion or the reward, he ought not to be deprived of the benefits by any narrow or literal construction of the law governing the case. There is at least one important point involved in the controversy that is clear beyond any dispute, and that is that formerly the police board, with the approval of the mayor, was clothed with the power to do all that it has done in this case; that is, to determine that the relator merited promotion by reason of his conduct on the occasion referred to, and to award the promotion.

The only other question involved is whether this power has been abolished or modified in such a way that the police board is disabled from acting except in conjunction with the municipal civil service commission, or has the power which it formerly exercised been taken away or divided between the board, the mayor, and the civil service commission? If it has, then it was necessary that the relator, in order to obtain the promotion and the increase in his salary, should have satisfied, not only the police board and the mayor, but also the civil service commission, that he was entitled to the promotion. But a special and local statute conferring power upon the police

board to promote a policeman for particular and exceptional acts of gallantry is not to be deemed repealed or modified by a subsequent general law relating to the civil service generally. The various statutes with respect to promotions in the civil service are no broader than the Constitution itself. That enacts that appointments and promotions in the civil service shall be made, when practicable, upon competitive examination. The fact is clearly recognized that in some cases where promotion is merited a competitive examination would be impracticable; and it is very evident that this is such a case, since it is obvious that no examination could be devised which would present the conditions to furnish a test of the comparative heroism of a policeman engaged in the attempt to rescue persons from a burning building. In this case the right to promotion depended upon some meritorious or heroic act. That act alone is the only test which is practicable to apply to the relator's right to promotion. It may be that in such cases the applicant would not be able to meet any educational test whatever, but that circumstance ought not to interfere with the right of promotion which the law held out to him at the time that he entered the service as a reward for acts of exceptional courage or bravery in the performance of duty. We do not think that either the Constitution or the various statutes regulating appointments and promotions in the civil service has any application to this case. The general legislation on that subject was not intended to affect or modify a statute which authorized the police board to promote the relator as a reward for his conduct on the occasion of the burning of the hotel. It is well settled that a special and local statute, providing for a particular case or class of cases, is not repealed or modified by a subsequent statute, general in its terms, provisions, and application, unless the intent to repeal or alter is manifest, although the terms of the general act would, but for the special law, include the cases provided by the latter. *Re Central Park Comrs.* 50 N. Y. 493; *McKenna v. Edmundstone*, 91 N. Y. 231; *Davis v. Supreme Lodge, K. of H.* 165 N. Y. 159, 58 N. E. 891. This principle would control this case even if the subsequent statutes regulating appointments and promotions in the civil service were general and sweeping in the language employed, and contained no exceptions or reservations applicable here. But in all the statutes regulating the civil service is to be found an important exception, which, it seems to me, takes this case out of their operation, and leaves the law with respect to the power of the police board to promote the relator substantially where it was originally. The last of these enactments is to be found in § 10 of chapter 370 of the Laws of 1899. That section, after providing for the classified service in cities, contains the following provision: "The authority by this section conferred shall not be so exercised as to take from any policeman or fireman any right or benefit con-

ferred by law, or existing under any lawful regulation of the department in which he serves." The city charter contains a provision substantially identical. These provisions of the general law regulating the civil service disclose an intention on the part of the legislature to except from the general rules therein enacted just such a case as this. All rights or benefits conferred by law referred to were not necessarily such rights as had vested in the individual, but the language is broad enough to embrace rights or benefits not then in possession or enjoyment, but in expectancy, under any law which entitled him to special honors or rewards for some particular meritorious act while in the service. The power of the police board to make promotions for such exceptional conduct is not at all inconsistent with the general scope and purpose of the civil service regulations. Both enactments can stand, and each can be made to perform the office which the legislature intended in enacting it. The subsequent legislation does not affect the original law conferring the power of promotion upon the police board and the mayor in such cases, since the latter statutes do not, in terms or by any reasonable implication, interfere with that power. On the contrary, these statutes disclose an intention on the part of the legislature to make such a case as this an exception to the general rule, and hence it is not within the general scope or purpose of the civil service regulations. These views are confirmed by an examination of a recent case in the supreme court. *People ex rel. Schelpp v. Knox*, 48 App. Div. 477, 62 N. Y. Supp. 940. In that case the various statutes relating to the question were considered, and the conclusion of the court commends itself to us as a fair and reasonable exposition of the law.

It follows that the order of the Appellate Division should be reversed, with costs, and that of the special term affirmed.

Bartlett, Haight, and Martin, JJ., concur.

Landen, J., dissenting:

The question presented by this appeal is whether the relator, under his appointment and service as patrolman before the charter of Greater New York took effect, and his continuance in service under that charter, and until his alleged promotion from patrolman to roundsman, June 1, 1900, was then eligible to such promotion by the board of police because of meritorious police service, without passing the civil service examination required by §§ 288 and 304 of the charter of Greater New York (chap. 378, Laws 1897), and by chapter 370, Laws 1899, known as the "White Civil Service Act." Section 288 of the present charter provides that promotions in the police force shall be made by the police board, as provided in § 304, on grounds of seniority, meritorious police service, and superior capacity. Section 304 provides that "promotions from the lower grades to the higher grades shall be

on the basis of seniority, of merit and of excellence, as shown by competitive examination. The police board shall transmit to the civil service commission the record of each candidate for promotion." Section 15 of the civil service act of 1899 provides: "Promotions shall be based upon merit and competition and upon the superior qualifications of the person promoted as shown by his previous service, due weight being given to seniority. For the purposes of this section an increase in the salary or other compensation of any person holding an office or position within the scope of the rules in force hereunder beyond the limit fixed for the grade in which such office or position is classified, shall be deemed a promotion. No promotion, transfer, or reinstatement shall be made from a position in one class to a position in another class unless the same be specially authorized by the state or municipal commission."

The relator claims exemption from examination for this promotion under § 10 of the act of 1899. This section provides for the creation of the municipal civil service commission, the making and enforcement by the commissioners of rules for the classification of offices, and for appointments and promotions therein and examinations therefor, and provides: "The authority by this section conferred shall not be so exercised as to take from any policeman or fireman any right or benefit conferred by law, or existing under any lawful regulation of the department in which he serves." Substantially the same provision is contained in civil service act 1883, § 8, as amended by chapter 410, Laws 1884, and in subsequent acts, and in § 125 of the charter of Greater New York. But no right or benefit is conferred or exists until vested by appointment, and unless made by the appointing power, while yet in possession of the power, it can only be made by the new body to which it is transferred, and then only within the new limitations of that power. If this were not so, then as to the relator the former statutes as to the power of the police board to promote him would be irrepealable. Suppose the relator were eligible to election by popular vote to the office of roundsman, and then the law should be changed making the office appointive upon competitive examination, it could not be supposed that he had been deprived of any existing right or benefit conferred by law. The relator had a capacity to take a right or benefit from the police board, but the board, before attempting to confer it, lost the power to do so. If he had secured promotion before a change in the law, its rights or benefits would not be impaired by the change. The provision protected his title to whatever he had acquired, and whatever he could as of his own right by virtue of that title, without a further appointment, promotion, or test, acquire. It did not embrace a future promotion which rested in the power and discretion of others, especially when their power was subject to be devested by law. This distinction seems to have been overlooked

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in *People ex rel. Schellpp v. Know*, 48 App. Div. 477, 62 N. Y. Supp. 940. It can be shown, I think, that, before the White act, the assignment, detail, or transfer of a patrolman to duty as a roundsman was not in legal sense a promotion, but a mere detail to particular police service. *People ex rel. Buckley v. Roosevelt*, 5 App. Div. 168, 39 N. Y. Supp. 78; Consol. Act, § 271; Charter Greater New York, § 292. The appellant rests his case upon promotion, not detail.

But passing this question, and assuming that before the passage of the White act the detail or assignment of a patrolman to permanent duty as a roundsman was in legal sense a promotion, I think that the civil service laws and rules in force at the time of the relator's appointment as patrolman precluded his promotion without the test of a competitive examination. This is satisfactorily shown in the majority opinions of the learned appellate division in *People ex rel. Grady v. Know*, 54 App. Div. 334, 66 N. Y. Supp. 984. This case was argued in the appellate division with that case, and decided upon the opinions therein given. 54 App. Div. 634, 67 N. Y. Supp. 1142. It should be noticed that in the *Schellpp Case* the former Brooklyn charter permitted promotion "on account of any gallant or meritorious deed in the discharge of his duty." The consolidation act and the charter of the Greater City of New York provided for promotions on grounds of "meritorious police service and superior capacity." A "gallant or meritorious deed" is a personal specific act; it speaks for itself, and in its nature excludes competitive examination. "Meritorious police service" admits of competitive examination, is not specific, and opens the door to favoritism. Thus the *Schellpp Case* is unlike this case. While we applaud the services of the relator, we should, nevertheless, advise him to seek his promotion through legal methods, instead of making a breach in them through which the unworthy can pass.

Parker, Ch. J., and Vann, J., concur with Landon, J.

Joseph NOWACK, by Guardian *ad Litem*,
Appt.,

v.

METROPOLITAN STREET RAILWAY
COMPANY, Resp't.

(166 N. Y. 433.)

1. Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor is competent as an admission of weakness in his case.

2. Evidence that an agent of a cor-

NOTE.—On the question of the admissibility of evidence of an attempt to bribe a witness as an admission of the weakness of the case in support of which the bribery was attempted, the opinion in the above case, and the briefs of counsel, quite fully review the authorities.

poration employed as investigator, to see witnesses and take their statements in actions against the corporation, attempted to bribe a witness in such a case, is admissible against the corporation, without proof of his authority to do such act.

(London, O'Brien, and Haight, JJ., dissent.)

(April 16, 1901.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Vann, J.:

This action was brought to recover damages alleged to have been sustained by the plaintiff, when a lad of twelve years, through the negligence of the defendant in running over him with one of its horse cars, and inflicting injuries which resulted in the loss of his right leg. Upon the trial the theory of the plaintiff was that he started to cross East Houston street, in the city of New York, when a horse car of the defendant was approaching from the west, about 75 feet away. He had about 16 feet to go in order to get entirely across the track. Going southerly in a diagonal direction, in order to reach a point further east on the opposite side of the street, where he was called by an errand, his back was partly towards the approaching car. He thought he had time to cross in safety, but after crossing the north rail he was knocked down by one of the horses on the south side of the track and run over by the car. The horses were galloping at full speed under the whip of the driver, and after running over the plaintiff the car went nearly three blocks before it stopped. The theory of the defendant was that the plaintiff was not in front of the horses at any time, and was not crossing the street, but was trying to catch on to the car near the middle, and that after several efforts he fell under the car, the rear wheels of which passed over him. The conflict in the evidence was irreconcilable for several witnesses were called to sustain the theory of either party. Among them, on the part of the plaintiff, one Klein was sworn, who testified that he was standing on the front platform with the driver, who was whipping his horses, which were running at full speed. He first saw the plaintiff when he was from 12 to 15 feet in front of the horses, between the two rails, and about to cross the south rail. He told the driver to look out for the boy, but the reply was, in substance, "Mind your own business." On the cross-examination he was asked if before the former trial of the action he tried to induce a woman to swear that she saw him on the front platform and that she refused, but he denied it. On the redirect examination he testified that he knew one Kaufmann, who had been to his house five or six times dur-

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ing the week then past; the first time being on Saturday, a week before. He was asked to state what Kaufmann said to him on that day, but it was excluded. The witness was then withdrawn, and Kaufmann, being put upon the stand by the plaintiff, testified that he was employed by the defendant as an investigator; that his duties were "to see to the witnesses and take statements and to interview witnesses,"—those who "expect and those who are" witnesses; and that he had been acting in this case for the defendant. The plaintiff thereupon resumed the examination of Mr. Klein, and asked him to state the conversation that he had with Kaufmann on the Saturday in question; but the defendant's objection as incompetent, immaterial, and irrelevant was sustained, and the plaintiff excepted. After the witness had testified that he had a conversation with Kaufmann on the occasion mentioned in reference to the testimony that he was to give upon the trial, he was asked these questions: "What conversation did he have with you in reference to the testimony you were to give upon the trial of this action? Did Harry Kaufmann make any offer to you of money or any other thing in reference to the testimony you were to give upon the trial of this action?" Each of these questions was objected to upon the ground above stated, the objections were sustained, and the plaintiff excepted separately to each ruling.

The jury found for the defendant and after affirmance by the appellate division, one of the learned justices dissenting, the plaintiff came here.

Messrs. Nathan, Leventritt, & Perham, for appellant:

The court erred in excluding evidence of attempts on the part of defendant to suborn plaintiff's witness. The evidence sought to be introduced was in the nature of an admission by the defendant that it had no defence. It was an admission by conduct, and receivable for that reason.

Moriarty v. London, O. & D. R. Co. L. R. 5 Q. B. 314; *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457, Affirming 48 Hun, 308, 1 N. Y. Supp. 443; *Gulerette v. McKinley*, 27 Hun, 320; *Adams v. People*, 9 Hun, 89; *Donohue v. People*, 56 N. Y. 208; *Mather v. Parsons*, 32 Hun, 338; *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Hastings v. Stetson*, 130 Mass. 76; *State v. Nocton*, 121 Mo. 537, 26 S. W. 551; *Heslop v. Heslop*, 82 Pa. 537; *Lyons v. Lawrence*, 12 Ill. App. 531; *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14; *Baldwin v. Boulware*, 79 Mo. App. 5; *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75; *Taylor*, Ev. 9th ed. 242, 939, note; *Stephen*, Digest of Ev. art. 7; *Greenl. Ev.* 15th ed. § 196; *Wharton*, Ev. § 1265; 11 Am. & Eng. Enc. Law, 2d ed. p. 503.

The act of the defendant's investigator in attempting to suborn a witness, being done in the course of his employment, was the act of the defendant company itself, and was equivalent to an admission, not by the agent, but by the company.

Fifth Avenue Bank v. Forty-second Street & G. Street Ferry R. Co. 137 N. Y. 231, 19 L. R. A. 331, 33 N. E. 378; *Jarvis v. Manhattan Beach Co.* 143 N. Y. 652, 31 L. R. A. 776, 43 N. E. 68; *Clark v. Koehler*, 46 Hun, 536; *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; Story, Agency, 9th ed. § 452; 4 Thomp. Corp. §4912; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380.

Messrs. Charles F. Brown and Henry A. Robinson, for respondent:

No admission by an agent is competent to bind his principal in the absence of authority.

Marvin v. Wilber, 52 N. Y. 270.

The rule as to apparent authority rests upon the doctrine of estoppel.

People v. Bank of North America, 75 N. Y. 547; Morawetz, Priv. Corp. 2d ed. p. 509, § 540a.

There are no implied duties connected with particular offices. It is incumbent upon the party seeking to hold a corporation for the act of its agent to prove that the act was within the scope of his authority.

Cook, Corp. §§ 716, 719; *Titus v. Cairo & F. R. Co.* 37 N. J. L. 98; *Re Utica Nat. Brewing Co.* 154 N. Y. 268, 48 N. E. 521; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *E. Carver Co. v. Manufacturers' Ins. Co.* 6 Gray, 214.

Kaufmann was an "investigator" under a "superior." His duties were confined to seeing witnesses and taking their statements; they were entirely ministerial. In the absence of proof of his authority to exercise discretion, none can be inferred.

Re Utica Nat. Brewing Co. 154 N. Y. 268, 48 N. E. 521; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Tripp v. New Metallic Packing Co.* 137 Mass. 499; *Kell v. Brillinger*, 84 Pa. 279; *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327; *Henry v. Northern Bank of Ala.* 63 Ala. 527; *Cosgray v. New England Piano Co.* 22 App. Div. 455, 48 N. Y. Supp. 7; *Jackson ex dem. Ballou v. Campbell*, 5 Wend. 571; *Flour City Nat. Bank v. Grover*, 88 Hun, 4, 34 N. Y. Supp. 496; *Wakefield Rattan Co. v. Tappen*, 80 Hun, 219, 30 N. Y. Supp. 38.

There is no such established meaning to the word "investigator" as to raise any presumption that an investigator has discretionary power to bind his principal by admissions. Therefore no such power can be inferred.

Penny v. New York C. & H. R. R. Co. 34 App. Div. 10, 53 N. Y. Supp. 1043; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597.

The master is not liable for acts of a servant which were wholly disconnected from the employment, although done by the servant while engaged generally in the employment or service.

Meehan v. Morewood, 52 Hun, 566, 5 N. Y. Supp. 710; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L. R. A. 791, 29 N. E. 952.
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Vann, J., delivered the opinion of the court:

Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor, although collateral to the issues, is competent as an admission by acts and conduct that his case is weak and his evidence dishonest. It is somewhat like an attempt by a prisoner to escape before trial or prove a false alibi, or by a merchant to make way with his books of account, except that it goes further than some of these instances; for, in addition to reflecting on the case, it reflects upon the evidence on that side of the controversy. "Where it appears that on one side there has been forgery or fraud in some material parts of the evidence, and they are discovered to be the contrivance of a party to the proceeding, it affords a presumption against the whole of the evidence on that side of the question, and has the effect of gaining a more ready admission to the evidence of the other party." 1 Phillpotts, Ev. (Cowen & H. Notes) 627. It is not conclusive, even when believed by the jury, because a party may think he has a bad case when in fact he has a good one, but it tends to discredit his witnesses and to cast doubt upon his position. It is for the consideration of the jury, after ample opportunity for explanation and denial, under proper instructions to prevent them from giving undue attention to the collateral matter to the detriment of the main issue. The leading authority in support of such evidence is an English case, decided after careful argument by counsel and upon full discussion by the judges. *Moriarty v. London, O. & D. R. Co.* L. R. 5 Q. B. 314. It is also sustained by the cases in this state relating to the subject, some with and some without discussion. *Cruikshank v. Gordon*, 118 N. Y. 178, 187, 23 N. E. 457; *Gray v. Metropolitan Street R. Co.* 165 N. Y. 457, 459, 59 N. E. 262; *Mather v. Parsons*, 32 Hun, 338; *Gulerette v. McKinley*, 27 Hun, 320; *Adams v. People*, 9 Hun, 89. It is received even in criminal actions. *People v. Rathbun*, 21 Wend. 509; *Gardiner v. People*, 6 Park. Crim. Rep. 155, 205; *Donohue v. People*, 56 N. Y. 208. The same rule prevails in other states, without exception, so far as we have been able to discover. *Egan v. Bowker*, 5 Allen, 449; *State v. Nocton*, 121 Mo. 537, 551, 26 S. W. 551; *Heslop v. Heslop*, 82 Pa. 537, 539; *Snell v. Bray*, 56 Wis. 156, 162, 14 N. W. 14; *Lyons v. Lawrence*, 12 Ill. App. 531; *People v. Marion*, 29 Mich. 31; *Com. v. Webster*, 5 Cush. 295, 316, 52 Am. Dec. 711. The elementary writers sanction it,—some notwithstanding they concede it to be collateral, and others upon the ground that, as it relates to good faith or the intent of a party, it is a material fact, and has a direct bearing on the issue. 1 Taylor, Ev. 9th ed. 242; 1 Greenl. Ev. 15th ed. § 196; Wharton, Ev. § 1265; 1 Starkie, Ev. 437; 11 Am. & Eng. Enc. Law, 2d ed. p. 503.

It is claimed, however, that such evidence is not admissible against a corporation without proof of some corporate act express-

ly authorizing an agent to tamper with witnesses. This is equivalent to claiming that such evidence cannot be received against corporations at all, because, in the nature of things, proof of express authority would be impossible. A corporation can act only through agents, and where a branch of its business, whether broad or narrow, is intrusted to an agent, without any restriction, whatever he does which directly relates to that part of the corporate business and tends to promote it is binding upon the corporation. Under such circumstances he has control of the method of action, and that which he does, whether morally right or wrong, within the general scope of the matter intrusted to him, in legal effect is done by the corporation itself. Having authority to accomplish a certain result, with no limitation as to the means to be employed, his acts, so far as they directly contribute to that result, even if unlawful, are corporate acts. They are done for the corporation by an agent clothed with general authority to effect a certain purpose, which they aid in attaining. Any admission made by him through acts done to carry on his branch of the business, and which reasonably tend to advance it, is regarded in law as made by the corporate body which authorized him to act for it with reference to the subject of his employment. Kaufmann was employed to look up and "see to" witnesses for the defendant, so as to enable it to defeat the plaintiff's claim, among others. He was to find witnesses, if possible, who would swear to such a state of facts as would prevent a recovery against the defendant. The method of doing this was left to his judgment and discretion. If he adopted a method not contemplated by the defendant, still it is responsible for what he did, in the line of his employment, to promote its interest. In order to promote its interest, he saw fit, as we must now assume, to use the power intrusted to him by trying to bribe the most important witness for the plaintiff to testify falsely in favor of the defendant. He was employed "to see to the witnesses," and this was his manner of seeing to them. He was to procure evidence, the method not being specified, and he tried to get it by an unlawful method. The subject was left to his judgment, and he acted according to his judgment. The scope of the business intrusted to him included whatever he thought best to do in order to get the right kind of witnesses. He was not working for himself, but for the defendant; and, as he represented it with reference to the subject of witnesses, his conduct not only tended to show that its case was weak, for witnesses are not bribed unless it is thought necessary, but to cast a doubt upon the testimony of the other witnesses who were looked up by him and sworn by the defendant. It indicated, as the result of his investigation for the defendant, that honest witnesses could not be procured who would swear to a defense. If he could not make a mere admission as such, he could do an act which had the effect of an admission. His declaration

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tions dum feroet opus were acts. Those acts, if shown, would have reflected upon the integrity of the defendant's case as presented in court through the medium of witnesses, and would have tended to prevent the verdict which was rendered in its favor. They would have afforded "a presumption against the whole of the evidence" for the defendant, which has served it so well. It has had the benefit of what he did with reference to the other witnesses, unaffected by the cloud which the evidence offered would have cast upon them. He was acting in the course of his employment, for he was employed to procure witnesses. The power of the corporation was intrusted to him with reference to that subject, to be used as he saw fit. His acts related solely to that subject, and were done by him, as its agent, wholly for its benefit. If this evidence would have been admissible against an individual defendant who had employed Kaufmann as he was employed, it is admissible against this corporate defendant. If an honest man by mistake employs a dishonest one to look up witnesses for him, and the latter, through excess of zeal, resorts to bribery, although it was never thought of by his employer, it is better, for cleanliness and purity in the administration of justice, that the facts should be shown, with the fullest opportunity for explanation, than to exclude all evidence of the evil acts upon the ground that they were not authorized, because authority may properly be inferred from the nature of the employment. In such a case all doubt should be resolved, if possible, in the interest of clean evidence and the exposure of foul practices.

There are but few authorities which bear directly upon this branch of the subject. We have the general rule that a principal is liable to a third person in a civil action for the fraud or other malfeasance of his agent perpetrated by the latter in the course of his employment, although the act was *ultra vires*, and the principal did not authorize, justify, or know of it. *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136, 30 N. E. 1001; *Fifth Avenue Bank v. Forty-second Street & G. Street Ferry R. Co.* 137 N. Y. 231, 19 L. R. A. 331, 33 N. E. 378; *Jarvis v. Manhattan Beach Co.* 148 N. Y. 652, 31 L. R. A. 776, 43 N. E. 68; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185. As was said in an important case in England: "If the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." *Ranger v. Great Western R. Co.* 5 H. L. Cas. 86, 87. So this court has declared that "where authority is conferred to act for another, without special limitation, it carries with it by implication authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use

of force towards or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business and was acting within the general scope of his employment. . . . In most cases where the master has been held liable for the negligent or tortious act of the servant, the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master." *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 133, 21 Am. Rep. 597. So far as this rule rests upon estoppel, it does not apply to the question before us, but so far as it rests upon public policy or convenience, it has some bearing; for the interest of the public is promoted by the exposure of corrupt acts intended to turn the course of justice.

The authorities directly in point, so far as they have been called to our attention, with one exception, support the theory that the evidence in question should have been received. In the leading case evidence was admitted to show that a clerk in the employ of the defendant, a railroad corporation, offered money to a witness for the plaintiff to influence his testimony in favor of the company. It was the duty of the clerk to look up and arrange the evidence in cases where the company had been sued by persons injured, without special directions, and with general authority to use his own judgment. It expressly appeared that he had no authority "to deal with a witness in any way," and that if he had used money to suborn a witness he would have been instantly discharged. The court, referring to the authority of the clerk, said: "He was empowered generally to perform that duty, without special directions. That part of the business of the company was placed in his charge, with general authority to use his judgment in its performance. His acts, therefore, were the acts of the company, within the scope of his employment. His legal authority, of course, but extended to lawful acts. So it is true of all agencies, as they are not appointed for the purpose of committing wrongs or the performance of illegal acts, except in rare cases. Few actions would be maintainable if a recovery could be had only in cases where express authority is given, or the agent is required to commit the wrong. . . . In this case the clerk was in the exercise of a corporate power, engaged in the performance of a duty delegated to him by the company, and in the performance of that duty he attempted the use of illegal means for the accomplishment of a legal end, and for the benefit of the company. He did not attempt to suborn the witness for the benefit of himself, but for the benefit of the company, not with the consent of his superior, but in the course of legitimate and authorized business of the company. He was unquestionably employed by the company, was acting for it, and did 54 L. R. A.

the act to promote its interest. He was engaged in performance of a duty for the company. He did the act as a part of the duty, although unauthorized. We are therefore of the opinion that he performed the illegal and unauthorized act while acting in and as a part of his employment, and we must hold the company is responsible for the act. For that reason, we hold that the evidence was admissible." *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29. In *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14, a man who expected to be sued requested a friend to write to an acquaintance, but did not authorize him to attempt to influence her testimony if she was called as a witness on the other side. The friend wrote to this person, warning her not to aid the other party or testify in the action; and it was held that the letter was properly received in evidence, as an admission by conduct, although it was written before the action was commenced. In *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75, it was said that "it was competent for the plaintiff to introduce evidence in rebuttal tending to show that the authorized agent of the Baltimore & Ohio Railroad Company had been engaged in suborning witnesses to testify falsely. Such evidence was relevant on the main issue, as tending to show an admission by its conduct that it had a bad case, needing false and perjured evidence to support it." In *Green v. Woodbury*, 48 Vt. 5, it was held that evidence was not admissible to show that a constable employed to subpoena witnesses and assist in the defense of a town had offered inducements to one of the plaintiff's witnesses to keep away from the trial, when it did not appear that any other officer or agent of the town was cognizant of, authorized, or approved the act. The rule laid down by the supreme court of Illinois in the case cited is the better calculated to advance justice by keeping its channels pure. It tends to prevent perjury and fraud, and to strengthen the confidence of the people in the courts. Upon principle, as well as according to the weight of authority, proof of Kaufmann's attempt to bribe Klein to swear falsely for the defendant should have been received.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Parker, Ch. J., and Bartlett and Martin, JJ., concur.

Landen, J., dissenting:

When the servant in the act of executing his master's business does wrong to the injury of another the master is liable, although he had not authorized the wrong. But when such unauthorized wrong of the servant does no injury to any one the master should not be punished for his servant's sin. That is this case. There is much authority the other way. It rests in great part upon the praiseworthy desire to punish the attempt upon the purity of justice. But this will not justify imputing to the innocent the

wrong of the guilty. Some evidence tending to support the inference of permission or acquiescence on the part of the master should be given. I advise affirmance.

O'Brien and Haight, JJ., concur with **Landon, J.**

PEOPLE of the State of New York *ex rel.*
Clinton H. SMITH, *Appt.*,
v.

Edward M. HOFFMAN *et al.*, *Respts.*

(166 N. Y. 462.)

1. A military examining board provided by the Constitution and statutes to determine the moral character, capacity, or general fitness for office of officers of the militia, and having within its jurisdiction the powers of a court-martial, and upon whose findings the governor may dismiss an officer from the service, is a judicial body whose determination may be reviewed by a common-law writ of certiorari.
2. The appeal which, under Code Civ. Proc. § 2122, will preclude review by writ of certiorari, means one that can be brought, argued, and heard as matter of right, and not a secret review of a judgment, as of that of a military examining board, the existence of which cannot be known to the defeated party until after the review has been made and the judgment executed.
3. No implied exception from the provisions of a statute authorizing the use of the common-law writ of certiorari when not expressly forbidden by statute can be made in case of the decisions of state military tribunals in proceedings for the discipline of militia officers in time of peace, on the ground that if civil courts were permitted to interfere with the judgment of military courts the discipline of the militia might be injured.
4. The governor is not a proper party to a writ of certiorari to review a determination of a military examining board as to the fitness of a militia officer for his office.

(*Haight, J., dissents.*)

(April 16, 1901.)

APPEAL by relator from an order of the Appellate Division of the Supreme Court, Third Department, affirming an order of a Special Term for Albany County dismissing a writ of certiorari to review the action of a military examining board in consequence of which relator was dismissed from the National Guard of the State. *Reversed.*

The facts are stated in the opinion.

Mr. Alexander S. Bacon, for appellant: The words "findings," "decision," "examination," and "testimony," contained in § 64, indicate the judicial character of the board. These alone are sufficient.

NOTE.—For a case in this series holding that certiorari will not lie to review the decision of a board of military commissioners, see *Devlin v. Dalton* (Mass.) 41 L. R. A. 379.

As to right of court to review decision of military tribunals generally, see *Lusby v. Kansas City, M. & B. R. Co.* (Miss.) 66 L. R. A. 510.

Chase's Stephen, Digest of Ev. p. 3; *Dibble v. Dimick*, 143 N. Y. 549, 38 N. E. 724. Section 64 grants a trial.

People ex rel. Keech v. Thompson, 94 N. Y. 451.

If a board of examination exercises any, even quasi, judicial functions, the relator has every right of a party in a civil action.

Any body or officer that exercises any judicial function is subject to have his act reviewed by certiorari.

People ex rel. New York v. Nichols, 79 N. Y. 582.

The courts of this state have interfered with military and quasi-military tribunals without hesitation.

People ex rel. Spahn v. Townsend, 10 Abb. N. C. 169; *People ex rel. Garling v. Van Allen*, 55 N. Y. 31; *Re Leary*, 30 Hun, 394; *State ex rel. Bend v. Harrison*, 34 Minn. 526, 26 N. W. 729; *Re Bracket*, 27 Hun, 605; *People ex rel. Skinnell v. Rand*, 41 Hun, 529.

The governor's approval of the board's findings in no way adopts them as an executive act so as to take them outside of the control of the civil courts.

People ex rel. Spahn v. Townsend, 10 Abb. N. C. 169.

Mr. Henry B. Corman, with **Mr. John C. Davies**, Attorney General, for respondents:

A board of examination is not a court within the meaning of § 6, art. 1, of the Constitution; its functions are not judicial; and its actions cannot be reviewed upon certiorari.

Military Code, §§ 64, 91; Const. art. 11, § 6; *People ex rel. Garling v. Van Allen*, 55 N. Y. 31; *People ex rel. Leo v. Hill*, 126 N. Y. 497, 27 N. E. 789; *People ex rel. Smith v. Doyle*, 28 Misc. 411, 59 N. Y. Supp. 259, 44 App. Div. 402, 60 N. Y. Supp. 1088.

Vann, J., delivered the opinion of the court:

For eighteen years the relator was a member of the National Guard, and for some time prior to June 6, 1900, was major of the 71st regiment thereof. On the 10th of May, 1898, as a member of that regiment, he entered the service of the United States for the Spanish war, and on the 15th of November following he was honorably discharged from such service, but still held his commission as major in the National Guard. Subsequently there appeared in several daily papers published in the city of New York an elaborate statement, signed by two captains of said regiment, which gravely reflected upon the conduct of the relator as an officer while in the service of the United States during the Cuban campaign. The statement, in effect, charged him and another officer with cowardice and inefficiency at the assault on San Juan Hill, July 1, 1898. On the 10th of December, 1898, at his request, a court of inquiry was convened to investi-

sses City, M. & B. R. Co. (Miss.) 66 L. R. A. 510.

As to exceptions to the rule that certiorari will not lie where there is an appeal, see *State ex rel. Hamilton v. Guinotte* (Mo.) 50 L. R. A. 787, and *note*.

gate the charge, express its opinion upon the evidence, and report what further action, if any, was necessary. The court examined many witnesses, made a full statement of the facts, and reported that the conduct of the relator during said campaign "was neither military nor officer-like, and that the same was to the prejudice of good order and military discipline." It recommended that he should be tried by court-martial, if there was "jurisdiction to try officers of the National Guard for offenses committed while in the service of the United States;" otherwise, that he should be ordered before an examining board "to determine his capacity and fitness for the service, and that the evidence taken by this court be referred to such board for its information." The report was referred by the commanding officer of the National Guard to the judge advocate, who, after reviewing the evidence, reported that it sustained the findings of the court. He further reported that a court-martial could not be ordered to try the relator for violating "a duty which at the time the offense was committed was owing to the United States," but that there was jurisdiction to order him before a board of examination. The commanding officer forwarded these reports to the adjutant general, with his approval, and recommended that the relator be ordered before a board of examination accordingly. The governor approved "the proceedings, findings, and recommendation of the court of inquiry," and, "pursuant to the provisions of § 64 of the Military Code," ordered the relator "before a board of examination to examine into his moral character, capacity, and general fitness for service in the National Guard as a commissioned officer." The board was to meet May 17, 1899, but, owing to the delay caused by an alternative writ of prohibition issued at the instance of the relator and finally dismissed, it did not meet until May 10, 1900. *People ex rel. Smith v. Doyle*, 28 Misc. 411, 59 N. Y. Supp. 959, 44 App. Div. 402, 60 N. Y. Supp. 1088, 162 N. Y. 659, 57 N. E. 1122. The relator was notified to appear before the board, and at the time and place appointed he appeared with counsel, whereupon, as stated by him in his petition, and not denied by the respondents, the proceedings were as follows: After the members of the board and the stenographer had been sworn, the relator stated: "I wish to be represented by my counsel, Colonel Alexander S. Bacon, of New York. He is here to represent me." Gen. Oliver, who spoke for the board, thereupon stated in open session that the relator could not be represented by counsel. The relator said, "If the board has counsel, I think I ought to have counsel;" and Gen. Oliver replied, "Very well; it will be entered on the minutes that you requested counsel, and that your request was denied." The orders convening, adjourning, and reconvening the board were then read, and the recorder produced the stenographer's minutes taken before the court of inquiry, and offered them in evidence. The relator said: "If that is to be used as evidence on this examination, I object. You

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have not allowed me counsel, and I am not a lawyer, but I know that this is something that ought to be objected to as being incompetent. As I understand it, it is not acceptable as evidence before any court or board." The room was then cleared to consider the objection, the relator and stenographer being sent outside. In about fifteen minutes an orderly informed the relator "that he was wanted at the board room." Upon trying to enter the room he was met by the recorder, who said, "Major, the board has adjourned," and, when asked to what time, replied, "I do not know, but you will be notified." The relator then asked if he should return to New York or remain in Albany, and the recorder replied, "I cannot tell, but you will receive notice." He inquired if he might go before the board to make a short statement, and the recorder went inside to consult the board, but immediately returned, saying, "No; the board is adjourned and cannot hear you. Anything you wish to say can be said at the next session, of which due notice will be sent you." The relator thereupon returned to the waiting room, and an orderly brought him his hat and coat, which had been left in the room where the board was sitting. He received no notice of any subsequent session, and the board never met again to his knowledge. No further proceedings were had, unless in secret session, and he never had any opportunity to be heard, except as stated. The next he knew about the matter was on the 6th of June, 1900, when he was served with a general order, issued by command of the governor and signed by the adjutant general, which, after reciting that the board had reported adversely, discharged him from the military service of the state.

The office held by the relator was of some pecuniary value, but owing to his discharge he is no longer entitled to the income therefrom. He claims that he has been deprived of property without due process of law, and that a shadow has been cast upon his name through the judgment of a military board, pronounced without a hearing or an opportunity to be heard. The only question before us is whether the civil courts can listen to his appeal; for thus far they, also, have refused to hear him, not in the exercise of discretion, but for the supposed want of power. It is claimed on the one hand that a board of examination appointed pursuant to § 64 of the Military Code is a judicial body composed of officers acting as judges, whose action can be reviewed by a writ of certiorari; and, on the other, that it is simply an agency created to advise the governor, as commander in chief, in respect to the fitness of a commissioned officer to remain in the service, and that its proceedings are not open to review by the civil courts. The board is not a permanent body, and has no inherent power, but only such as is conferred by the Constitution and statutes, to which we must turn in order to discover the nature of its functions.

Article 11 of the Constitution relates to the state militia, and § 6 thereof provides that no commissioned officer shall be removed from office during the term for which he

shall have been appointed or elected, unless by the senate on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the sentence of a court-martial, or upon the findings of an examining board organized pursuant to law, or for absence without leave for a period of six months or more. The provision relating to an examining board is new, and has been in force only since January 1, 1895, when the revised Constitution went into effect. The Military Code is an elaborate statute, consisting of 12 articles and many sections, providing for the organization and government of the militia of the state. Laws 1898, chap. 212; Laws 1899, chap. 240; Laws 1900, chap. 746. The fourth article relates to commissioned officers, and § 64, which is a part thereof, is as follows: "The governor may, whenever he may deem that the good of the service requires it, order any commissioned officer before a board of examination, to consist of not less than three nor more than five general or field officers, which is hereby invested with the powers of courts of inquiry and courts-martial, and such board shall examine into the moral character, capacity, and general fitness for the service, of such commissioned officer, and record and return the testimony taken and a record of its proceedings. If the findings of such board be unfavorable to such officer and be approved by the governor, he shall be discharged from the service. No officer whose grade or promotion would in any way be affected by the decision of such board, in any case that may come before it, shall participate in the examination or decision of the board in such case. Failure to appear when ordered before a board constituted under this section shall be sufficient ground for a finding by such board that the officer ordered to appear be discharged." A board of examination is not one of the four military courts created, *eo nomine*, by article 7, called "courts of inquiry," "general courts-martial," "garrison courts-martial," and "delinquency courts," but it has the powers of the two courts first named, with the same organization and method of procedure. While its jurisdiction is different, it has the same power, so far as its jurisdiction extends, just as the county court has the power of the supreme court upon the trial of an action that it can try at all. A court of inquiry may be ordered "to examine into the nature of any transaction of or accusation or imputation against any officer or soldier." It has power to take evidence, make findings of fact, and, when required, to express an opinion thereon. § 92. General courts-martial have power to try commissioned officers for eighteen classes of offenses relating to their conduct in the military service, such as disobedience of orders, neglect of duty, and the like; and by their judgment an officer may be dismissed from the service, fined, or reprimanded. § 95. "Each military court" has "the same power to compel by subpoena, by *subpoena duces tecum*, and by attachment the attendance of witnesses both civilian and military and the production of books, papers,

and documents, and to punish for contempt a witness duly subpoenaed for nonattendance or refusal to be sworn or testify or to produce books, papers, and documents as is possessed by the supreme court of this state." Commissions and subpoenas may be issued "in behalf of the people of this state, and on application in behalf of any person to be tried by such court." § 108. Any member of the court may be challenged and the members are sworn "in the presence of the accused, . . . faithfully try and determine according to evidence the matter before him, . . . and that he will duly administer justice according to the established rules of law for the government of the military forces of the state." § 109. Said courts are empowered to issue process, including writs and warrants, to the sheriff of any county, or a constable of any town or city, who are required to execute the same. § 110. They may commit to the common jail of the county in which their sessions are held any person guilty of disorderly, contemptuous, or insolent behavior in open court. § 111. A judge advocate is required to attend courts of inquiry and general courts-martial, and "in all the courts provided by this chapter the accused shall have the right to the assistance of counsel." § 112. They keep a record of their proceedings, and pronounce sentence, which is delivered to the officer ordering the court, who may approve or disapprove thereof, reconvene the court, and send back its findings or sentence for revision. §§ 114, 115. The members are protected from prosecution on account of the imposition or execution of any sentence, or the execution of any warrant, writ, or process issued by the court. § 116.

Thus it is apparent that a board of examination, which is expressly given the powers of courts of inquiry and courts-martial with reference to the questions intrusted to it for decision, has the general powers of a court, with the right to investigate questions of fact relating in part to rights of property, to decide those questions upon the evidence taken, and pronounce a judgment. It is not clothed with arbitrary discretion to act without evidence or against law, but is a body of military officers of high rank, each sworn to faithfully try and determine according to evidence, and to administer justice according to law. These functions are not ministerial, executive, or legislative, but judicial in character. The words "testimony," "findings," and "decision," as used in § 64, indicate a trial before a judicial body, and the provision for judgment by default on failure to appear shows that the accused officer has a right to be heard. The action of the board is upon a question arising between the people and the officer ordered before it, and results in a judgment based upon evidence. The power, the procedure, and the result are appropriate only to an impartial tribunal, exercising judicial power; for the statute is carefully drawn to secure disinterested men, who are to decide the issues according to the testimony. "When . . . the law requires a judicial determination to

be made, such as the decision of a question of fact, . . . the duty is regarded as judicial. . . . *People ex rel. Harris v. Land Office Comrs.* 149 N. Y. 26, 31, 43 N. E. 418. The power to hear a controversy and decide it is a judicial power, and, whether exercised by a court or by a board of examination, the members act as judges, as we think the members of the board in question acted, both in form and in fact. It was not their duty to advise the governor, but to make an adjudication, which was essential in order to enable him to remove the relator from office. An officer may be removed by the sentence of a court-martial, or upon the findings of an examining board; the former executing itself, and the latter requiring an executive order. Const. art. 11, § 6. With all his power as commander in chief, the governor cannot remove a commissioned officer of the National Guard in time of peace without the findings of an examining board, except for absence without leave, although the senate may remove upon his recommendation. When judgment of removal is pronounced by a court-martial, it takes effect, *ex proprio vigore*, upon the simple approval of the governor, without further action on his part. The Constitution surrounds every commissioned officer with these safeguards against the exercise of arbitrary power, and protects him until he is adjudged guilty either of an offense cognizable by a court-martial, or of a want of moral character, capacity, or general fitness for the service, cognizable by a board of examination. Section 64 does not relate to the retirement or discharge of officers upon reaching a certain age, or becoming disabled, unfit, or incompetent, and thereby incapable of performing their duties. Such cases, depending on physical condition rather than on moral character, are provided for by § 63, which requires that a surgeon shall aid in the investigation there provided for. The order for the trial of the relator was specifically made under § 64, which, as well as the order itself, limits the investigation and decision to moral character, capacity, and general fitness for the service. The board was required to take the evidence offered by the people and the relator, and, after hearing both sides, determine the question submitted to them by the order under the statute. We regard their powers, duties, and determination as judicial in nature, although there may be wide latitude of procedure, so far as form is concerned. As an examining board has the same power to try and decide as a court-martial, although for different offenses, and its judgment may be the sole authority for the removal of a commissioned officer elected or appointed for life, if the judgment of a court-martial can be reviewed upon certiorari the determination of a board of examination can be reviewed in the same way.

It is well established that the judicial determinations of inferior tribunals and officers acting judicially under the authority of a statute may be reviewed under a common-law writ of certiorari, which is issued

to correct errors of law affecting the property or rights of the parties, and to test the validity of official action judicial or quasi-judicial in character. *People ex rel. Steward v. New York Railroad Comrs.* 160 N. Y. 202, 54 N. E. 697; *People ex rel. Loughran v. New York R. Comrs.* 158 N. Y. 421, 428, 53 N. E. 163; *People ex rel. Burnham v. Jones*, 112 N. Y. 597, 20 N. E. 577; *People ex rel. Corwin v. Walter*, 68 N. Y. 403, 408. Unless military tribunals are excepted from the general rule, their judicial determinations are subject to review by means of this ancient and important writ. They are not expressly excepted either by the Military Code or the Code of Civil Procedure. Section 2120 of the latter provides that the writ may be issued either when expressly authorized by statute, or when authorized by the common law and not expressly forbidden by statute. The limitations placed by the next two sections upon the power thus conferred do not apply to the case in hand; for the determination in question was not made in a civil action or proceeding, and cannot adequately be reviewed by appeal. No appeal is authorized by the Military Code, and the judgments of all military tribunals are kept secret until published in orders as approved, modified, or disapproved by the officer directing the investigation. Military Code, §§ 113, 114. The appeal mentioned in § 2122 of the Code of Civil Procedure means one that can be brought, argued, and heard as a matter of right, and not a secret review of a judgment, the existence of which cannot be known to the defeated party until after the review has been made, and in such a case as this not until after the judgment has been executed.

It may be claimed, however, that the determination of military tribunals, although not expressly excepted from the provisions of the Code relating to the right of certiorari, are impliedly excepted, because, if civil courts were permitted to interfere with the judgments of military courts, the discipline of the National Guard might be injured. There is force in this argument, which is confirmed to a certain extent by the decisions of the Federal courts relating to the regular army, and by some, but not by all, writers on military law. The subject, however, is treated with reference to a standing army, rather than the militia of the various states. *Dynes v. Hoover*, 20 How. 65, 81, 15 L. ed. 838, 844; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773; 1 Winthrop, Military Law, 55; De Hart, Militia Law, 226; Maltby, Courts-Martial, 151, 158; O'Brien, Military Laws, 222; Davis, Military Laws, 6. There is a conflict of authority between the courts of the different states as to the rights of the civil courts to review the judgments of military tribunals. *Durham v. United States*, 4 Hayw. 54; *State v. Davis*, 4 N. J. L. 311; *Ex parte Dunbar*, 14 Mass. 393; *Re Contested Election*, 1 Strobb. L. 190; 4 Enc. Pl. & Pr. 40. The courts of England review such judgments, but cautiously, as the subject requires. *Grant v. Gould*, 2 H. Bl. 69, 101; *Re Mansergh*, 1 Best & S. 400;

1 Winthrop, Military Law, 57; *Re Poe*, 5 Barn. & Ad. 681.

Confining the discussion to times of peace, as in time of war military necessity may sanction the temporary exercise of almost any power to save the state, there is a wide distinction between the regular army of the nation and the militia of a state when not in the service of the nation; for discipline which is ample for the latter will not answer for the former. A member of the state militia belongs to civil life, has a civil avocation, and only occasionally engages in the exercise of arms. A member of the United States army, on the other hand, has no employment except that of a soldier, and arms constitute the business of his life. Hence more rigid rules and a higher state of discipline are required in the one case than in the other. Moreover, the state militia is organized by statutes of the state, and the legislature, under the limitations of the Constitution, has power to regulate the entire subject, to invest boards of examination with such authority, and to give the civil courts such power to review as it sees fit. When, therefore, the legislature issued a general command upon the subject of reviewing the action of inferior judicial tribunals and officers acting judicially, and made certain exceptions thereto, the matter was exhausted, and the courts have no power to add an exception relating to any tribunal which the legislature is presumed to have had in mind. The part of the Code of Civil Procedure under consideration went into effect on the 1st of September, 1880, and nearly fifty years before the judgment of a court-martial was reviewed and affirmed under a writ of certiorari. *Rathbun v. Sawyer*, 15 Wend. 451. By one of the early decisions of the court of appeals after its reorganization in 1870 the same power was exercised without question. *People ex rel. Underwood v. Daniell*, 50 N. Y. 274. The strongest case upon the subject, however, occurred a year later, when this court not only reviewed, but reversed, the proceedings of a court-martial of the National Guard. *People ex rel. Garling v. Van Allen*, 55 N. Y. 31. In that case the relator, upon his trial before a court-martial, was virtually, though not absolutely, denied the right to defend by counsel; and its judgment was reversed by this court, upon certiorari, because the right to defend by counsel before a military court in this state is guaranteed by the bill of rights, as embodied in the Constitution of 1846, although not in that of 1821. *Id.* 37. These decisions had been made before either the Code of Procedure or the Military Code was passed, and others of like character were made after the former but before the latter was enacted. *People ex rel. Spahn v. Townsend*, 10 Abb. N. C. 169; *Re Brackett*, 27 Hun, 605; *People ex rel. Skinnell v. Rand*, 41 Hun, 529. Those statutes, therefore, must be read in the light of the common law as it existed at the date of their passage, which authorized a writ of certiorari to issue to military tribunals organized under the militia statutes of the state for the purpose of reviewing their de-

cisions. The legislature is presumed to have known the common law, and to have made its enactments with reference to the decisions of the courts, yet, when providing general rules to govern the issuance of this great writ, although it excepted the action of certain tribunals from review, it did not except the action of military tribunals. Even when the Military Code was passed, no provision was made to exempt judgments of the tribunals created thereby from review by the civil courts according to the law and practice prevailing at the time. Under these circumstances, an exception should not be implied by the courts, but left to the legislature, in its wisdom, to express, if it sees fit.

We thus reach the conclusion that the supreme court has power to issue a writ of certiorari to review the determination of a board of examination appointed under § 64 of the Military Code, and that the order dismissing the writ under consideration for want of power was erroneous. If the courts below see fit to dismiss the writ in the exercise of their discretion, they have the power to do so, but otherwise it is their duty to require a return, and proceed thereon according to law. *People ex rel. May v. Maynard*, 160 N. Y. 453, 55 N. E. 9. The review authorized does not substitute the judgment of the civil court for that of the military court upon the evidence or the merits, but inquires into jurisdiction of the subject-matter, the exercise of authority in relation to the subject-matter according to law, the violation of any rule of law to the prejudice of the relator, and the like. Code Civ. Proc. § 2140.

It is suggested that there is no power to issue a writ of certiorari to the governor, but it is unnecessary to pass upon that question. While it was done in a recent case, the point does not appear to have been raised. *People ex rel. Leo v. Hill*, 126 N. Y. 497, 27 N. E. 789. In view of a later decision, there is grave doubt whether the courts could compel the governor to make a return. *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L. R. A. 231, 50 N. E. 791. The writ in the case before us, however, although issued to the governor, among others, was not served upon him, and he is not a proper party. The writ should be directed to the body or officer whose determination is to be reviewed, or to any other person having the custody of the record or other papers to be certified, or to both, if necessary. Code Civ. Proc. § 2129. The adjutant general is the custodian of the record and report of an examining board, and hence he was properly made a party. Military Code, § 15. The determination of the examining board was to be reviewed, and hence the members thereof were proper parties; but the action of the governor was not to be reviewed, and he should not have been made a party. His action was executive, while theirs was judicial. As he could not have removed the relator except upon their "findings," a reversal of their determination would render the order

of removal void, because there would be nothing to justify it, and this would leave the relator still in office. While we cannot touch the person of the governor, we can pass upon the effect of his acts, and decide whether they are valid or invalid.

The order appealed from should be re-

versed, with costs, and the matter remitted to the courts below for further proceedings.

Parker, Ch. J., and O'Brien, Bartlett, Martin, and Landon, JJ., concur.

Haight, J., dissents.

NORTH CAROLINA SUPREME COURT.

John G. BRAGAW

v.

SUPREME LODGE KNIGHTS AND LADIES OF HONOR, *Appt.*

(128 N. C. 354.)

1. The financial secretary of a subordinate lodge of a benefit society, who is designated by the supreme lodge to receive and forward assessments from certificate holders, is for that purpose the agent of the supreme lodge, so that the standing of certificate holders will not be affected by his failure to forward assessments paid him.
2. A provision in the constitution of a benefit society, that members shall become such subject to the power of the corporation to change its by-laws, cannot be construed into liberty to change at will the contract of insurance it has made with each member.

(May 28, 1901.)

APPPEAL by defendant from a judgment of the Superior Court for Beaufort County in favor of plaintiff in an action brought to enforce payment of a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Messrs. John L. Bridgers and Charles F. Warren, for appellant:

The relations which local and subordinate lodges of such societies shall bear to the supreme lodge or directory, and to the members of the order, are proper matters for regulation in the by-laws of the society. Where the by-laws on the subject are plainly and clearly drawn, it is not difficult to determine these relations.

Niblack, Mut. Ben. Soc. § 276.

The subordinate lodge is the agent of the supreme lodge unless otherwise contracted; the provisions of the by-laws of 1889 make it otherwise.

1 Bacon, Ben. Soc. §§ 11, 118, 144; *Supreme Lodge K. of P. v. La Malta*, 95 Tenn. 157, 30 L. R. A. 838, 31 S. W. 493.

Payment to a subordinate lodge, where such lodge is made the agent of the supreme lodge to receive and transmit assessments, is a sufficient payment to prevent a forfeiture.

NORM.—As to forfeiture of benefit certificate by default of subordinate lodge, see *Murphy v. Independent Order S. & D. of J. of A. (Miss.)* 50 L. R. A. 111, and *note*.

As to power of beneficial insurance association to change, amend, and repeal by-laws, see, 54 L. R. A.

3 Am. & Eng. Enc. Law, 2d ed. note 1, p. 1101. The converse should be true where it is not the agent of the supreme lodge.

By the terms of its charter, constitution, and laws the defendant had the power to make, alter, amend, or repeal its Constitution, laws and by-laws.

A contract of membership in a mutual association is always made with reference to, and always includes, the constitution and by-laws, of which every member is bound to take notice.

3 Am. & Eng. Enc. Law, 2d ed. p. 1081.

The adoption of the by-law was for the evident purpose of imposing upon the members who had elected the financial secretary of the lodge responsibility for his acts in collecting and remitting assessments.

The members of the association are bound by the by-laws and all subsequent amendments thereto.

Bacon, Ben. Soc. §§ 91a, 185; Niblack, Mut. Ben. Soc. § 114; *Bauer v. Samson Lodge K. of P.* 102 Ind. 262, 1 N. E. 571; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 382; *Simoral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *Coles v. Iowa State Mut. Ins. Co.* 18 Iowa, 425; *Coleman v. Supreme Lodge K. of H.* 18 Mo. App. 189; *Osoeola Tribe No. 11 I. O. of R. M. v. Schmidt*, 57 Md. 106; *Woodfin v. Asheville Mut. Ins. Co.* 51 N. C. (6 Jones, L.) 558; *Boyle v. North Carolina Mutual Ins. Co.* 52 N. C. (7 Jones, L.) 373.

This by-law adopted in 1889 simply defines the relations between the members of the subordinate lodge and the officers of that lodge elected by them. It does not tend to impair vested rights, either by diminishing the value of the certificate payable to plaintiff, or by increasing the assessments upon that certificate, or by an arbitrary classification of members of the order.

The by-laws were a material part of the contract,—not only those in force at the time the contract was entered into, but those subsequently enacted.

Fugure v. Mutual Society of St. Joseph, 46 Vt. 388; *Coleman v. Supreme Lodge K. of H.* 18 Mo. App. 189; *Boyle v. North Carolina Mutual Ins. Co.* 52 N. C. (7 Jones, L.) 373; 1 Bacon, Ben. Soc. §§ 91a, 92, 185.

The contract is made with reference to

in this series, *Supreme Lodge K. of P. v. Knight (Ind.)* 3 L. R. A. 409, and *note*; *Supreme Lodge K. of P. v. La Malta (Tenn.)* 30 L. R. A. 838; and *Thibert v. Supreme Lodge K. of H. (Minn.)* 47 L. R. A. 136.

the constitution and by-laws, and they are parts of it, and the member is supposed to know them.

3 Am. & Eng. Enc. Law, 2d ed., p. 1083; Niblack, Mut. Ben. Soc. § 18; 1 Bacon, Ben. Soc. 81; *Cuthbertson v. North Carolina Home Ins. Co.* 96 N. C. 485, 2 S. E. 258.

Messrs. Small & MacLean and S. C. Bragaw, for appellee:

A contract by which one party promises to make a certain payment upon the destruction or injury of something in which the other party has an interest is a contract of insurance, whatever may be the terms of payment or the consideration, or the mode of estimating or securing payment of the same to the insured in case of loss.

Com. v. Wetherbee, 105 Mass. 149.

Organizations similar to the defendant are insurance companies with fraternal features.

Bacon, Ben. Soc. § 14, pp. 23, 24, 2d ed. § 52, p. 83; 2 May, Ins. chap. 31, p. 1248; *National Union v. Marlow*, 21 C. C. A. 89, 40 U. S. App. 95, 74 Fed. 775.

The benefit certificate in question constituted a contract between the defendant and the assured, in which her rights were vested.

The financial secretary was the agent of the defendant, the supreme lodge, and not the agent of the individual members.

Whitesides v. Supreme Conclave I. O. of H. 52 Fed. 275; *Supreme Lodge, K. of P. v. Withers*, 32 C. C. A. 182, 59 U. S. App. 177, 89 Fed. 160; *New York L. Ins. Co. v. Russell*, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94; *Knights of Pythias of the World v. Bridges*, 15 Tex. Civ. App. 196, 39 S. W. 333; *Masters v. Madison County Mut. Ins. Co.* 11 Barb. 625; 1 Bacon, Ben. Soc. 2d ed. § 118, p. 199; 1 May, Ins. pp. 223, 249, 250, 257; 16 Am. & Eng. Enc. Law, 2d ed. p. 910; 1 Am. & Eng. Enc. Law, p. 1220.

The by-laws must be: (1) Reasonable; (2) they must not disturb the vested rights, or impair the contract, or impose additional obligations upon the member.

Thibert v. Supreme Lodge K. of H. 78 Minn. 448, 47 L. R. A. 136, 81 N. W. 220; Niblack, Mut. Ben. Soc. pp. 273, 274; 1 Bacon, Ben. Soc. 2d ed. § 91a; 1 Thomp. Corp. §§ 946, 1019.

Clark, J., delivered the opinion of the court:

The defendant was duly incorporated in Kentucky in 1878 as "The Supreme Lodge Knights and Ladies of Honor." It organized a subordinate lodge (Pamlico Lodge, No. 715) in Washington, North Carolina, in 1883, and in September of that year issued a policy for \$1,000 to Annie C. Bragaw, in which policy her husband, the plaintiff, John G. Bragaw, was the beneficiary. The relief-fund (or insurance) department of the organization was a separate and distinct feature from its social and fraternal features. At the date the Bragaw policy was issued (September, 1883) the constitution and by-laws which had been adopted in 1881

were in force. They were amended in several material particulars in 1889, but it is not shown that notice of these amendments was given to the subordinate lodges, nor to the assured or the beneficiary in this policy. It is not denied that the assured paid all the assessments which were demanded or of which she had any notice from the date of her policy or certificate down to the date of her death, and that the same were paid to the financial secretary of the subordinate lodge, who was admittedly the proper and only official to whom these payments could be made. His receipts for payments made by her up to her death, in 1895, were in evidence. Notice of death was given as required. The defendant declined to pay the claim upon the ground that the assured had failed to pay assessments Nos. 256 and 257, and because the subordinate lodge had been suspended for nonpayment of these two particular assessments. There is no evidence that Annie C. Bragaw in any particular failed to comply with any law, rule, or regulation of the order. The defense is that the subordinate lodge did not hold regular meetings, and that the secretary failed to remit collections and was suspended. The plaintiff testified that his wife paid all the assessments made on her from the date of the certificate or policy until her death; that these payments were made to the financial secretary of Pamlico Lodge, No. 715. These payments included the assessments Nos. 256 and 257. But the defendant excepted upon the ground that the true question was whether the assessments had been paid to the supreme lodge. This presents the main point involved in this case; i. e., whether the financial secretary, for the purpose of collecting money upon policies of insurance, was the agent of the supreme lodge or of the assured, the individual members. There is another feature of this association, —social and fraternal. In all matters of that kind, and in matters of purely local nature, the financial secretary, who was chosen by the subordinate lodge, was its agent. But in this matter of insurance there are only two parties to the contract. One is the insurer, the supreme lodge, which alone is incorporated, and which receives the premiums and contracts to pay the policy. The other is each individual assurer, who pays his premiums to the financial secretary, whom the supreme lodge has designated as the proper person to whom to pay the premiums, and whose duty it is to forward the money thus received to the supreme lodge. The subordinate lodge cuts no figure in the insurance. It is not incorporated. It has no legal entity. It receives no money for insurance, and contracts to pay no policy. The fact that the supreme lodge designates to receive the money, when paid by the assured, one whom the subordinate lodge has elected financial secretary, is purely a matter of convenience, but does not affect the legal proposition that such officer is thereby

made the agent of the supreme lodge for the purpose of notifying the assured (who are called members) of the assessments when made from time to time, collecting the same, and forwarding the money to the supreme lodge.

In their brief the learned counsel for the defendant say: "The subordinate lodge is the agent of the supreme lodge, unless otherwise contracted. The provisions of the by-laws of 1889 make it otherwise." The by-laws in force at the date of the policy contained no words making it otherwise. In 1889 the following amendment to the by-laws was adopted: "Sec. 14. In receiving money from members in payment of relief-fund assessments, and in all acts performed in complying with the relief-fund laws of the order, the subordinate lodge and its officers are the agents of the members, and not the agents of the supreme lodge." It is not shown that the assured had any notice of or assented to this amendment. A provision that one should become a member, subject to the power of the corporation to change its by-laws, cannot be construed into liberty to change at its will the contract of insurance it has made with each insurer. The company and the assured occupy two entirely different relations. In one it is a company, and the other party one of its members. In that relation the by-laws or constitution can be amended at will of the majority, if done in the legal and prescribed mode. The other relation is that of insurer and insured, and this contract relation cannot be altered save by the consent of both parties, and the party alleging that the consent was given must show it. *Strauss v. Mutual Reserve Fund Life Assn.* 126 N. C. 971, post, 605, 36 S. E. 352.

But, passing that by, suppose the company had the power to enact the above by-law without the assent of the assured; it could not have the effect contended for by the plaintiff. The subject has been so recently and thoroughly discussed by the Supreme Court of the United States, and with such a wealth of authority from the supreme courts of New York, Pennsylvania, Illinois, Indiana, Iowa, Michigan, Kansas, Wisconsin, Texas, and other states, that it is unnecessary to do more than refer to that case, which is *Supreme Lodge E. of P. v. Withers*, 177 U. S. 260, 44 L. ed. 782, 20 Sup. Ct. Rep. 611, filed April 9, 1900. It is there held, in a unanimous opinion of the court, affirming both the circuit court and the circuit court of appeals (32 C. C. A. 182, 59 U. S. App. 177, 89 Fed. 160), with an able and exhaustive discussion of the above authorities by Mr. Justice Brown, as follows: The failure of the secretary of a local, subordinate lodge of the Knights of Pythias to transmit to the general board of control, within the time specified by the general laws of the order, moneys paid to him in due time by a member, will not be ground for forfeiture of the policy of such member, since the secretary's negligence is not chargeable to the member, but is

that of an agent of the order, notwithstanding a provision in the general laws of the order to the effect that he is to be regarded as the agent of the member and not of the order, where the general laws also require the member to pay dues to such secretary only, and provide that he shall transmit at certain specified times all moneys collected by him, and that the local branch or lodge shall be responsible to the supreme lodge for all such moneys collected by the secretary. This will render futile or irrelevant all the other exceptions taken; for if the secretary of the subordinate lodge is the agent of the supreme lodge, as far as the contract of insurance goes (here called the "Relief-Fund Department"), inasmuch as it is not controverted that Mrs. Bragaw paid every assessment, to the date of her death, to one who in law was the agent of the supreme lodge, it becomes immaterial whether the subordinate lodge was suspended or not, and whether notice of suspension was given; for, as she was in no default, her contract with the defendant that the latter would pay her beneficiary (the plaintiff) \$1,000 at her death cannot be forfeited, either by the misconduct of the secretary as agent of the defendant, or by the failure of other members of the lodge (if any) who held like policies to pay their assessments. The suspension of the subordinate lodge could not affect her contract rights. The supreme lodge having sent her notice of the assessments through the secretary, with the unrevoked order to pay to him, such payment is binding on the supreme lodge. In the case above cited it is said: "To invest him [the secretary] with the duties of an agent, and to deny his agency, is a mere juggling with words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policy holders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section [local lodge] who was bound to remit them to the board of control [supreme lodge]; but they [the assured] could not compel him to remit, and were thus completely at his mercy. . . . The reports are by no means barren of cases turning upon the proper construction of this so-called 'agency clause,' under which the defendant seeks to shift its responsibility upon the insured for the neglect of . . . [the secretary] to remit on the proper day. In some jurisdictions it is held to be practically void and of no effect, in others it is looked upon as a species of wild animal lying in wait and ready to spring upon the unwary policy holder, and in all it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case or opposed to the interests of justice. . . . The object of the clause is, in most cases, to transfer the responsibility for his acts from the party to whom it properly belongs to one who generally has no knowledge of its existence." As in this case, the supreme lodge knew at once wheth-

or the secretary remitted for assessments or not; but the assured who, upon receipt of notices of assessment from the supreme lodge, paid them to the secretary as directed, had no means of knowing whether he forwarded the money to the supreme lodge or not. The above decision has more recently been followed, with copious citations, in *Murphy v. Independent Order, S. & D. of J. of A.* 77 Miss. 830, 50 L. R. A. 111, 27 So. 624, in which it is held: "Under a by-law of the beneficial association declaring that officers of subordinate lodges shall be the agents of the body that elects them, and not of the grand lodge, the grand lodge cannot escape liability on a certificate of membership by reason of the failure of the subordinate lodge to do its duty in paying assessments to the grand lodge." Among the precedents cited in both of above cases is *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 375, in which, under such a formidable nomenclature, is found the following sound reasoning: The subordinate lodge "acts for and represents the defendant in making the contract with the member, unless we adopt as correct the idea . . . that the member, by some one-sided arrangement, makes a contract with himself through his own agent." In another case also there cited (*Young v. Grand Council A. O. of O.* 63 Minn. 506, 65 N. W. 933) it is said: "The assured did all she could. It cannot be that a wilful failure of these officers [of the subordinate lodge] can cause a failure of appellant's rights she not being in fault. On the same general line is our late decision in *Doggett v. United Order of G. C.* 126 N. C. 477, 36 S. E. 26, where it is held: "Where according to the constitution and laws of the society, notice and proofs of death are to be furnished by officers of the subordinate commandery or lodge of which the deceased was a member, they are the agents for that purpose of the supreme commandery, for whose action the beneficiary plaintiffs are not responsible." "Demand having been made, the certificate shown, and the death of assured proved, a prima facie case was made out for the plaintiff." *Doggett v. United Order of G. C.* 126 N. C. 477, 36 S. E. 26. In addition it has here been shown, without contradiction, that the assured for twelve years (from the date of her policy, in 1883, down to her death, in 1895) paid to one who was the agent of the supreme lodge every assessment laid upon her and called for by the defendant, said supreme lodge. There is no evidence in rebuttal of these facts. This renders it unnecessary, as already said, to consider in detail the other exceptions, whose decision is either involved in what has been said, or they have been made irrelevant. There were some errors committed in favor of appellant, but these need not be discussed.

Affirmed.

*This statement is from the *Murphy Case* upon the authority of the *Young Case*. [Ed.] 54 L. R. A.

Joseph STRAUSS

v.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Appt.

(126 N. C. 971, 128 N. C. 465.)

1. The contract evidenced by a certificate of membership in a mutual benefit society cannot, after the holder has paid large sums thereon, be altered by resolutions of the society without the holder's consent so as to place him in a class and assess that class in a manner different from the rule applied to newer members, the result of which is to destroy the value of the contract.
2. The rule that the damages for breach of a contract insuring a life are the premiums paid prior to the breach, with interest thereon from the date of each payment, is applicable to contracts in mutual benefit associations.

On rehearing.

3. A mere general consent by a member of a mutual benefit society that the constitution and by-laws may be amended applies only to such reasonable regulations as may be within the scope of its original design, and does not authorize changes which will destroy the value of his contract.

(June 9, 1900.)

A PPEAL by defendant from a judgment of the Superior Court for Craven County in favor of plaintiff in an action brought to recover damages for alleged wrongful cancellation of a life-insurance policy. *Affirmed.*

The facts are stated in the opinions.

Mr. John W. Hinesdale, for appellant:

To ascertain the contract between the association and its members, regard must be had to the nature of the association and the relations which exist between it and them. The contract is contained in the laws under which it was created, its charter, its constitution and by-laws, rules and regulations and all amendments thereto, and the member's application and certificate of membership.

May, Ins. 3d ed. § 548; Bacon, Ben. Soc. § 51; Joyce, Ins. § 340; Biddle, Ins. §§ 42, 43, 44; Bliss, Ins. § 426.

The charter or articles of incorporation and the laws of New York form a part of the contract.

Relfe v. Rundle, 103 U. S. 222, *sub nom. Life Asso. of America v. Rundle*, 26 L. ed. 337; *Bockover v. Life Asso. of America*, 77 Vt. 85; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125; 1 Bacon, Ben. Soc. § 91, p. 144; Niblack, Ben. Soc. § 130, p. 171.

The charter, consisting of the articles of

NOTE.—As to power of beneficial insurance societies to change, amend, and repeal provisions which enter into the contracts with their members, see, in this series, *Supreme Lodge K. of P. v. Knight* (Ind.) 8 L. R. A. 409, and note; *Supreme Lodge K. of P. v. La Malta* (Tenn.) 80 L. R. A. 838; and *Thibert v. Supreme Lodge K. of H.* (Minn.) 47 L. R. A. 136.

incorporation and the laws of the state of New York, subjects the contract to further amendments of the constitution or by-laws.

N. Y. Laws 1875, chap. 267, § 2; N. Y. Laws 1883, chap. 175, § 4.

The constitution and by-laws and amendments thereto form a part of the contract, whether they are referred to in the certificate of membership or not.

Suls v. Mutual Reserve Fund Life Asso. 145 N. Y. 563, 28 L. R. A. 379, 40 N. E. 242; *Re Equitable Reserve Fund Life Asso.* 131 N. Y. 354, 30 N. E. 114; *Poultney v. Bachman*, 31 Hun, 49; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125; *Miller v. Hillsborough Mut. F. Assur. Asso.* 42 N. J. Eq. 459, 7 Atl. 895, 47 N. J. L. 393, 1 Atl. 461; *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479; *Simeral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Railway Pass. & F. C. Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138, 35 N. E. 168; *Hass v. Mutual Relief Asso.* 118 Cal. 6, 49 Pac. 1056; *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681, 28 S. E. 498.

This applies whether or not such constitution and by-laws are referred to in the certificate or application for membership.

Hass v. Mutual Relief Asso. 118 Cal. 6, 49 Pac. 1056; *May v. New York Safety Reserve Fund Soc.* 14 Daly, 389, 13 N. Y. S. R. 66; *Simeral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Woodfin v. Asheville Mut. Ins. Co.* 51 N. C. (6 Jones, L.) 558; *Treadway v. Hamilton Mut. Ins. Co.* 29 Conn. 68; *Miller v. Hillsborough Mut. F. Assur. Asso.* 42 N. J. Eq. 459, 7 Atl. 895; *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681, 28 S. E. 498; *Davidson v. Old People's Mut. Ben. Soc.* 39 Minn. 303, 1 L. R. A. 842, 39 N. W. 803; *Suls v. Mutual Reserve Fund Life Asso.* 145 N. Y. 563, 28 L. R. A. 379, 40 N. E. 242; *Re Equitable Reserve Fund Life Asso.* 131 N. Y. 354, 30 N. E. 114; *Blias, Life Ins.* 2d ed. § 425; *Bacon, Ben. Soc.* § 81; *Joyce, Ins.* (1897) § 188; *Cooke, Ins.* (1891) § 11.

Members of mutual assessment associations are bound by lawful amendments that may from time to time be made to the by-laws or constitution.

Poultney v. Bachman, 31 Hun, 49; *Sargent v. Supreme Lodge, K. of H.* 158 Mass. 557, 33 N. E. 650; *Supreme Lodge, K. of P. v. La Malta*, 95 Tenn. 157, 30 L. R. A. 838, 31 S. W. 493; *Korn v. Mutual Assur. Soc.* 6 Cranch, 192, 3 L. ed. 195; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Borgards v. Farmers' Mut. Ins. Co.* 79 Mich. 440, 44 N. W. 856; *McCabe v. Father Matthew Total Abstinence Ben. Soc.* 24 Hun, 149; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125; *Bowie v. Grand Lodge, L. of the W.* 99 Cal. 392, 34 Pac. 103; *Sup-*

preme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479; *Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1041; *Currie v. Mutual Assur. Soc.* 4 Hen. & M. 315, 4 Am. Dec. 517; *Suls v. Mutual Reserve Fund Life Asso.* 145 N. Y. 563, 28 L. R. A. 379, 40 N. E. 242; *Re Equitable Reserve Fund Life Asso.* 131 N. Y. 354, 30 N. E. 114; *May v. New York Safety Reserve Fund Soc.* 14 Daly, 389, 13 N. Y. S. R. 66; *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681, 28 S. E. 498; *Schrick v. St. Louis Mut. House Bldg. Co.* 34 Mo. 423; *Fullenwider v. Supreme Council, R. L.* 73 Ill. App. 321; *Haydel v. Mutual Reserve Fund Life Asso.* 98 Fed. 200.

Members of the association are bound by, and conclusively presumed to know, the provisions of its constitution and by-laws.

Miller v. Hillsborough Mut. F. Assur. Asso. 42 N. J. Eq. 459, 7 Atl. 895; *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479; *Simeral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *May v. New York Safety Reserve Fund Soc.* 14 Daly, 389, 13 N. Y. S. R. 66; *Supreme Lodge, A. O. U. W. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816; *Poultney v. Bachman*, 31 Hun, 49; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125; *Treadway v. Hamilton Mut. Ins. Co.* 29 Conn. 68; *Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1041; *Railway Pass. & F. C. Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138, 35 N. E. 168.

The charter of the association authorizes it to divide its members into classes.

People ex rel. Atty. Gen. v. Life & Reserve Asso. 150 N. Y. 94, 45 N. E. 8; *White v. Ross*, 4 Abb. App. Dec. 589; *Mygatt v. New York Protection Ins. Co.* 21 N. Y. 52; *Sands v. Boutwell*, 26 N. Y. 233; *Sands v. Sanders*, 26 N. Y. 239; *Jackson v. Roberts*, 31 N. Y. 304; *White v. Coentry*, 29 Barb. 305; *Cooper v. Shaver*, 41 Barb. 151; *Sands v. Hill*, 42 Barb. 651; *Thomas v. Achilles*, 16 Barb. 491; *Joyce, Ins.* § 350.

The plaintiff is estopped by acquiescence.

1 *Joyce, Ins.* § 350; *Margut v. United Brethren Mut. Aid Soc.* 148 Pa. 185, 23 Atl. 896.

The action of the board of directors in 1897, and of the members in mutual meeting in 1898, in raising the assessment of the members of the fifteen-year class, was reasonable.

Niblack, Mut. Ben. Soc. § 254; *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681, 28 S. E. 498; *Seymour v. Mutual Reserve Fund Life Asso.* 14 Misc. 151, 35 N. Y. Supp. 1116; *Howard v. Mutual Reserve Fund Life Asso.* 125 N. C. 49, 45 L. R. A. 853, 34 S. E. 200; *Bigelow, Estoppel*, 568.

The courts will not declare the action of the association unreasonable unless it is clearly so.

Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201; *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287; *Fullenwider v. Supreme Council, R. L.* 73 Ill. App. 321.

The validity of the resolution of reapportionment of 1895 cannot now be called in question.

Jones v. Jones, 118 N. C. 447, 24 S. E. 774; *Newell v. March*, 30 N. C. (8 Ired. L.) 441; *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627; *Lyle v. Siler*, 103 N. C. 261, 9 S. E. 491; *Macon County Comrs. v. Jackson County Comrs.* 75 N. C. 240; *Howard v. Mutual Reserve Fund Life Asso.* 125 N. C. 49, 45 L. R. A. 853, 34 S. E. 200; *Bigelow, Estoppel*, 568.

These actions for money had and received cannot be maintained, except upon the theory that the contract has been rescinded, and that the plaintiff accepts this condition.

1 Chitty, Pl. 354; *Bannister v. Read*, 6 Ill. 92; *Drew v. Claggett*, 39 N. H. 431; *Brown v. Mahurin*, 39 N. H. 156; *Pierce v. Duncan*, 22 N. H. 18; *Fuller v. Little*, 7 N. H. 535; *Randlet v. Herren*, 20 N. H. 102; *Miller v. Thompson*, 22 Ark. 258; *Allen v. Webb*, 24 N. H. 278; *Weeks v. Robie*, 42 N. H. 316; *Stahelin v. Sowle*, 87 Mich. 124, 49 N. W. 629.

The law does not raise an implied promise to return money had and received, unless such return is just and equitable.

Pom. Eq. Jur. §§ 182, 1047; *Beach, Modern Law of Contracts*, §§ 399, 660; 1 Wait, Act. & Def. 382; 4 Wait, Act. & Def. 493, 503, 511; 1 Chitty, Pl. 362; *Roberts v. Ely*, 113 N. Y. 131, 20 N. E. 606; *Chapman v. Forbes*, 123 N. Y. 536, 26 N. E. 3; *Falconer v. Smith*, 18 Pa. 130, 55 Am. Dec. 611; *Orman v. North Alabama Development Co.* 53 Fed. 470; *Heck v. Shener*, 4 Serg. & R. 249, 8 Am. Dec. 700; *Gaines v. Miller*, 111 U. S. 397, 28 L. ed. 467, 4 Sup. Ct. Rep. 426.

The law does not raise the implied promise to return the assessments as money had and received, if the plaintiff has received benefits.

Beach, Modern Law of Contracts, § 660; *Barber v. Lyon*, 8 Blackf. 215; *Ellen v. Topp*, 6 Exch. 424; 1 Chitty, Pl. 355.

When a risk has once begun on insurance no portion of the premium will be returned as money had and received upon a rescission of the contract.

Continental L. Ins. Co. v. Houser, 89 Ind. 258; *Mailhoit v. Metropolitan L. Ins. Co.* 87 Me. 374, 32 Atl. 929; *Bliss, Life Ins.* § 423.

A claim for money had and received will be sustained upon rescission of a contract, only when there is a total failure of consideration.

2 Enc. Pl. & Pr. p. 1019, note 1.

The law does not raise such implied promise if the defendant association has lawfully disbursed the assessments with the consent of the plaintiff.

Haynes v. McKee, 19 Misc. 511, 43 N. Y. Supp. 1126; *Keener, Quasi Contracts*, p. 91; *Beach, Modern Law of Contracts*, § 1495; 4 Wait, Act. & Def. pp. 483, 508; *Verona v. Peckham*, 66 Barb. 103.

The law does not raise such implied promise if the parties cannot be put in *statu quo*.

Pollock, Contr. p. 552, *513; *Wharton*, 54 L. R. A.

Agency, § 516; *Mayer v. New York*, 63 N. Y. 455; *Coolidge v. Brigham*, 1 Met. 547; *Bellows v. Cheek*, 20 Ark. 424.

The plaintiff cannot recover back, as money had and received, assessments paid with knowledge of the facts, and especially those paid since reapportionment of 1895.

Jones v. Jones, 118 N. C. 440, 24 S. E. 774; *Macon County Comrs. v. Jackson County Comrs.* 75 N. C. 240; *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627; *Howard v. Mutual Reserve Fund Life Asso.* 125 N. C. 49, 45 L. R. A. 853, 34 S. E. 200.

If the plaintiff can recover for money had and received, the value of the benefit received by him must be deducted.

Abell v. Penn Mut. L. Ins. Co. 18 W. Va. 400; *Richards v. Allen*, 17 Me. 298; *Lovellet v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; *Phanias Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Union Cent. L. Ins. Co. v. McHugh*, 7 Neb. 66.

If the plaintiff has been injured by the illegal action of the association in expelling him he has an adequate remedy by mandamus for restoration to membership.

Niblack, Ben. Soc. §§ 47, 51, 53, 55, 56; *Lavalle v. Société Saint Jean Baptiste*, 17 R. I. 680, 16 L. R. A. 393, 24 Atl. 467; 1 Thomp. Corp. § 904; *People ex rel. Pulford v. Detroit Fire Department*, 31 Mich. 459; *People ex rel. Bartlett v. Medical Soc.* 32 N. Y. 187; *Fuller v. Academic School*, 6 Conn. 532; *Marbury v. Madison*, 1 Cranch, 168, 2 L. ed. 70; *Rea v. Baker*, 3 Burr. 1266; *Com. v. St. Patrick Benev. Soc.* 2 Binn. 441, 4 Am. Dec. 453; *Black & White Smiths' Soc. v. Vandyke*, 2 Whart. 309, 30 Am. Dec. 283; *Com. ex rel. Fischer v. German Society*, 15 Pa. 251; *People ex rel. Schmitt v. Saint Francis Benev. Soc.* 24 How. Pr. 220; *High. Extr. Legal Rem.* 294; *State ex rel. Sibley v. Carteret Club Bd. of Management*, 40 N. J. L. 295; *Peyre v. Mutual Relief Soc.* 90 Cal. 940, 27 Pac. 191; *Lysaght v. St. Louis Operative Stonemasons' Asso.* 55 Mo. App. 542; *People ex rel. Doyle v. New York Benev. Soc.* 3 Hun, 361; *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N. Y. 105, 23 N. E. 129; *Society for Visitation of Sick v. Com. ex rel. Meyer*, 52 Pa. 132, 91 Am. Dec. 139; *Franklin Beneficial Asso. v. Com.* 10 Pa. 357; 14 Am. & Eng. Enc. Law, p. 154; 2 Bacon, Ben. Soc. 894.

If, however, the action should be held to be an action for damages upon breach of contract, then the measure of damages should be as follows:

The plaintiff is entitled merely to compensation.

Robinson v. Harman, 1 Exch. 850; *Smith v. Sherwood*, 2 Tex. 460; *Griffin v. Colver*, 16 N. Y. 493, 69 Am. Dec. 718; *Wall v. City of London Real Property Co.* L. R. 9 Q. B. 249; *Sedgw. Damages*, § 30; 8 Am. & Eng. Enc. Law, 2d ed. p. 632.

The character of the parties and of their relation to each other must be considered.

Niblack, Ben. Soc. 2d ed. pp. 72, 271; *People ex rel. Atty. Gen. v. Life & Reserve*

Asso. 150 N. Y. 94, 45 N. E. 8; *People v. Security L. Ins. & Annuity Co.* 78 N. Y. 114, 34 Am. Rep. 522; *Re Protection L. Ins. Co.* 9 Biss. 198, Fed. Cas. No. 11,444; *Ridley v. Paillard*, 26 Misc. 513, 57 N. Y. Supp. 693; May, *Ins.* 3d ed. § 146.

The plaintiff may recover the equitable value of the policy.

Day v. Connecticut General L. Ins. Co. 45 Conn. 480, 29 Am. Rep. 693; *Union Cent. L. Ins. Co. v. McHugh*, 7 Neb. 68; *Smith v. Charter Oak L. Ins. Co.* 64 Mo. 330; *Farley v. Union Mut. L. Ins. Co.* 41 Hun, 303; *Barney v. Dudley*, 42 Kan. 212, 21 Pac. 1079; *Speer v. Phoenix Mut. L. Ins. Co.* 36 Hun, 323.

Under no conditions can there be a recovery of all premiums and assessments paid.

Speer v. Phoenix Mut. L. Ins. Co. 36 Hun, 323; *Barney v. Dudley*, 42 Kan. 212, 21 Pac. 1079; *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Landaster's Case*, Cairns, Dec. 81; *Day v. Connecticut General L. Ins. Co.* 45 Conn. 480, 29 Am. Rep. 693; *Union Cent. L. Ins. Co. v. McHugh*, 7 Neb. 66; *Farley v. Union Mut. L. Ins. Co.* 41 Hun, 303; *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; *Maitloit v. Metropolitan L. Ins. Co.* 87 Me. 374, 32 Atl. 980; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789; *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 401; *Missouri Valley L. Ins. Co. v. Kelso*, 16 Kan. 481; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120; *Rumbold v. Penn Mut. L. Ins. Co.* 7 Mo. App. 71; *Watts v. Phoenix Mut. L. Ins. Co.* 16 Blatchf. 228, Fed. Cas. No. 17,294; *Pries v. Guardian Mut. L. Ins. Co.* 5 W. N. C. 250; *Knickerbocker L. Ins. Co. v. Heidel*, 8 Lea, 488; *American Life Ins. & T. Co. v. Shultz*, 82 Pa. 46; *Brooklyn L. Ins. Co. v. Week*, 9 Ill. App. 358.

Messrs. George Burnham, Jr., James E. Shepherd, and Sewell Tyng also for appellant.

Mr. William W. Clark for appellee.

Douglas, J., delivered the opinion of the court:

This is an action brought to recover damages for the alleged wrongful cancelation of a policy of insurance. The record comprises over 500 pages, with a large number of insertions, amounting in the aggregate to perhaps 600 pages of printed matter. The case was fully and ably argued at length, and we have been favored with well-prepared and exhaustive briefs; and yet we see but one simple point essential to the determination of the case: Can a mutual association, by whatever name it may be called, or whatever may be its purposes, enter into a contract with one of its members, and, after receiving large sums upon said contract, alter its essential terms, without the consent of the member, so as practically to destroy its value? We think not. The plaintiff became a member of the plaintiff association in 1883, and received a policy in the form of a certificate of membership, wherein it was expressly agreed that assessments

should "be made upon the entire membership in force at the date of the last death for such a sum as the executive committee may deem sufficient to cover said claims; the same to be apportioned among the members according to the age of each member as per table indorsed" on said certificate. It appears from the findings of fact that the plaintiff paid all demands made upon him up to the year 1898, and call No. 96. This last call he refused to pay on the ground that it was exorbitant and contrary to the express terms of his policy. It seems that by successive resolutions, none of which were amendments to its constitution, the association has placed in a separate class all members who entered prior to 1890, and requires them to pay on the basis of the age attained by each at the date of each assessment, while other members continue to be assessed only as of their age of entry. That the result of such discrimination is injurious to the plaintiff clearly appears from the 16th, 18th, 21st, and 22d findings of fact, as follows: "(16) . . . That since the last resolution of 1898 the plaintiff and all who joined said company prior to 1890, and who held policies similar to plaintiff's were assessed at their full attained age, at rates applicable to such age, whereas persons who became members since 1890, and who held policies under what is styled the 'Ten-Year Class' and the 'Five-Year Class,' are only assessed at their age of entry; and plaintiff is thereby assessed at a higher amount than if the entire membership were assessed at rates of their attained ages." "(18) That call number 96, made on plaintiff in 1898, and pursuant to the resolutions of said year, is larger in amount than it would have been had all the members of the association been assessed at their full attained ages." "(21) That the present value of plaintiff's policy, assuming that the rates were properly established and the members lawfully classified, was, at the time he ceased to be a member of said company, only a nominal sum, as by said classification and rating the amount of policy discounted to such time would not exceed the present value of premiums which would be due and payable for the period of plaintiff's expectancy (22) That if the entire membership of the company had been rated and assessed at their attained ages, and no distinction made among the classes, then the present value of plaintiff's policy would be more than the present value of the premiums, and the policy have a substantial present value; but there are no data given from which said damage can be estimated or even approximated." Upon his findings of fact, the court below concluded, as matter of law, that the assessment made in pursuance of the resolutions of 1898 was "in violation of defendant's constitution and excessive and invalid;" that the defendant, having ceased and refused to recognize the plaintiff as a member on account of his having refused to pay such excessive and invalid assessment, had broken its contract, and had become liable to the plaintiff in damages,

to be measured by "the amount of premiums and dues paid by plaintiff prior to call 96, with interest thereon from date of each payment." Judgment was rendered accordingly. In it we see no error. All that we decide in the present case is that the defendant has violated its contract with the plaintiff in a material matter, whereby the plaintiff, having suffered substantial injury, is entitled to substantial damages. We do not decide that a mutual insurance company, or any other kind of insurance company, cannot issue policies of divers kinds and classes, if so authorized by its charter; nor do we decide that a member of a purely mutual association is not bound by all reasonable by-laws and changes lawfully made therein. We are not considering the enforcement of a contract inequitable on its face, but the violation of a lawful contract by attaching thereto, without the consent of the plaintiff, conditions which utterly destroy its value. It is evident that, if the resolution of 1898 is binding upon the plaintiff, he would in any event be eventually forced out of the company by the constantly increasing premiums.

There is one fact that does not clearly appear from the record, and upon which counsel themselves seem to differ, which, while not essential to the determination of this case, seems worthy of notice: On the hearing it was contended that the defendant association had the right to subsequently rearrange its members into classes, so as to make each class bear the burden of insuring its own members. If by that the association claims the right to place all its members who entered before 1890 into a distinct class, entirely separate from the other members, and make them raise exclusively among themselves enough to pay all the death claims that may occur among their own number, we cannot admit the right, unless such was the understanding when the original contract was made. What would be the result? Suppose certain men start a mutual association, and support it through all its infant struggles into a vigorous and enlarged growth. In course of time the new members would naturally outnumber the old ones. Suppose they should say to the old members: "You are getting old, and therefore your insurance is more costly than ours. We will place you in a class by yourselves, and make you insure each other without any help from us. It is true you have borne the heat and burden of the day and we are resting in the shade of the tree you have planted, but that makes no difference to us. Insure yourselves or leave." Of course, as one by one died off, the burden would be greater upon the survivors, as a death claim of \$1,000 bears more heavily upon twenty men than it would upon 100. Finally two would be left. When one died, the other would have to pay his entire policy, and then pay his own policy at his own death. Would this be insurance, and could it be said that any claim which would lead to such a result is sound in principle? It may be that the association has provided for

such cases, but it is apparent that if any class of men is set apart, and no new blood permitted to enter, it will eventually die out. If a man voluntarily goes into such a contract with his eyes open, we are not inclined to help him; but his valid, existing contract cannot be changed into such a contract without his consent. Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights.

It is admitted that the measure of damages followed by the court below is the established rule in this state. *Braswell v. American L. Ins. Co.* 75 N. C. 8; *Lovick v. Providence Life Assn.* 110 N. C. 93, 14 S. E. 506; *Burrus v. Life Ins. Co.* 124 N. C. 9, 32 S. E. 323. But it is contended that this rule was established purely in contemplation of old-line companies, and was not intended to apply to mutual associations. Whatever may have been the inception of the rule, we see no better one to adopt, and, as at present advised, must follow our own precedents.

* The judgment of the court below is affirmed.

A petition for rehearing having been filed, Douglas, J., on June 4, 1901, handed down the following response:

This case is before us on a rehearing, being originally reported in 128 N. C. 971, 36 S. E. 352. We have again given it careful consideration, and have been forced to the same conclusions announced in our former opinion. It seems useless to again discuss the principles involved, as they are few and simple, as the case is viewed by us. The plaintiff had a contract of insurance with the defendant, which the latter seems to have violated in its most essential features, with the result of having destroyed its value to the plaintiff. But it is said that the plaintiff made such contract of insurance with a mutual insurance association, of which he was a member, and by virtue of such membership; and that he is therefore bound by all such rules and regulations as may be thereafter lawfully adopted. "Lawful adoption" may mean much or little. Rules may be adopted under the forms of law that might nevertheless be so unreasonable and inequitable as to be clearly beyond any possible contemplation of law. In any event, such rules can never have any greater force than the law that authorizes their adoption; and, if this has the effect of impairing the obligation of a contract, it is void by constitutional inhibition. But it is said that the plaintiff, upon entering the association, agreed, expressly or impliedly, that changes might be made in its constitution and by-laws, and is bound thereby. We have no evidence that he agreed that such changes might be made as were made, and we have no idea that he ever intended to place it within the power of the association to break his contract at pleasure, or render it utterly valueless by subsequent

stipulations or regulations adopted without his consent. A mere general consent that the constitution and by-laws may be amended applies only to such reasonable regulations as may be within the scope of its original design. We must again repeat what we said in our former opinion: "Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights."

It is urged by the defendant that, if the plaintiff is entitled to any relief, it is not by recovery of the premiums he has paid, but by mandamus for reinstatement. This remedy is not demanded by the plaintiff, nor does it seem practicable to us. It is true, we might issue the mandamus to a foreign corporation having its general offices in New York; but how to make such a mandamus effective is a different question, the solution of which is not at all clear to us. Moreover, in the present instance the plaintiff, Strauss, is now dead. Much stress has been laid upon the fact that the supreme court of Minnesota, in *Ebert* against this defendant (81 Minn. 116, 83 N. W. 506), while agreeing with us upon the main question of the right of recovery, differs with us as to the measure of damage. We are much impressed with the views of the court upon that point, which have much to commend them as theoretical propositions; but we are equally impressed with the frank admission of the court as to the difficulty of their practical application. Our own rule, even in our own minds, falls short of theoretical perfection; but, after most careful consideration, we are unable to find a better. The impaired health of the insured, or his having passed the insurable age, would present complications practically insurmountable in the actual trial of an action. Moreover, the defendant claims that the plaintiff's insurance has cost more than he has paid in, and therefore his recovery would be nothing. The plaintiff would have no means of disproving the alleged cost of his past insurance, the proof of which

would be exclusively in the possession of the defendant. He might cross-examine the defendant's witnesses, or demand its books and papers; but, if he got them, what could he do with them? It seems to have taken the defendant several years to find out that the plaintiff's insurance was costing more than his premiums, and this it did only with the assistance of the insurance commissioner of New York and expert actuaries. With or without such assistance, what chance would the average juror have of mentally digesting five hundred pages of insurance statistics? All actions must be capable of a practical determination, with a reasonable certainty of substantial justice; and rules of law must be adjusted to that end, even if, in exceptional cases, they fall short of the full measure of ideal right. A distinguished jurist has said: "Indeed, one of the remarkable tendencies of the English common law upon all subjects of a general nature is to aim at practical good, rather than theoretical perfection; and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business." Story, Eq. Jur. [11th ed.] § 111, p. 109. The rule we have followed is not new. It was laid down by Chief Justice Pearson in *Braswell v. American L. Ins. Co.* 75 N. C. 8, and has been uniformly followed in this state for the past twenty-five years. But it is said this rule was intended to apply to "old line" companies, and not to mutual associations. Where is the essential difference in principle or in its practical result? Both companies pay back only what they have received, with legal interest thereon, and neither company is permitted to retain anything for the cost of past insurance. If the mutual association receives less, it pays back less. If the old line company collects more than the actual cost of insurance, it pays back that much more, and loses its surplus, as well as its cost of insurance. As we see no reason to change our former judgment, the petition to rehear is denied.

Petition dismissed.

NORTH DAKOTA SUPREME COURT.

E. B. GRANDIN, *Appt.*,

Gunder G. EMMONS *et al.*, *Respts.*

(.....N. D.....)

*1. A written assignment of a real-estate mortgage, the execution of which is acknowledged before a notary public of another state, is entitled to be read in evidence

*Headnotes by YOUNG, J.

NOTE.—For a case in this series holding that at least forty-two days must intervene between the first publication of a notice of mortgage foreclosure and the day of sale, see *Finlayson v. Peterson* (N. D.) 83 L. R. A. 532.

54 L. R. A.

under the provisions of § 5696, Rev. Codes, without further proof, when the certificate of acknowledgment attached thereto is authenticated by the signature and official seal of such notary. It is not necessary to have attached thereto the certificate of an officer of a higher rank to the official character and signature of such notary.

2. A notice of mortgage foreclosure sale by advertisement, which is published six times, once in each week, for six successive weeks before the sale, is a sufficient compliance with § 5848, Rev. Codes, regulating the publication of notices. *McDonald v. Nordyke Marmon Co.* 9 N. D. 290, 83 N. W. 6, followed.

3. In this state a power of sale inserted in a real-estate mortgage is a

power coupled with an interest, and is not revoked or suspended by the death of the mortgagor, and when so exercised, and redemption is not made as provided by law, is effective to cut off the rights of redemption of the heirs of such deceased mortgagor.

(May 4, 1901.)

APPEAL by plaintiff from a judgment of the District Court for Traill County in favor of defendants in an action brought to quiet title to real estate. *Reversed.*

The facts are stated in the opinion.

Mr. F. W. Ames, for appellant:

McDonald v. Nordyke Marmon Co. 9 N. D. 290, 83 N. W. 6, is a complete disposal of the controversy on the point of notice.

The instrument shows itself to have been duly acknowledged, and this alone entitles it to be received in evidence.

Rev. Codes 1895, § 5696; *Anglo-American Land, Mortg. & Agency Co. v. Hegwer*, 7 Kan. App. 689, 51 Pac. 915; *Wilkins v. Moore*, 20 Kan. 538; *Webb v. Holt*, 113 Mich. 338, 71 N. W. 637; *Cameron v. Culkins*, 44 Mich. 531, 7 N. W. 157; *Webb*, Record of Title, 66.

The significance of an acknowledgment is "that the grantor personally appeared before the officer, and in his presence signed, sealed, and delivered the instrument, and then acknowledged the same before him."

Carpenter v. Dexter, 8 Wall. 513, 19 L. ed. 426; *Milledge v. Coleman*, 47 Wis. 184, 2 N. W. 77.

A defense on the ground that the instruments were executed under duress, undue influence, etc., cannot be sustained, except on perfectly clear, convincing, and satisfactory evidence.

Smith v. Allie, 52 Wis. 337, 9 N. W. 155; *Cameron v. Culkins*, 44 Mich. 531, 7 N. W. 157; 1 Am. & Eng. Enc. Law, 2d ed. p. 560, ¶ 5; *Karcher v. Gans*, 13 S. D. 383, 83 N. W. 431.

Mr. M. A. Hildreth, for respondents:

This action cannot be maintained against the heirs of Ingeborg G. Emmons.

Jones v. Parker, 55 Ga. 11; *Johnson v. Culbertson*, 79 Fed. 5.

The property was a homestead, and the pleadings show it has been lived upon ever since by the defendants as such.

Harsh v. Griffin, 72 Iowa, 608, 34 N. W. 441.

A foreclosure by advertisement where one of the mortgagors had died did not cut off the period of redemption, nor set the statute running as against the heirs of the deceased.

Plaintiff brings an action in ejectment, and the foundation of that action is that it is a remedy to recover an estate. It must stand upon the strength of the plaintiff's title, and not upon the weakness of the defendants'.

Nelson v. Triplett, 81 Va. 237; *Butrick v. Tilton*, 141 Mass. 98, 6 N. E. 563; *Mitchell v. Lines*, 36 Kan. 380, 13 Pac. 593.

Our statute does not cover an acknowledgment taken outside of this state, but the certificate of the officer must be accompanied by higher evidence certifying to his official

character and signature before such document can be offered in evidence.

1 Am. & Eng. Enc. Law, 2d ed. p. 535; *Tittman v. Thornton*, 107 Mo. 500, 18 L. R. A. 410, 17 S. W. 979.

A foreclosure by advertisement cannot be effectual as against minors or the heirs of the mortgagor because they are not parties to the record. All these persons are entitled to redeem.

1 Story, Eq. Pl. § 193; *Matcain v. Smith*, 6 McLean, 416, Fed. Cas. No. 9,272; *Martin v. Noble*, 29 Ind. 216; *Kelgour v. Wood*, 64 Ill. 345; *Ohling v. Luitjens*, 32 Ill. 23; *Cutler v. Jones*, 52 Ill. 84; *Hodgen v. Guttery*, 58 Ill. 431; *Strang v. Allen*, 44 Ill. 428; *Dunlap v. Wilson*, 32 Ill. 517; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Frische v. Kramer*, 16 Ohio, 125, 47 Am. Dec. 368; *Hall v. Hall*, 11 Tex. 526; *Webb v. Mawan*, 11 Tex. 678; *Tallman v. Ely*, 8 Wis. 218; *Hodson v. Treat*, 7 Wis. 263; *Porter v. Kilgore*, 32 Iowa, 379; *Douglass v. Bishop*, 27 Iowa, 214; *Veach v. Schaup*, 3 Iowa, 194; *Valentine v. Havener*, 20 Mo. 133; *Brundred v. Walker*, 12 N. J. Eq. 140; *McCall v. Yard*, 11 N. J. Eq. 58; *Vanhorn v. Duckworth*, 42 N. C. (7 Ired. Eq.) 261; *Haffley v. Maier*, 13 Cal. 13; *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606; *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84.

The heirs of the mother are entitled to redeem.

Sheldon v. Bird, 2 Root, 509; *Zagel v. Kuster*, 51 Wis. 31, 7 N. W. 781; *Hunter v. Dennis*, 112 Ill. 568; *Butts v. Broughton*, 72 Ala. 294; *Chew v. Hyman*, 10 Biss. 240, 7 Fed. 7; *Stover v. Bounds*, 1 Ohio St. 108.

Young, J., delivered the opinion of the court:

Action to recover the possession of real estate and to quiet and confirm the title thereto. The real estate in controversy comprises 160 acres, situated in Traill county. The defendants are in possession under claim of title. Plaintiff alleges that he is the owner of said land, and that defendants have no right, title, or interest therein. The case was tried to the court without a jury. No evidence was offered by the defendants. At the close of plaintiff's testimony, at the request of defendants' counsel and on his motion, findings of fact and conclusions of law were made adverse to plaintiff's claim of title. Judgment was thereafter entered declaring certain transfers, upon which plaintiff bases his claim of title, void and of no effect. Plaintiff appeals from the judgment, and requests a review of the entire case in this court.

It is a stipulated fact that on December 1, 1885, Gunder G. Emmons was the owner of the land in controversy, and it is from this common source that both parties to this action claim the title they rely upon. Plaintiff sets forth his claim of title as follows: He alleges that on December 1, 1885, Gunder G. Emmons and Ingeborg G. Emmons, his wife, executed and delivered a mortgage covering said land to one Hiram D. Upton, to secure their joint note for

\$700, payable to said Upton, of even date with said mortgage; that on June 1, 1894, said Upton assigned said note and mortgage to one R. C. Alexander, by an instrument in writing; that said mortgage contained a provision authorizing the mortgagee, his heirs and assigns, in case of default in payment of said debt or interest thereon, "to sell said premises at public auction, and convey the same agreeable to the statutes in such case made and provided;" that pursuant to a default in payment of the debt so secured, the said Alexander foreclosed said mortgage by advertisement, causing the notice of sale to be published in a weekly newspaper "six times, once in each week, for six successive weeks," which notice so published fixed the time of sale on June 13, 1896, at 2 o'clock P. M.; that on said date said premises were sold to R. C. Alexander, and a sheriff's certificate of sale duly issued to him; that thereafter, to wit, on June 18, 1897, no redemption having been made, a sheriff's deed was duly issued to the said Alexander, the purchaser at said sale; that thereafter, to wit, on June 21, 1897, the said Alexander conveyed said premises to the plaintiff by executing and delivering to him a warranty deed therefor. All of the instruments above referred to were duly recorded in the proper office.

It is apparent that, if the foreclosure proceedings and the several conveyances are valid, plaintiff's title is perfect, and he is entitled to the relief he demands. The defendants do not claim title or right of possession by virtue of any conveyance. Their rights, if any they have, rest solely upon the fact that they are the heirs at law and next of kin of Ingeborg G. Emmons, who died prior to the foreclosure proceedings hereinbefore referred to. At the time of the execution of the mortgage, and up to the time of her death, she occupied the land in question with her husband as their homestead, and since her death the defendants have continued to so occupy it. One of the defendants, Peter Emmons, is still in his minority. The facts placed in issue by the answer are few, and require but brief mention.

The execution of the mortgage by Ingeborg G. Emmons is denied; also the assignment of the note and mortgage from Upton to Alexander. An examination of the evidence transmitted to this court leaves no doubt in our minds that the mortgage was executed by her, and that it was assigned to Alexander by Upton, as alleged in the complaint. The execution of the mortgage is satisfactorily shown by the testimony of one of the persons who witnessed its execution, and by the certificate of the notary public attached thereto, certifying to the acknowledgment of its execution by the mortgagors before such notary public. The transfer of the note and mortgage to Alexander is established by the introduction in evidence of the original written assignment executed by Upton and duly acknowledged by him before a notary public, which acknowledgment is certified to by the notary public over his official signature and seal. Objec-

tion was made to the admission of this instrument on the ground that it is incompetent, and that no foundation was laid for its introduction. The particular ground of objection is that, the instrument having been executed and acknowledged in New Hampshire before a notary public of that state, it is necessary to have attached thereto the certificate of some other officer of that state of higher official rank, certifying to the official character and signature of such notary public, before the same can be held to be an acknowledged instrument, within the meaning of the statutes of this state. The objection is not well taken. Sections 3573, 3575, 3576, Rev. Codes, authorize the proof or acknowledgment of instruments to be made before a notary public, within this or any other state or foreign country. The authentication of the certificate of acknowledgment taken by a notary public is prescribed by § 3586, Rev. Codes, which provides that the certificate shall be authenticated by the signature and official seal of the officer. Aside from these express statutory provisions, it is a well-settled rule of law that "courts take judicial notice of the seal of a notary public, and it proves itself prima facie by its appearance upon the certificate." *Green v. Gross*, 12 Neb. 117, 10 N. W. 459, and cases cited on page 124, 12 Neb., and page 461, 10 N. W.; *Hoadley v. Stephens*, 4 Neb. 431; *Galley v. Galley*, 14 Neb. 174, 15 N. W. 318; *Southerin v. Mendum*, 5 N. H. 420. The assignment was accordingly acknowledged, within the meaning of § 5696, Rev. Codes, and, under the authority of said section, was entitled to be read in evidence without further proof. No further facts are in dispute. The questions which remain for consideration relate to the alleged invalidity of the foreclosure proceedings, and the legal effect of the foreclosure, if valid, upon the rights of the heirs of Ingeborg Emmons, deceased.

It was urged at the trial in the district court that the entire foreclosure proceedings were void, and that the sheriff's deed issued to Alexander pursuant thereto, and the deed of the latter to plaintiff, conveyed no title, for the reason that "the publication of the notice of mortgage sale is insufficient to comply with the statutes in this, to wit, that the publications occurred on May 7, 1896, May 14, 1896, May 21, 1896, May 28, 1896, June 4, 1896, and June 11, 1896, and the sale took place on June 13, 1896, being a period of only thirty-seven days." The foregoing quotation from the language of the order of the trial judge correctly states the facts as to the publication of the notice and date of sale, and gives the sole ground relied upon by the trial court in rendering the judgment appealed from. The case was decided before our decision was announced in the case of *McDonald v. Nordyke Marmion Co.* 9 N. D. 290, 83 N. W. 6, wherein for the first time a construction was placed upon § 5848, Rev. Codes, which governed the publication of the notice of mortgage sale now under consideration. In that case the statute now in force, namely § 5848, was

distinguished from the antecedent provisions found in § 5414, Comp. Laws, under which *Finlayson v. Peterson*, 5 N. D. 587, 33 L. R. A. 532, 67 N. W. 953, was decided and was construed to only require a publication of the notice of sale six times, once in each week for six successive weeks, prior to the date of sale, instead of a period of forty-two days, as under the former enactment. In *McDonald v. Nordyke Marmon Co.* 9 N. D. 290, 83 N. W. 6, we said: "Under the present law, the notice is required to be published before the sale 'six times, once in each week, for six successive weeks.' When this is done, there need be made no perplexing computations of days or weeks." No reasons are advanced by counsel for respondents, and none have occurred to us, for questioning the entire soundness of that construction. It follows, therefore, that the trial court was in error in holding the foreclosure proceedings invalid. The notice was published in strict conformity to the statute governing such publication.

It is also earnestly urged by respondents' counsel that, notwithstanding the regularity and validity of the foreclosure proceedings, they are ineffectual as against minors and heirs of the mortgagors, because it is a foreclosure by advertisement, and they are not parties to the record, and that it does not, therefore, cut off their right to redeem. This contention is based upon the theory that the power of sale contained in the mortgage authorizing the mortgagee, his heirs and assigns, to sell the land described in the mortgage, pursuant to the statute regulating the manner of exercising the right so conferred, was merely a naked power, one not coupled with an interest, and that it was therefore revoked by the death of Ingeborg Emmons, one of the mortgagors, and that, therefore, as to the heirs of said Ingeborg Emmons, the foreclosure is without effect. A large array of cases is presented by counsel as supporting this position. All but two of them relate to foreclosure by action wherein necessary parties were omitted. It is, of course, well settled that such persons are not cut off by such a foreclosure and upon elementary principles. None of these cases have reference to the effect of a statutory foreclosure under a power of sale, and are not in point. *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606, and *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84, however, squarely hold that a power of sale in a real-estate mortgage cannot be exercised after the death of the mortgagor, and that a sale made thereafter does not cut off the rights of the heirs at law of the mortgagor. The express ground of these decisions is that the power of sale in those states is not a power coupled with an interest, and is therefore revoked and rendered incapable of execution by the death of the mortgagor. In holding that the power of sale was not coupled with an interest, and so expired at the death of the mortgagor, it would appear that the courts in the cases just cited were largely controlled by the fact that in those states there was "no statute recogniz-

ing or declaring the effect or providing a method for the execution of the power. It could be executed only as any other power of attorney in the name of the principal." But, however that may be, the almost unanimous voice of authority is the other way. 2 Perry, Tr. § 602A, states that "it is a universal rule that a power coupled with an interest is irrevocable, and, as a power of sale inserted in a mortgage, . . . is a power coupled with an interest, it cannot be revoked by any act of the grantor or donor of the power. Not even the death or insanity of the grantor or donor will annul the power or suspend its exercise. The debt remains, the right or lien on the property remains, and the power is coupled with them." The doctrine just stated, that neither death nor disability will suspend or terminate the power, is supported by the following cases: *Conners v. Holland*, 113 Mass. 50; *Varnum v. Meserve*, 8 Allen, 158; *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *Jones v. Tainter*, 15 Minn. 512, Gil. 423; *Encking v. Simmons*, 28 Wis. 272; *Meyer v. Kuechler*, 10 Mo. App. 371; *Van Meter v. Darrah*, 115 Mo. 153, 22 S. W. 30; *Berry v. Skinner*, 30 Md. 567. In support of the doctrine that the power of sale is a beneficial power coupled with an interest, see *Jencks v. Alexander*, 11 Paige, 624; *Wilson v. Troup*, 2 Cow. 195, 14 Am. Dec. 458; *Anderson v. Austin*, 34 Barb. 319; *King v. Duntz*, 11 Barb. 191; *George v. Arthur*, 2 Hun. 406; *Cole v. Moffitt*, 20 Barb. 18. In this jurisdiction the doctrine of these cases has been recognized, and to some extent embodied, in the following sections of the statute: Section 4710 declares that the power of sale in a mortgage is a trust; and § 3419 declares that it is a part of the security, and vests in the person entitled to the security. Section 3403 distinguishes it from a simple power of attorney to convey real property in the name of the owner. Section 4350, which provides that the power of an agent shall be terminated by revocation, death, or incapacity, expressly excepts powers coupled with an interest in the subject of the agency. Section 5844 provides that "every mortgage of real property containing a power of sale may, upon default being made in the conditions of such mortgage, be foreclosed by advertisement," etc. That no limitation is in fact placed upon the exercise of the power is also made plain by § 5857, which directs that the surplus, if any, at the sale shall be paid to the mortgagor, his representatives or assigns, which plainly contemplates a sale after the death of the mortgagor. These several sections are identical in language with §§ 4354, 2829, 2813, 4007, 5424, 5411, Comp. Laws, which were construed by the supreme court of South Dakota in a learned and exhaustive opinion written by Kellam, J., in *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780, which was a case involving the precise questions under consideration and upon facts almost identical. In that case the widow and heirs of a deceased mortgagor made the same claim

that is set up by these defendants. That court, after a careful investigation, reached the conclusion that "both under our statute or without it the power of sale is one so coupled with an interest that it survives the death of the grantor." We fully agree with this conclusion, and approve the following language as directly applicable and controlling in this case: "She [the deceased mortgagor] could leave no more to her heirs than she herself had at the time of her death. Their rights must be measured by hers. They took her place, and might only do with respect to the property what she might do. The rights of the heirs having accrued subsequent to the mortgage, they are subordinate to it,—not only to the lien of the mortgage, but to the power of sale which it conveyed as a part of the security. . . . By the statute of our state no notice of sale is required to be served upon anybody. General notice to all interested is given by publication. There are no parties to the proceeding, as in an action for foreclosure; and yet the proceeding, where authorized by a power of sale in the mortgage, was, without question, intended to take the place of a foreclosure by action, and to have the effect of an old foreclosure in equity. The statute having made no provision for service of notice of the sale either upon heirs or others interested in the mortgaged property, such service, if made, would be entirely voluntary on the part of the mortgagee, and could add nothing to the legal effect of the sale. This court cannot add to the statute another provision requiring that express notice shall be given to minor heirs or their guardian in order to make the foreclosure sale effective against them. If, as the law stands, a foreclosure would be good with such actual notice, it is good without it."

It follows from what we have already said that the foreclosure in question was regular and valid, and that the defendants, having failed to redeem within the time allowed by law, have no right, title, or interest in said premises, and that the plaintiff is entitled to judgment confirming his title to

said real estate, and enjoining said defendants from asserting any claim or demand thereto, and giving possession thereof to the plaintiff. The district court is accordingly directed to enter an order vacating its judgment heretofore entered, and to direct the entry of a judgment in plaintiff's favor for the relief to which he is entitled, as above stated.

Counsel for respondents, in his oral argument, and also in his brief filed in this court, requested that, in the event of an adverse decision, the case be sent back to the district court for a new trial. Section 5630, Rev. Codes, under which this case was tried and the appeal taken, among other things provides that this court may, "if it deem such a course necessary to the accomplishment of justice, order a new trial of the action." Just how broad a discretion is intended to be given by the language quoted is a matter of much doubt. But it is clear that the power so conferred should not be exercised arbitrarily or capriciously, but only upon substantial grounds. Such grounds do not exist in this case. It is true the respondents did not introduce any evidence in the district court, for the reason, as appears, that the court held with the views of respondents' counsel, which were presented at the close of plaintiff's case, namely, that the notice of sale was insufficient, and the foreclosure proceedings void. The opportunity existed, however, for presenting testimony, if respondents so desired. There is not in this case even the suggestion of a possibility of establishing facts which would alter the conclusions we have already announced. Under such circumstances, it certainly would not be in furtherance of justice to grant the request, and the same is denied.

Judgment is reversed, and the District Court will enter judgment as heretofore directed.

All concur.

Petition for rehearing denied June 17, 1901.

VIRGINIA SUPREME COURT OF APPEALS.

Ann J. SANDS'S ADMINISTRATOR *et al.*,
App'ts.,
v.

John H. DURHAM.

(98 Va. 392.)

A partner who, not being in arrears to

the firm upon dissolution of the partnership and exhaustion of the social assets, pays judgments subsequently recovered against it on partnership debts, is entitled to be subrogated to the rights of creditors whose judgments he has satisfied against the real estate of his copartner in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional

NOTE.—*Right of partner who pays firm debt to subrogation against copartner.*

I. In general.

- I. In general.
- II. After dissolution.
 - a. In general.
 - b. Debts assumed by one or more partners.
 - c. Death of partner.

III Conclusion.

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Where a debt for which all the partners are equally liable is paid during the continuance of the partnership by one of the partners the right of subrogation does not exist in his favor, according to the weight of authority,—at least until the partnership account has been settled and a balance shown to be due him.

Thus, where one partner has paid a firm debt

part of the liability as shown by a settlement of the partnership account.

(June 28, 1900.)

A PPEAL by the representatives of Ann J. Sands, deceased, from a decree of the Circuit Court for Giles County in favor of plaintiff in an action brought to enforce subrogation to the rights of creditors of a co-partnership against the property of one of the partners, in favor of another partner who had paid more than his share of the claims against the estate. *Affirmed.*

The facts are stated in the opinions.

Messrs. Wysor & Gardner for appellants.

Messrs. W. J. Henson and S. W. Williams, for appellee:

Copis v. Middleton, Turn. & R. 229, holds

he is not entitled to be subrogated against his copartner until an accounting has been had between them. *Fessler v. Hickernell*, 82 Pa. 150.

And where money is borrowed from a bank by a firm for use in the firm business, and a part is so used by one partner and the balance loaned or misapplied by the other partner, and the bank obtains a judgment which it collects from the former partner, he cannot be substituted to the rights of the bank in the judgment until there has been an accounting by him for the profits of the firm business, his proper remedy being by action for account render, or by a bill in equity for an accounting. *Baily v. Brownfield*, 20 Pa. 41. The court says in this case that it is not the law that a partner who pays a partnership debt may be substituted to the rights of the creditor as against his copartner; and that, where money is borrowed for use in the firm business, it becomes a partnership fund, and, no matter how the partners stand on the security given to the lender, they are accountable to each other as partners, and the relation of principal and surety can have no place between them.

And where the separate real estate of one partner is sold to pay a judgment for a firm debt, a subsequent individual judgment creditor of such partner is not entitled to be substituted as plaintiff in such judgment so as to enable him to proceed against the other partner without showing that the latter was indebted to the partner whose realty was sold, as he is not entitled to any greater rights than such partner himself would have; and the latter's only remedy would be by an action of account render against his copartner, in which case the partnership accounts would have to be brought into view and stated and settled by auditors appointed for the purpose, and, unless it appeared on the settlement that there was an indebtedness to the partner whose land was sold from his copartner, there would be no right to contribution. *Sterling v. Brightbill*, 5 Watts, 229, 30 Am. Dec. 304.

And where three of four partners execute a note to raise money for use in the firm business, and the fourth indorses it, and a judgment for its amount is obtained against the makers and a separate judgment therefor against the indorser, and the latter has the former judgment transferred to a third person who knows of the relations of the judgment debtors between themselves, and the indorser himself pays the amount of the judgment, both judgments are thereby satisfied, as one partner cannot, after a firm obligation is paid, keep it alive against his copartners, either in his own name or that

that a payment by one jointly bound with another, even if it is by a surety jointly bound with his principal, extinguishes the obligation, and that there can be no subrogation.

By the Virginia court of appeals, in *Powell v. White*, 11 Leigh, 309, the doctrine of *Copis v. Middleton* was thoroughly examined and repudiated.

See also *Wheatley v. Calhoun*, 12 Leigh, 205, 37 Am. Dec. 654.

The doctrine of *Powell v. White*, known as the Virginia doctrine, was sustained by the United States circuit and Supreme Court in *Lidderdale v. Robinson*, 2 Brock. 160, Fed. Cas. No. 8,337, and 12 Wheat. 594, 6 L. ed. 740, and has ever since been followed in Virginia.

The following cases hold that the remedy may be by way of subrogation:

Sells v. Hubbell, 2 Johns. Ch. 394; *Dahl-*

of a third person, unless, perhaps, under special circumstances to the extent of the sum which may be found due to him from his copartners on an accounting with them. *Booth v. Farmers' & M. Nat. Bank*, 74 N. Y. 228, *Affirming* 11 Hun, 258.

A firm creditor who receives from one partner less than the full amount of the debt in compromise cannot authorize the partner paying the same to keep the debt against the firm alive and enforce it by action in such creditor's name against the other partner. *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469.

After the satisfaction of a judgment for a firm debt by one of the partners sued, who takes an assignment of the judgment from the creditor, he cannot, on the doctrine of subrogation, charge under such judgment the bill of the other partner. *Hinton v. Odenheimer*, 57 N. C. (4 Jones, Eq.) 408. The court says in this case that partners are not entitled to the equities accorded to sureties; that they all stand alike to the creditor, being all principal debtors and equally liable primarily for the debt, both in law and in equity; and that there is no reason why payment of the firm debt by one partner should be considered in equity as anything but payment simply, or why a judgment for it should be kept on foot to enable one of the partners to charge the other, much less to charge the bill of the other.

Where one partner purchases outstanding notes or accounts of the firm it operates as a payment ordinarily, and gives him no right against his copartners except to demand an accounting and contribution. *Coleman v. Coleman*, 78 Ind. 844. The court says in this case that under supposable circumstances it may be that a partner who had taken assignments of the firm obligations to himself would be permitted to keep them alive and enforce them against his copartners for their contributory share of the sums paid by him for the purpose of giving him the benefit of securities incident to the debt when necessary to justice between the partners without injury to any creditor, but that under no circumstances should he be permitted to enforce such obligations for more than the amount paid by him in taking them up.

And where a firm indorses a note, and one member pays the note with his own money, taking back the note and holding it until the dissolution of the firm, he cannot then transfer the note so as to make the firm liable on its indorsement, as it was legally extinguished by his payment thereof; and the fact that the debt to secure which the note was given had been paid by him out of his own funds gave him no lien

gren v. Duncan, 7 Smedes & M. 280; *Booth v. Farmers' & M. Nat. Bank*, 74 N. Y. 228.

If subrogation is refused on the ground that payment by a coprincipal is an extinguishment of the debt, and leaves no right of subrogation, it would overrule the following Virginia cases:

Tompkins v. Mitchell, 2 Rand. (Va.) 428; *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654; *Dobyns v. Rawley*, 76 Va. 537; *Sheldon*, Subrogation, § 169; 24 Am. & Eng. Enc. Law, p. 234.

As to our proper proportion of these judgments we are principal, and as to our co-partner's proportion we are sureties.

Morris v. Morris, 4 Gratt. 319; *Clevinger v. Miller*, 27 Gratt. 740; 1 Collyer, Partn. 170.

Subrogation is enforced in favor of sureties and others who are required to pay in order to protect their own interest.

or claim on the note, but only made the firm liable to him for the amount paid, to be adjusted in the settlement of the partnership account. *Dana v. Conant*, 80 Vt. 240.

But *Klipp v. McChesney*, 66 Ill. 460, holds that one member of a firm may purchase from the payee a note given by the firm, giving his individual money therefor, and, although he cannot enforce it at law in his own name, it is a difficulty attending the remedy only, and not the right, and a third person to whom he indorses it may maintain an action thereon against the firm.

Where a firm of druggists purchase the stock of another druggist for which they give their individual notes secured by a mortgage on their entire stock of drugs, including those thus purchased, and also a mortgage on certain realty of one of the partners, and the other partner, after paying part of the purchase price, sells his interest to a third person describing the amount so paid as a firm debt, and the incoming and continuing partners agree between themselves that any payment on such debt by the former is to be refunded from the business from time to time or on final settlement, and such incoming partner pays the balance of the debt, he will not be subrogated to the rights of the mortgagee so as to be entitled to foreclose the mortgage against the land of the other partner, although at the dissolution of the firm a larger amount is coming to him on the settlement, as by his agreement to treat payments by him as a firm debt the right to such subrogation, if it ever existed, was obliterated. *Evans v. Rhea*, 12 Ky. L. Rep. 224, 14 S. W. 82. The right of subrogation was also disallowed in this case in the Kentucky superior court (9 Ky. L. Rep. 326), on the ground that the incoming partner was seeking to subject the mortgaged property to a sum equal to half the debt paid to the mortgagee, instead of to half the debt itself.

One member of a firm who is to receive a specified share of the profits for his services, the other partner agreeing to furnish the land, building, and capital for carrying on the business, cannot be subrogated to the claims of certain preferred creditors of the firm whom he pays out of his individual means as against other firm creditors, but all he can claim is the right to be paid out of the firm property or its proceeds in preference to the individual creditors of the other partner. *Gordon v. His Creditors*, 6 Rob. (La.) 328.

One partner who pays firm debts with his individual means does not, in Missouri, the law of which state makes a partnership debt joint and

Gatewood v. Gatewood, 75 Va. 415; *Clevinger v. Miller*, 27 Gratt. 740; *Pace v. Pace*, 95 Va. 792, 44 L. R. A. 459, 30 S. E. 361.

Cardwell, J., delivered the opinion of the court:

In the year 1886, John H. Durham, D. L. Whittaker, and D. A. Early formed a partnership for conducting a mercantile business in Giles county, under the style and firm name of D. L. Whittaker & Co. Whittaker furnished the capital of a stock of goods amounting to \$3,000, which he was to get back out of the concern, and they were to be equal partners, dividing equally the profits and losses. The firm, after doing an unsuccessful business, dissolved in October, 1897, by selling out their stock of goods to one G. L. Bane. Judgments had been obtained against the firm, which were unpaid, and there were also many outstanding claims not in judg-

several, become subrogated to the rights of the creditors whose debts he pays, so as to come into competition with other firm creditors, but has merely the right to bring such payments into his accounts; and after the payment of other firm debts the amounts so paid by him will go to his credit on a settlement as between the partners. *Lyons v. Murray*, 95 Mo. 23, 8 S. W. 170.

Ex parte Reid, 2 Rose, Bankr. 84, as digested in 2 Mews' Digest, col. 567, holds that where joint creditors of a firm resort to the separate estate of the ostensible partner, thereby exonerating the joint estate so as to produce a surplus of it, the separate creditors of the ostensible partner have a lien on such surplus to the extent to which the separate estate of such partner had been thus diminished, as against the dormant partner or his creditors. See also *Conrad v. Buck*, 21 W. Va. 396; *Re Swayne*, 1 Clark (Pa.) 457, *infra*, II. a.

In *Re Foot*, 8 Ben. 228, Fed. Cas. No. 4,906, one partner indorsed the firm paper and pledged his individual property as security to obtain money for the firm. Such partner and the firm subsequently became bankrupt, and the separate creditors of such partner claimed that he, as surety for the firm, became subrogated to the claims of the holders of the notes, and entitled to prove their amount against the joint estate which would inure to the benefit of the creditors of the separate estate. The court stated that if such partner, as surety, became subrogated to the rights of the holders of the notes, and entitled to prove their amount, the rule which precludes a partner from proving his individual debt in competition with joint creditors would defeat his separate estate from deriving any benefit through his claim, but held that where the holders of the notes had obtained payment by a sale of the securities pledged after the commencement of the bankruptcy proceedings the separate creditors would be substituted to the rights of the holders to enforce payment from the joint estate in bankruptcy, and were entitled to receive any surplus arising from the sale, and to obtain from the joint fund a sum equal to the dividend on the note.

Where one partner mortgages his individual property to secure a firm debt which is also secured by a mortgage on the firm property, he stands as surety for the firm debt, and on paying any part of the same is entitled to be subrogated to the rights of the mortgagee to that extent, and his creditors are entitled to the same rights of subrogation, the partnership property being the primary fund, and the private property the collateral pledged to pay the debt. *National Bank v. Cushing*, 53 Vt. 321.

ment against the firm. The accounts, notes, etc., were turned over to J. H. Durham for collection. He collected all he could, and applied the collections to the firm debts, and the residue of the judgments against the firm he paid out of his own means. These judgments were duly docketed on the lien docket of Giles county court, and were not marked satisfied. Durham brought this suit in October, 1895, for a settlement of the partnership accounts, and not only to have contribution from his partners, Whitaker and Early, but to be subrogated to the lien of the judgments which he had paid out of his private means to the extent his partners might fall in arrears to him on settlement, and to subject the lands owned by Early at the time of the rendition and docketing of the judgments against the firm to the extent that Early might be indebted to

him on the settlement. Early and wife having on the 5th of March, 1890, sold and conveyed to Mrs. Ann J. Sands three small tracts of land in Giles county, five eighths of which belonged to Early, and the remaining three eighths to his wife, complainant claimed the right by subrogation to subject the five-eighths interest in those lands, formerly owned by Early, to the payment of one half of the judgments against the firm discharged by complainant out of his private means, amounting to \$4,574.87; the other partner, Whitaker, being insolvent.

The circuit court decreed that Durham was entitled by subrogation to the rights of the judgment creditors whose judgments he had paid off, and subjected, not only the property owned by Early at the time of his death, but the five-eighths interest in the land which he had conveyed to Mrs. Sands in

And where one partner gives a mortgage on his separate property as collateral security for a firm debt he becomes a surety for the firm, and if his separate estate is first applied in payment of such debt he or his separate creditors will be entitled to be subrogated to the rights of the mortgagee as against the partnership funds. *Averill v. Louckse*, 6 Barb. 470.

And where two members of a firm purchase land in trust for the firm, giving their notes and mortgage back to secure the purchase money, the firm agreeing to pay the same as it falls due, and one of such partners pays the mortgage to save the firm property, he will be subrogated to the rights of the mortgagee so as to be entitled to interest on the money so paid. *McMillan v. James*, 105 Ill. 194.

And in *Stebbins v. Willard*, 53 Vt. 666, the court says that the principle is too well settled to need the citation of authorities that one partner may pay a mortgage debt and keep the mortgage on foot until reimbursed the moiety paid for the other partner.

Where two of three partners give their bond for a firm debt on which they afterwards confess judgment, they become individually responsible and the partnership nature of the debt is discharged; and if the third partner thereafter pays the judgment having it indorsed for his use the partners against whom the judgment was rendered cannot resist its collection in favor of the third partner on the ground that he was liable for the judgment jointly with them, and that his payment satisfied the judgment. *Sydam v. Cannon*, 1 Houst. (Del.) 431.

In *O'Bryan v. Neel*, 84 Ga. 184, 10 S. E. 598, three partners borrowed in their individual names money to be used in the firm business, the lender refusing to make the loan to the firm. One of the partners paid an execution issued on a judgment rendered against the members of the firm taking an assignment of the judgment and execution. The court held that such partner, or his transferee, was subrogated to the rights of the judgment creditor as against subsequent judgment creditors of the firm or the other partners, under Ga. Code, § 3599, providing that when judgments have been obtained against several persons, and one or more of them has paid more than his just proportion of the same, he or they may, by having such payment entered upon the fieri facias issued to enforce the judgment, have full power to use and control the fieri facias, as securities in fieri facias control the same against principal or cosureties, and shall not be compelled, as heretofore, to sue the debtors for the excess of payment on such judgment. The reason given by the court for its holding is that the debt was not in reality

a partnership debt, saying that the fact that the money borrowed was used in the firm business made no difference, as the individual members of the firm borrowed the money in their individual names.

II. After dissolution.

a. In general.

While there is a conflict in the authorities as to the right of subrogation where a partner pays a firm debt after dissolution of the firm, the decided weight of authority is in favor of such right.

Thus, *SANDS v. DURHAM* holds that where a partnership has been dissolved, and the social assets exhausted, and judgments subsequently recovered against the members of the firm on firm debts have been paid by one of the partners, who is not in arrears to the firm, out of his individual means as shown by a settlement of the partnership accounts, he is entitled to be subrogated to the rights of the creditors whose judgments he has satisfied, against the real estate of his copartner in the hands of a subsequent purchaser, to the extent to which his payments exceeded his proportional part of the liability.

And *Rowlett v. Grieve's Syndica*, 8 Mart. (La.) 483, 13 Am. Dec. 296, holds that one partner, who has, at the expiration of the partnership, paid all the firm debts, is subrogated to the rights of the firm creditors on the joint property.

And in *Re Smith*, 16 Nat. Bankr. Reg. 113, Fed. Cas. No. 12,991, the court said that there was no reason why a partner who had become surety for a copartner, and had paid a joint debt out of his individual means after final settlement of the firm affairs, should not be subrogated to the rights of the creditor of both as against the individual estate of the other partner for his proportion of the joint debt; but held that such right of substitution could not arise where the debt was a social debt, and was paid with social assets, at least as against the creditors of either partner, although a balance which had not been judicially ascertained was due from one partner to the other, and the latter had gone into bankruptcy.

Where a third person pays a decree of foreclosure of a mortgage on partnership property for the benefit and on the procurement of one of the partners, although after the dissolution of the partnership, he is subrogated to the rights of the mortgagee for the purpose of procuring payment from the other partner of half the amount so paid, as he occupies the same posi-

March, 1890, to the payment of one half of the judgments paid by Durham. From this decree the administrator and heirs of Mrs. Sands, who had died, obtained an appeal to this court.

It is well settled that one partner who has paid out of his own means debts of a partnership of which he is a member may, upon a settlement of the partnership accounts, have contribution from the other partners of their due proportion of the debts so paid. It is also well settled that, where one in the situation of surety pays the debt of him who is primarily liable, equity will put him in the place of the creditor whose debt he has discharged, and give him the benefit of the securities which the creditor has obtained from the principal debtor, and, though no assignment is actually made, equity treats it as having been done. *Grubbs v. Wysors*, 32 Gratt. 129.

tion which the partner himself would have occupied if he had paid the mortgage. *Stebbins v. Willard*, 53 Vt. 665.

Where, after dissolution of a partnership, one of the partners executed notes to the other to be negotiated for money by sale and transfer for the benefit of the firm, and the latter, without negotiating the notes, paid, out of his own means, firm debts in a large amount, so that, after allowing the amount of the notes, there would still be a balance coming to him from the other partner, he will be regarded as occupying the attitude of an assignee of such notes in case they have been assigned, and will not be enjoined from collecting a judgment recovered by him thereon. *Tibbetts v. Magruder*, 9 Dana, 79.

Where one partner accepts for his individual benefit a draft in the firm name on which a judgment is obtained against the firm after its dissolution, the other partner, on paying such judgment and receiving a subrogation from the creditor to all his rights thereunder, has the right to recover back from the former partner the entire amount of the judgment. *Hall v. Gaennie*, 18 La. 442.

Where partners made an assignment for creditors to pay the firm creditors in full, and to pay one half of any surplus to one of the partners, his executors and assigns, and the other half to certain assignees of the other partner to be appropriated to a certain debt due from the latter, and the former partner on the same day made an assignment for creditors and the joint creditors claimed and received a dividend on the funds of the assignee under the latter assignment, and there was a surplus thereby created in the hands of the assignees under the firm assignment after payment of firm creditors in full, the assignees who paid such dividend were subrogated to the rights of the firm creditors as to such surplus to the amount of the dividends paid, so as to be entitled to preference to that amount over the creditor of the other partner to whom his share of the surplus was to be paid. *Re Swayne*, 1 Clark (Pa.) 457.

See also *Ex parte Reid*, 2 Rose, Bankr. 84, *supra*, I.

But where one partner makes an assignment to trustees for the benefit of creditors, which operates as a dissolution of the firm, and the trustees thereafter, at the request of the partner in charge of settling the firm affairs, pays out of his own funds a note against the firm in order to prevent suit, but which he is under no obligation to pay, he is not entitled to be subrogated to the rights of the original holder of the note as against any of the partners except 64 L. R. A.

Subrogation is the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor in the same rank with himself. To entitle a party to subrogation, his equity must be strong and his case clear. It is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may then be made whole. *Bispham*, Eq. 393. But says this learned author (p. 396): "The principle of subrogation is a general one, and will apply to every instance (except in the case of a mere stranger) where one man has paid a

the one requesting him to make the payment, but becomes a simple contract creditor as to such other partners. *Conrad v. Buck*, 21 W. Va. 396.

Where a judgment was obtained against two partners as such, and after the dissolution of the firm one of them tendered the amount of the judgment and asked that it be marked to his use, the court held that the remedy of a judgment debtor was by contribution instead of subrogation, and that the Pennsylvania statutes as to settlement after dissolution did not affect the case; and also said that the courts had not generally compelled the plaintiff to mark a judgment for the use of another. *Pearce v. Yost*, 1 W. N. C. 472.

Where at the time a bill for the dissolution of a firm was filed by one partner the other was individually liable for the goods purchased for the firm, and the receiver required the former to give his notes with security to the receiver for one half the value of such goods for the use of the merchants who sold them, and such partner thereafter conveyed his interest in the firm property, after which the receiver recovered judgment on the notes and levied on and sold his interest in the firm property notwithstanding such conveyance, the other partner purchasing at the sale, the latter will not be subrogated to the rights of the sellers so as to be entitled to maintain a suit to set aside the conveyance, as he occupies the position of an ordinary vendee as to such purchase and not in any sense that of a surety, there being nothing to show that the protection of his interest required or even induced the purchase. *Richmond v. Marston*, 15 Ind. 134.

Where one partner conveyed his interest in the firm property to the other partner subject to firm debts, and a judgment for an individual indebtedness was soon after recovered against the former, and the conveyance was thereafter declared fraudulent and his interest in the firm property subjected to payment of such judgment, after which the other partner entered into a partnership with two other persons, and the new firm paid off a mortgage and other indebtedness of the old firm, and made extensive repairs, the new firm, which agreed to pay the debts of the old firm, or at least the new members, are not entitled to be subrogated to the rights of the mortgagee and the other creditors whose debts were paid, so as to deprive the judgment creditor of his right to sell, on execution, the interest of the partner against whom he obtained the judgment, as there is no subrogation where one pays his own debts, and that was all that was done in paying the mortgage

debt for which another is primarily liable. The right will not, however, exist between parties who are equally bound; as, for example, copartners, co-obligors, and cocontractors, except, of course, by virtue of a special contract. Such special contract may exist, for example, where an outgoing partner takes a covenant from the remaining members of the firm to pay the partnership debts and save him harmless. He stands, under these circumstances, in the position of a surety; and may be subrogated to the remedies of the creditor, if the covenant be not fulfilled."

A partner who retires from the firm, and for a valuable consideration is indemnified by the remaining partners against all debts and liabilities of the firm, will in equity be considered a surety for them, and subrogated to the rights of the creditor to whom

he has been compelled to pay a firm debt. 24 Am. & Eng. Enc. Law, p. 237. Among the authorities cited in support of this text is the case of *Buchanan v. Clark*, 10 Gratt. 164.

In that case G., B. & K. were principal obligors in a bond. B. and K. put money in the hands of G. to pay the bond, and he bound himself to pay it, but failed to do so, and became insolvent. A judgment was recovered on the bond against the three, and B. paid it. After the judgment G. conveyed his land to S. to secure a debt due to him and another debt due to C. Upon a bill by B. and K. against S. and C. to subject the land conveyed in the deed to S. to satisfy the debt B. had paid, the court held that it was competent for G., B. & K. to contract that, as between themselves, G. should be the principal, and B. and K. his sureties,

and other debts of the old firm. *Dill v. Voss*, 94 Ind. 500.

b. Debts assumed by one or more partners.

Where one or more partners assume on the dissolution of the firm the payment of specified firm debts or all such debts, the other partners occupy the position of sureties as to them, and on paying the debts are entitled to be subrogated to the rights of the creditors whose debts are paid.

Thus, where one of the partners sells his interest in the firm to the other partners, who assume and agree to pay the firm debts, he becomes a surety as to the other partners, and on payment of any of the debts he becomes entitled to be subrogated to the rights of the creditors. *Frow J. & Co.'s Estate*, 73 Pa. 459. The court also holds that where the old firm had given a note on which the retiring partner was liable, which the holders retained on taking a new note from the continuing partners, and the retiring partner was required, because of his original liability, to indorse a new note given by some of the members of the new firm, he was, on paying the same, entitled to stand in the room of the original creditors, and to a cession of the note of the old firm.

And a partner who goes out and for a valuable consideration is indemnified by his copartners against all debts and liabilities of the firm stands in the attitude of a stranger, as against a creditor of one of the partners, for his individual debt whose judgment has been obtained since he retired, and is entitled to subrogation for a debt of the firm paid by him for which he was not liable as between himself and his copartners at the time he retired. *Scott's Appeal*, 88 Pa. 173.

And where one partner on the dissolution of the firm assumes for a consideration to pay the firm debts, the other partners are, as between themselves, sureties for him, and those who are thus sureties may advance the money to a creditor obtaining a judgment against all the partners, and have such judgment assigned to a third party to be kept alive for their security, and such transaction will not operate as a satisfaction of the judgment. *Chandler v. Higgins*, 109 Ill. 602.

And where one partner purchases the other's interest in the firm business, agreeing to pay all the firm debts and liabilities, he becomes the principal and the other partner a surety as between themselves; and the latter is entitled, on paying any debt, to the benefit of all securities in the hands of the creditor, and such creditor cannot object to his right to such securities.

and such partner is released to the extent that the creditor, by his acts, releases the securities which he would otherwise have against his copartner. *Johnson v. Young*, 20 W. Va. 614.

And where one of the partners on the dissolution of the firm promises to pay a debt due from the firm but fails to do so, and the other partner induces his brother to purchase the claim and take an assignment of it, the debt is not thereby extinguished, and recovery may be had thereon for the benefit of such assignee. *Etna Ins. Co. v. Wires*, 28 Vt. 93. The court also said that the partner to whom the promise was made became a mere surety for the debt as between the partners, and that it was no want of good faith in him to procure his brother to buy the claim with the latter's own money, and that the cases read by counsel showed that if the money used in the purchase had belonged to the partner himself he might still keep the claim on foot, being a virtual surety, but that it was not necessary to discuss that point.

And where a partnership is dissolved, one partner purchasing the firm assets and agreeing to assume all the firm liabilities, and giving a lien on the firm effects to indemnify the other partner on such agreement and also to secure the purchase money, and both partners subsequently become insolvent, the creditors of the partner whose debts are indemnified against may be subrogated to the rights of the partner indemnified. *Buck Stove Co. v. Johnson*, 7 Lea, 282.

And where, on the dissolution of a firm, one partner agrees to pay a firm note, and gives a mortgage to the payee as security to him for the indebtedness and also as indemnity to the other partner, the latter, on paying the note or any part of it, is entitled to be subrogated to the rights of the payee to the extent of such payment. *Conwell v. McCowan*, 81 Ill. 285. On a prior appeal, 53 Ill. 363, relief by way of subrogation was refused to such partner because it did not appear that he had paid any part of the firm debt, nothing being said as to any partnership relation existing between the parties, the statement being merely that he was surety on the note.

And where on the dissolution of a firm one partner receives from the firm money with which to discharge a firm liability whereby he becomes a trustee, and he, in violation of the trust, uses such money for the purchase of land and the erection of buildings thereon for his own use, which he subsequently transfers to his wife, she receiving the same with notice of the facts, and the other partners are subsequently compelled to pay such firm debt, they are subrogated

and that this had been done; that as between B., K., and G. the former were entitled to be subrogated to the lien of the judgment creditor upon the land; and that they were equally entitled as against purchasers from G., who did not show a better equity. The opinion of the court recognizes that partners ordinarily are not entitled to be subrogated to the rights of the firm's creditor holding a security for a debt of the firm paid by one of the partners out of his own means, and puts its adjudication in that case whereby B. and K. were subrogated to the rights of the judgment creditor, whose judgment they paid, solely upon the ground that B. and K. and G. had contracted that, as between themselves, G. should be the principal, and B. and K. his sureties, in the debt; for the opinion says: "As between the partners

and the creditor, they were all equally bound, and no understanding and agreement as between themselves could change that relation so as to impair his right. But there was nothing in that relation which would prevent the parties, as between themselves, from assuming the relation of principal and securities."

The ground upon which some of the adjudicated cases hold that a partner of a losing concern, paying a debt of a lien creditor of the firm, cannot have subrogation to the rights of the creditor, is that payment by a coprincipal extinguishes the debt, and leaves no right of subrogation. It is more accurately stated by Strong, J., in the well-considered case of *McCormick v. Irwin*, 35 Pa. 111, thus: "The reason why subrogation is not allowed to one partner as against his copartner, or to one merely a joint

to the rights of the creditor to follow the trust fund, both as against the partner and his wife, to whom the property was transferred. *Robinson v. Roos*, 138 Ill. 550, 28 N. E. 821, Affirming 37 Ill. App. 646.

And where, on a final settlement between the partners, it is agreed between them that one of them shall pay specified debts, and he fails to pay them, and judgments are recovered thereon against both partners which the other partner pays, he occupies, as to the former partner, the position of a surety, and is subrogated to all the rights of the creditors in such judgments, so as to be entitled thereunder to maintain an action against such former partner to set aside a conveyance by him as fraudulent. *Swan v. Smith*, 57 Miss. 548.

And where, at the dissolution of a firm, one partner assumes all the business, profits, and responsibilities, and agrees to indemnify the other partner against all debts due from the firm, and the latter partner is required to pay a judgment which had been obtained against them, the judgment creditor agreeing that he shall have the benefit of the judgment and use his name to recover the money from the continuing partner, he is to be considered merely as a surety of such continuing partner, and entitled to an equitable lien on his property which was bound by the judgment as against the assignees for the benefit of creditors of the latter. *Waddington v. Vredenburg*, 2 Johns. Cas. 228.

And where partners enter into an agreement for the settlement of their affairs by which one of them is to pay one of two judgments of equal amount, or procure a release of his copartner from liability thereon, and it is agreed that if he fails to do so the other partner may pay both judgments, and shall in that case have the right to collect from such copartner the amount of one of such judgments, and the second partner is compelled to pay both judgments, he is entitled to use one of them to compel his partner to pay the amount of it, both under the agreement and by virtue of his relation as surety, as, although originally partners, such second partner becomes practically a surety for the other by such agreement. *Brown v. Black*, 96 Pa. 482.

And where mill property owned by two partners is subject to a mortgage which, as between them, it is the duty of one of them to pay, and he executes a mortgage on a farm received in exchange for the mill property to replace the mortgage thereon, which the mortgagee at first refuses to accept, but afterwards recognizes as an accepted security, taking from the other partner his individual mortgage and assigning the mortgage on the farm to him, an equity arises 54 L. R. A.

in his favor entitling him to ask indemnity through such mortgage. *Laylin v. Knox*, 41 Mich. 40, 1 N. W. 913.

And where two partners give to the third the money to pay a joint and several single bill of the partners given for a firm debt which he agrees and binds himself to pay but fails to do, and one of the other partners pays a judgment obtained on such bill, the latter is entitled to be subrogated to the rights of the judgment creditor as against the partner making such promise and purchasers from him after the rendition of the judgment, as by his agreement to pay the debt he becomes, as between the partners, the principal, and his copartners are sureties only; and, although the judgment is in fact extinguished by the payment, it is kept alive in the contemplation of equity for the benefit of the surety. *Buchanan v. Clark*, 10 Gratt. 164.

And where one of two partners agrees with the other to pay for oxen purchased by the firm by giving his note, and the seller refuses to accept such note as payment, and the other partner pays him, it being agreed between them that the seller should retain the note and pay over to the partner paying him anything he may receive from the other partner on such note, and the former partner subsequently pays the latter partner a certain per cent of his indebtedness to him, obtaining a discharge from all further liability, and thereafter makes a payment on the note, the amount so paid belongs to such other partner, as, on paying the debt represented by such note, he becomes entitled by subrogation to all the securities, and avails of securities, which the creditor has or afterwards receives on the debt. *Field v. Hamilton*, 45 Vt. 35.

And where one of two partners gives collateral security to a surety on a debt due from the firm, and afterwards purchases the interest of the other partner, agreeing to assume such debt and all other firm debts, the latter partner, although continuing to occupy the position of a principal as to such surety and the creditor, becomes a surety as to his copartner; and where a judgment for the debt is levied on and paid from his individual property he becomes entitled, as a cosurety of the original surety, to the collaterals held by him, or a sufficient amount to indemnify him for such payment as against a subsequent judgment creditor of the continuing partner. *Butler v. Birkey*, 13 Ohio St. 514.

But *Griffin v. Orman*, 9 Fla. 22, holds that where two partners sell the firm property to a third partner, agreeing that it shall be his exclusive property, and he agrees to pay all the firm debts, giving his bond with security that

debtor as against his codebtor, is because, as between them, there is no obligation to pay the debt resting upon one superior to that which rests upon the other." See also *Dering v. Winchelsea*, 1 Cox, Ch. Cas. 318, 1 White & T. Lead. Cas. in Eq. pt. 1, p. 148, and Sheldon, Subrogation, §§ 170, 171.

Counsel for appellee contends that the rule is changed by the statute (Code, § 2855) passed in 1849, whereby partnership debts are now joint and several; and also cites *Morris v. Morris*, 4 Gratt. 293, in support of the further contention that, because the partnership debts are now joint and several, one partner who pays off the creditor's debt with his own private means is entitled to be subrogated to the creditor's right. That case only held that a surviving partner, having paid the partnership debts of a losing concern, is entitled to be substi-

tuted, for the amount that the estate of the deceased is indebted to him on that account, to the rights of the creditors of the firm whose debts he has paid; that is, the surviving partner paying the debts is entitled to share in the separate estate of the deceased partner. But this, as was said by Sheldon in his work on Subrogation (§ 171, *supra*), is upon the ground that by virtue of the partnership agreement to contribute to losses the partner paying a firm debt out of his private property may in equity enforce contribution from his copartner, rather than by way of subrogation. In other words, the doctrine of subrogation does not ordinarily apply as between copartners, though the right exists to have contribution from each other, where one has paid out of his private means a debt of the firm, which is not repaid to him out of the

he will do so, and a judgment for a firm debt is recovered against the two retiring partners alone, which they pay, they cannot, on the doctrine of subrogation or substitution, use executions on such judgment to subject the property so sold to the third partner in payment thereof, as the doctrine of subrogation does not apply, and the judgment debtors are not, as to creditors, sureties for the third partner, and the creditors themselves could not subject such property so sold in good faith to the payment of the firm debts until they had exhausted their remedies at law against the partnership.

Where, on the dissolution of a firm, one partner took the stock of goods, agreeing to pay their cost price to the other, who was to take the book accounts and notes and assume the firm indebtedness, and who assigned to one becoming surety for him certain property, including the debt due from the former partner for the stock of goods, and joint judgments were obtained against the partners and the surety by firm creditors which the surety paid, he is entitled to be subrogated to the rights of the creditors as against the former partner who had paid no part of the price of the stock of goods, although his copartner had obtained judgment therefor against him, and by virtue of such rights could impeach a fraudulent transfer of his property made by such former partner. *Highland v. Highland*, 5 W. Va. 68.

c. Death of partner.

Where the firm has been dissolved by the death of one of its members and either the surviving partner or the estate of the deceased partner has paid more than its share of the firm debts, the one so paying is entitled, according to the weight of authority, to be subrogated to the rights of the creditor for the purpose of recovering the excess so paid.

Thus, where partners give their joint and several obligations for a firm debt and the survivor pays such obligation, he is entitled to be subrogated to the rights of the creditor against the estate of the deceased partner for his proportionate share of the debt thus paid. *Morris v. Morris*, 4 Gratt. 293.

And where judgments are recovered against surviving partners and the administrators of a deceased partner, and one of the surviving partners pays the judgments in full to protect his own property from sale, the administrator paying no part of the same and procuring a final settlement of his accounts to prevent the filing of claims against the estate, such payment did not extinguish the judgments, under Ind. Rev. Stat. 1881, § 1215, providing that any one of several judgment defendants having paid and

satisfied the plaintiff shall have the remedy against the codefendants or cosureties to collect of them the ratable proportions each is equitably bound to pay given by § 1214, which provides that when any defendant surety in a judgment shall be compelled to pay any judgment or any part thereof, or shall make any payment which is applied upon such judgment by reason of the suretyship, the judgment shall not be discharged by such payment, but shall remain in force for the use of the surety, and after the plaintiff is paid so much of the judgment as remains unsatisfied may be prosecuted to execution for his use. *Harter v. Songer*, 188 Ind. 161, 87 N. E. 595.

Where judgments against a firm, one of the members of which is dead, are satisfied out of the decedent's estate, his representatives are entitled to have the creditor assign the judgments, and to recover thereon against the surviving partner one half the amount of such judgments. *Sells v. Hubbell*, 2 Johns. Ch. 394. The court says in this case that it would be a thing almost of course for equity to allow the representatives of a deceased partner, who had to pay the whole debt, to be substituted in place of the creditor, in order to recover from the surviving partner or his estate a moiety of what they had paid, and that nothing could stay the proceeding for that purpose but an allegation of the surviving partner that he was the creditor partner, and that the estate of the deceased partner owed him a balance as much as or more than it had been obliged to pay, which would render the taking of an account necessary.

And in *Dahlgren v. Duncan*, 7 Smedes & M. 280, the court said that if the firm creditors proceed against the estate of a deceased partner, and it pays more than its proportionate share of the firm debts, his representative will stand in the place of such creditors, and be substituted to their rights in reference to the other partners.

And where one partner gives his individual bond and mortgage for a firm debt, which debt is paid after such partner's death from his individual property, his estate is subrogated to the rights of such creditor in the partnership assets, and should be allowed interest on such payments from such assets instead of from the funds of the surviving partner. *Gee v. Humphries*, 40 S. C. 253, 27 S. E. 101. *McIver*, Ch. J., and *Pope*, J., dissented in this case, holding that the estate of the deceased partner was not entitled to interest at all, and in any event only on the amount of the excess received by the deceased partner after deducting from the latter amount the amount of the debt so paid out of his estate.

social assets. To entitle a partner, paying out of his private means debts against the firm, to be subrogated to the rights of the creditors whose debts he has so paid, the relations ordinarily existing between copartners must have been changed by an agreement between them whereby they assumed the relation of principal and surety. *Buchanan v. Clark* and other authorities, *supra*. There was no such agreement in the case at bar, and appellee was therefore not entitled to be subrogated to the rights of the judgment creditors whose judgments against the firm of D. L. Whittaker & Co. he paid.

Much stress is laid by counsel for appellee upon the constructive notice to Mrs. Sands of the rendition and docketing of these judgments, and the actual notice she is claimed to have had when she bought the land from Early; but leaving out of view the testimony going to show that she was misled by the statements made by appellee to her agent, Hall, who purchased the land for her, and conceding that she had both constructive and actual notice of the judgments at the time of the purchase, it does not alter the case; for she may have actually known of the existence of the judgments on the docket, yet she also knew that they were judgments against the partnership of D. L. Whittaker & Co., that each

member of the firm was primarily bound for their payment, and that appellee was solvent. The only risk she ran in taking a conveyance of Early's portion of the land from Early and wife was that the judgments would not be paid by the firm or either of the partners, and could not be made out of either of them. They, however, having been paid by appellant, without a special contract or agreement changing the relations ordinarily existing between copartners, whereby he became surety for the other partners, are no longer enforceable on the lands alienated by Early to Mrs. Sands. Therefore the decree appealed from, in so far as it holds the contrary, is erroneous, and will be reversed and annulled, and the cause remanded to the circuit court for such further proceedings therein as may appear proper, in accordance with the views expressed in this opinion.

Riely, J., absent.

A petition for rehearing, having been granted, **Whittle, J.**, on March 14, 1901, handed down the following additional opinion:

An opinion was handed down in this case in June, 1900, but, this court not being satisfied with the conclusion then reached, a rehearing was granted.

Where the widow of a deceased partner, by whose will the partnership was to be continued, paid off certain notes given by the firm and secured by mortgage with the understanding among all the parties that she should be subrogated to that extent to the rights of the mortgagee, and some two years thereafter she joined with the surviving partner in executing a surety deed to a creditor of the firm to whom the mortgage had been assigned, reciting that the deed was given subject to such mortgage, and stating the amount due on the mortgage, which did not include the amount so paid by her, nothing being said as to her rights by subrogation, and there being a covenant that the premises included in the deed were free and clear of all encumbrances except such mortgage, the right of subrogation, if it ever existed, is thereby waived as against the grantee in such security deed. *Ferris v. Van Ingen*, 110 Ga. 102, 85 S. E. 347.

Where different judgments for the same firm debt are recovered against the surviving partner and the administratrix of the deceased partner, the administratrix cannot, on paying the judgment, take an assignment of it to herself for the purpose of having execution thereon against the survivor, as under the Alabama statute authorizing suit to be brought against the representatives of a deceased partner the firm debts are a several charge on the survivor and administratrix, although the survivor is primarily liable, and the satisfaction of the judgment against either is the extinguishment of the right against both. *Bartlett v. McRae*, 4 Ala. 688.

And where a judgment on a firm debt is recovered against the surviving partners, and the amount of it is afterwards paid to the judgment plaintiff by a third person with funds furnished by one of the survivors and the executor of the deceased partner, an assignment of the judgment which is made to such third person for the purpose of keeping the judgment alive and enforcing it against the other survivor is without effect, as the payment from those who were li-

able to pay satisfied the judgment in full, and it could not be kept alive for the benefit of those paying it, as, if a judgment is paid by one who is a principal and as such bound to pay it he cannot, by taking an assignment of it in his own name or that of another, keep it alive to enforce payment from his coprincipal. *Hogan v. Reynolds*, 21 Ala. 56, 56 Am. Dec. 236. No question seems to have been made in this case but that the judgment was satisfied to the extent that the surviving partner's money was used in paying therefor.

And in *Singiser's Appeal*, 28 Pa. 524, the court held that the administrator of a deceased partner could not claim a *pro rata* dividend from the assignee for creditors of the survivor for one half the amount of firm debts paid by such administrator where the accounts and equities of the parties had not been adjusted, and said that the doctrine of subrogation did not apply in the case of joint debtors or partners, and that the administrator was not a surety.

III. Conclusion.

Where one partner during the existence of the partnership pays a firm debt on which all of the partners are equally liable no right of subrogation exists in his favor according to the weight of authority,—at least until it is shown by a partnership accounting that a balance is due him. But when the partnership has been dissolved by death of one partner or otherwise, and the partnership accounts have been settled, and one partner, or the estate of a deceased partner, thereafter pays a firm debt, the right of subrogation exists, according to the weight of authority. And if one partner has agreed to pay a particular debt or all the firm debts, the partners occupy the position of principal and surety as between themselves, and if the other partner thereafter pays such debt or debts the right of subrogation exists in his favor.

J. H. H.

There is but this single question presented for decision: Where a partnership has been dissolved, and the social assets exhausted, and judgments subsequently recovered against the members of the firm on partnership debts have been paid by one of the partners, who is not in arrears to the firm, out of his individual means, and this is shown by a settlement of the partnership accounts, is the partner who has paid the judgments entitled to be subrogated to the rights of the creditors whose judgments he has satisfied against the real estate of his copartner, in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional part of the liability?

The doctrine of subrogation is independent of any mere contractual relations existing between the parties to be affected by it, and involves the equitable principle that where one who is secondarily liable has paid the debt of another, who is primarily liable therefor, he will, in equity, be substituted to all the rights and remedies of the creditor against the party whose share of the joint liability he has been compelled to discharge. Sheldon, in his work on Subrogation, states the doctrine thus: "The usual rule is that one of several joint debtors will, as against his codebtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his codebtors, by means thereof, their proportional shares of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as a principal debtor for that part of the debt which he ought to pay, and as a surety for his codebtors as to that part of the debt which ought to be discharged by them." Sheldon, Subrogation, § 169, citing *Morrow v. Peyton*, 8 Leigh, 54; *Boyd v. Boyd*, 3 Gratt. 113.

Subrogation has been denominated as one of the benevolences of the law, created, fostered, and enforced in the interest and for the promotion of justice.

In England, and in a few of the states of the Union which have adopted the English rule, the application of the doctrine is very much restricted. Indeed, prior to an act of Parliament (Stat. 19 & 20 Vict. chap. 97), the courts had held that even a surety who satisfied a judgment against himself and his principal was not entitled to be subrogated to the rights of the creditor, and to have the judgment kept alive for his benefit (*Copis v. Middleton*, Turn. & R. 229; *Hodgson v. Shaw*, 3 Myl. & K. 190); but, by the act of Parliament aforesaid, the doctrine was extended to sureties.

With the exception of the courts of Alabama, Vermont, and North Carolina, the English rule has not been followed in this country.

In most of the other states it has been extended until, in its practical application, it has been deemed broad enough to cover every instance in which one party has been required to pay a debt for which another

is primarily answerable, and which in equity and good conscience ought to be discharged by the latter.

In no other jurisdiction has the doctrine been more firmly adhered to, or more liberally expounded and applied, to meet the exigencies of particular cases, than in Virginia.

In *Powell v. White*, 11 Leigh, 309, this court expressly repudiated the doctrine of *Copis v. Middleton*, Turn. & T. 229, and *Jones v. Davids*, 4 Russ. Ch. 277. In a review of these cases found in a note to *Dering v. Winchelsea*, 1 White & T. Lead. Cas. in Eq. pt. 1, p. 140, it was remarked: "In the more recent case of *Powell v. White*, 11 Leigh, 309, the decisions in *Copis v. Middleton* and *Jones v. Davids* were thoroughly examined in the court of appeals, and the Virginia practice was vindicated against the authority of Lord Eldon, with distinguished and convincing ability."

This court said in *Enders v. Brune*, 4 Rand. (Va.) 447: "It has nothing of form, nothing of technicality, about it; and he who, in administering it, would 'stick in the letter,' forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real, essential justice is its object."

In *Tompkins v. Mitchell*, 2 Rand. (Va.) 428, it was enforced in behalf of the principal debtor against a codebtor, where the former had paid more than his proportion of the debt, by substituting him to the rights of the creditor whose vendor's lien he had discharged; the court holding that, as between themselves, each was a principal debtor for his one half of the debt, and the one paying more than one half was surety as to the excess paid by him.

In *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654, the parties were partners. The original debt was a joint obligation, but not a partnership debt. Subsequently the firm made its notes therefor, and secured them by a lien on the property for which the debt was created. Afterwards one of the partners paid the entire debt, and he was subrogated to the lien of the creditor whose debt he had satisfied.

In *Gatewood v. Gatewood*, 75 Va. 415, it was declared that subrogation would be enforced in favor of sureties and others who are required to pay in order to protect their own interest.

In *Dobyns v. Rawley*, 76 Va. 537, the consideration of real estate sold and conveyed by Fulton to Rawley and Davis jointly was \$5,000, for the payment of which they executed their joint bonds. In a subsequent division of the land between the purchasers, Rawley's parcel was rated at \$3,000, and Davis's at \$2,400, and in this proportion they were to discharge their joint indebtedness to Fulton. It was held that the legal effect of the arrangement was that, as between the two purchasers and in relation to each other, they were principal debtors for their respective portions of the purchase money, and each was surety for the other's portion, and that, if either paid more than

his agreed share, he became entitled to all the rights and remedies of a surety—to subrogation among the rest—against the other for repayment of such excess.

This principle was recognized in *Horton v. Bond*, 28 Gratt. 825, as the true ground for substitution to enforce contribution among cosureties. It was there said: "Sureties are not only sureties for the principal debtor for the whole debt, but, as among themselves, they are each surety for the other to the extent of the excess of the whole debt beyond his proportionate part thereof."

In *Pace v. Pace*, 95 Va. 792, 44 L. R. A. 459, 30 S. E. 361, it was held that the liabilities of a decedent's estate and the rights of his creditors are fixed by his death. If at that time a creditor has the right to prove a debt against a decedent's estate for which the decedent and another are bound as sureties, and subsequently the cosurety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one half of the debt is paid, although the estate of the decedent will not pay his debts in full.

Buchanan v. Clark, 10 Gratt. 164, is relied on as sustaining the contention that subrogation does not obtain among partners. The facts of that case are as follows: K., B., and G., who had formed a partnership for the purchase and sale of cattle, executed a joint bond to C. Cattle were sold, and G. was supplied with money arising from the sales, for the purpose of paying the bond to C. and all other partnership debts. It was agreed that G. should be the principal, and K. and B. sureties only, for said debts. The bond was not paid, and C. recovered judgment thereon against K., B., and G. G. was insolvent, and K. and B. satisfied the judgment. Subsequently to the recovery of said judgment, G. sold certain real estate, and K. and B. filed a bill in equity against G. and his alienees, setting forth the foregoing facts, and praying that they might be subrogated to the rights of C. under the judgment. The court held that it was competent for K., B., and G. to contract that, as between themselves, G. should be principal and K. and B. his sureties; that, as between themselves, K. and B. were entitled to be subrogated to the lien of the judgment creditor; and that they were equally entitled against the purchases from G., who did not show a better equity. The court said: "I do not think, therefore, that there is anything in the objection that the debt when contracted was a partnership debt, and that with respect to the creditor it retained its original character. As between themselves, they occupied the relation of principal and sureties."

It will be observed the court was dealing with a case of "convention subrogation," and confined its decision to the case in hand, without intimation as to whether the general doctrine of subrogation would or would not obtain among partners.

Bispham's Principles of Equity is also referred to. 64 L. R. A.

lied on to show that the doctrine does not apply to partners, and that author does say, at § 337: "The right . . . will not, however, exist between parties who are equally bound,—as, for example, copartners, co-obligors, and co-contractors,—except, of course, by virtue of special contract."

His statement is general, is not confined to copartners, but embraces all cocontractors; and, as has been seen from the authorities reviewed, it is not, without qualification, a correct exposition of the Virginia doctrine. Of course, so long as such parties remain equally bound, the right does not attach, but they cease to be equally bound when one obligor discharges an obligation resting upon himself and his co-obligor. Both are bound to the obligee; but, *inter se*, each is primarily, not equally, liable for his own share, and secondarily liable for the share of the other, and when he pays the share of such other all the conditions essential for the application of the doctrine arise.

In *Baily v. Brownfield*, 20 Pa. 41, cited to sustain the text, there is an *obiter* to the effect that a partner who has paid a partnership debt cannot be substituted to the creditors' rights. But in that case there had been no settlement of partnership accounts, and there was nothing to show that the partner asserting the right of subrogation had paid more than his share. It was therefore properly denied.

In the later case of *Fessler v. Hickernell*, 82 Pa. 150, subrogation was denied one partner against another, for the reason that until there had been a settlement of partnership accounts there was no means of ascertaining whether any, and, if any, what, balance was due to the partner demanding subrogation. But the right of a partner, who had been shown by a settlement of partnership accounts to have paid more than his share, was conceded in that case.

In the still more recent case of *Ackerman's Appeal*, 106 Pa. 1, subrogation was allowed between principal debtors, the court holding that they were principals so far as their creditor was concerned, but each was surety as to the share of the other.

Thus it appears that the Pennsylvania cases do not sustain the general proposition laid down by Bispham, but are in accord with the decisions of this court.

In *Sells v. Hubbell*, 2 Johns. Ch. 394, Chancellor Kent said: "The debt of Sells was the debt of the copartnership of Bedient & Hubbell. It was the common equal debt of both partners, and the consideration for which it was created is presumed to have inured equally to the benefit of both, and the contribution ought to be equal. The estate of each partner ought to be charged with the debt in equal portions, provided their interests in the copartnership were equal, and their accounts as between each other were equal. This is the intentment, in the first instance, and it would be a thing almost of course for equity to allow the representatives of a deceased partner, who had to pay the whole debt, to be substituted in the place of the creditor,

in order to recover, from the surviving partner or his estate, a moiety of what they had paid. Nothing could stay this proceeding but the allegation of the surviving partner that he was the creditor partner, and that the estate of the deceased partner owed him a balance as much or more than it had been obliged to pay. This would render it necessary to take and state an account between the partners before this court could interfere in any way to enforce the claim for contribution."

In the case under consideration, the partnership had been dissolved, the social assets had been exhausted in the payment of partnership debts, and a settlement of the

partnership accounts had been made, from which it appeared that the appellee, J. H. Durham, was in advance to the firm, and with his individual means had paid the judgments against it. Under these circumstances, the circuit court was of opinion and decreed that appellee was entitled to be subrogated to the rights of the judgment creditors whose liens he had discharged, and to subject the real estate owned by his co-partner, D. A. Early, at the date of the recovery and docketing of said judgments, to their satisfaction.

This court is of opinion *there is no error in said decree*, and that it ought to be affirmed.

OREGON SUPREME COURT.

S. O. SWACKHAMER, *Respt.*,

v.

Joseph JOHNSON *et al.*,

and

Lee Tung YIN, *Appt.*

(.....Or.....)

One who hires a gang of workmen and furnishes them to a third person, together with a time keeper, who is to impart to them the latter's orders as to the time and place to work, will not be liable for trespasses committed by them in cutting timber upon a stranger's land under direction of such third person, although he is to pay the wages and has power to discharge the men, where he is ignorant of the trespass, is not interested in the work except as security for his advances, and has no voice in directing the laborers when or where to work.

(June 10, 1901.)

A PPEAL by defendant Lee Tung Yin from a judgment of the Circuit Court for Union County in favor of plaintiff in an action brought to enjoin a trespass upon real estate and to recover damages for injuries thereby. *Reversed.*

Statement by Moore, J.:

This is a suit to enjoin a trespass upon real property and to recover damages for injuries thereto. The facts are that the defendant Joseph Johnson, having conceived the project of building a railroad from Union, Oregon, to Bear, Idaho, and being without means to execute his proposed scheme, certain citizens of Union, on June 8, 1898, to promote that city's growth, entered into a contract with him whereby they agreed to donate a right of way for said railroad through the corporate limits of Union, 6 acres of land therein for depot facilities, and the sum of \$3,500 upon the

construction of the first 10 miles of railway. The plaintiff agreed with said citizens to donate the depot grounds required by them, but, Johnson having demanded a greater area than specified, the plaintiff on August 13, 1898, in consideration of the sum of \$217, paid for Johnson by said citizens, and Johnson's agreement to pay the further sum of \$283, executed a deed to him for 12 acres of land in said city, which he deposited with the First National Bank of Union, to be delivered upon the payment of the remainder of the purchase price, if the first 10 miles of said railway were completed within six months. The land so selected for depot purposes and right of way therefrom across plaintiff's premises was covered with valuable timber, which afforded security to his stock as a wind break for their protection against the inclemency of the weather. Johnson on October 5, 1898, entered into a contract with Lee Ching Duck and Lee Tung Yin, partners as the Wing Chin Lung Company, and Ung Cuey, whereby they agreed to furnish him forty Chinese laborers to work upon said railroad for \$1.10 each per day, except a bookman or foreman, for whose service they were to be paid the sum of \$1.25 per day, the contract providing that the laborers so to be furnished "shall perform work faithfully, and at such times and places upon said line of railway as they may be directed by and under the supervision of the party of the first part (Johnson) and his superintendent or engineer." After this contract was consummated, but before any laborers were furnished, Johnson, to secure Lee Tung Yin, assigned the subsidy agreement and conveyed all his interest in the depot grounds to him, and so notified the citizens' committee, the First National Bank of Union, and the plaintiff; but the latter refused to yield his consent thereto. The laborers were sent to Union in charge

NOTE.—For an earlier case in this series as to liability for acts of servant under control of third person, see *Wyllie v. Palmer* (N. Y.) 19 L. R. A. 285.

As to which of two or more persons is the

master of another who is conceded to be the servant of one of them, see *Hardy v. Shelden Co.* (C. C. App. 6th C.) 37 L. R. A. 38, and *Channon v. Sanford Co.* (Conn.) 41 L. R. A. 200.

of a bookman or foreman selected by the Wing Chin Lung Company, where, in pursuance of Johnson's orders, and without the knowledge of the parties sending them or of the plaintiff, they cut down most of the timber growing upon the land set apart for depot purposes and on the right of way leading therefrom across the plaintiff's premises. The first 10 miles of said railroad were never constructed, and, the project having been abandoned by Johnson, who left the country without paying the Wing Chin Lung Company any part of the expense of about \$3,000 incurred on account of the laborers so furnished, plaintiff commenced this suit, but, having served a summons upon Lee Tung Yin only, and the other defendants not having appeared, a trial was had, resulting in a decree perpetually enjoining any further trespass upon plaintiff's premises, and awarding him the sum of \$750 as damages, from which Lee Tung Yin appeals.

Mr. W. T. Muir for appellant.

Mr. T. H. Crawford for respondent.

Moore, J., delivered the opinion of the court:

It is argued by appellant's counsel that the plaintiff consented to the cutting of the timber, and hence, invoking the maxim, *Volenti non fit injuria*, that the decree is erroneous. But the court found that no agreement had ever been entered into by the plaintiff with Johnson, or any other person, for a right of way for said proposed railroad, nor had any license been granted by him whereby said timber might be cut, and, as the preponderance of the testimony, in our judgment, supports such finding, it will not be disturbed. The timber having been cut by the Chinese laborers without any license therefor, the question to be considered is whether Lee Tung Yin was at that time their master, and therefore liable for the damage which they caused, for the principle of *respondeat superior* is founded upon the maxim, *Qui facit per alium, facit per se*, and, unless such relation existed at the time the trespass was committed, the appellant is not liable therefor. *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304. It was alleged in the original answer that the laborers who cut said timber were at that time in the employ of the Wing Chin Lung Company and Johnson, but that they were acting under the orders of the latter. In the amended answer it is averred that Lee Tung Yin had no knowledge of the employment in which the laborers, or any of them, were to be engaged, except that they were to be employed in railroad construction; and that all the acts complained of were done by said laborers under the exclusive control and direction of Johnson, and without the knowledge, consent, control, or direction of Lee Tung Yin. The original answer was offered in evidence, and testimony introduced tending to show that by securing an assignment of the subsidy contract and of Johnson's

interest in the depot grounds, Lee Tung Yin undertook to build the first 10 miles of railroad, and that the laborers who cut the timber were his servants. Yin, as a witness in his own behalf, testified that the original answer was prepared by his counsel, and that he subscribed his name thereto, and verified the pleading without observing the allegation that he was interested with Johnson in building the railroad. The testimony of C. E. Cochran, called by the plaintiff in rebuttal, would seem to imply that Yin was interested with Johnson in the enterprise; but this witness had theretofore said that he did not understand that Yin was building the road, but that Johnson was constructing it, and that the former had taken an assignment of the subsidy contract and a conveyance of the depot rights in order to secure the payment of the money which it would be necessary to advance to the laborers. We think the evidence clearly shows that Yin never agreed to build any part of the railroad, and that he took said assignment and conveyance as security to indemnify him for the expense which his firm was obliged to incur. "The characteristics of the position of a master," say Roberts & Wallace, in their work on the *Duty and Liability of Employers*, 3d ed. 82, "are the following: (1) The engaging of the servant; (2) the payment of wages; (3) the power of dismissal; (4) the control of the servant's actions." In commenting upon the fourth distinguishing test of relationship, these authors say: "The power of controlling the servant's actions is undoubtedly the most important element for consideration in determining whether the relationship of master and servant exists between any two persons, and it is the only one which, by itself, can be at all depended upon; the chief value of the three tests above mentioned consisting in the assistance they afford in discovering the person who has this power, for the true principle of a master's liability to the public for the acts of his servants is that the master has control over their actions in their capacity as such, and that it is his duty so to exercise his control that no injury is occasioned by his business infringing upon the rights of third persons." 1d. 68. To the same effect, see *Shearm. & Redf. Neg.* 3d ed. § 73; 2 *Thomp. Neg.* 909; *Wood, Mast. & S.* 2d ed. § 817; *Mound City Paint & Color Co. v. Conlon*, 92 Mo. 221, 4 S. W. 922. The Wing Chin Lung Company and Ung Cuey engaged the Chinese laborers, selected as their bookman or foreman one Young John, who communicated and interpreted Johnson's orders to the laborers, kept their time, and was to pay them for their labor from money to be furnished by the Wing Chin Lung Company and Ung Cuey. These laborers were undoubtedly the servants of the parties agreeing to furnish them, but such relationship would not preclude them from becoming Johnson's servants; for, as was said by Mr. Justice Morton in *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218: "It is well settled that one who is the general servant of another may be

lent or hired by his master to another for some special service, so as to become, as to that service, the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired." It will be remembered that the laborers to be furnished by Wing Chin Lung Company were to work faithfully, and at such times and places upon the line of railway as they might be directed by Johnson's orders. The court found that Lee Tung Yin had supervision of said laborers, and employed and discharged them. The record fails to show who was authorized to discharge these laborers, but, as the Wing Chin Lung Company engaged them, it may reasonably be inferred that they might dispense with their services; and it may also be inferred that Johnson could discharge such of them as did not correspond with the terms of the agreement in respect to their being able-bodied and willing to work as directed. The supervision of the laborers by Lee Tung Yin, as found by the court, is probably predicated upon the selection of a bookman or foreman by the Wing Chin Lung Company, and from the following clause contained in their contract with Johnson, to wit: "And it is further agreed by the said party of the first part [Johnson] that payments for the work to be done and performed under this agreement shall be made on the 15th day of each month next succeeding the month in which such labor is performed, and that the said party of the first part will supply one of the parties of the second part, or an agent to be selected by the parties of the second part, free of cost of the parties of the second part, with transportation to and from Portland and Union and to the points where said laborers may be employed from time to time, so as to enable the said parties of the second part to oversee said laborers, supervise, and pay them off." Young John, "the bookman or foreman" selected by the Wing Chin Lung Company, as a witness for the defendant testified that he received orders from Johnson, communicated them to the Chinese laborers, who performed work as so directed, and that he kept their time, so as to know what sums to pay them for their labor. We think it cannot be said, from the service rendered by Young John, that Lee Tung Yin thereby "had supervision of the said laborers;" for, while the person so selected is denominated a "foreman," it is evident that he was employed as a "bookman" to keep a record of the labor performed by the Chinese, and that he was powerless to direct the time, place, or manner of service to be performed by them. Nor do we think it is reasonably inferable from the clause of the contract so quoted that Lee Tung Yin "had supervision of the said laborers;" for, Johnson having stipulated that on the 15th of each month he would supply one of the parties agreeing to furnish the laborers, or their agent, free transportation from Portland and Union to the place where said la-

borers might be employed, from time to time, so as to enable such person to oversee the laborers, supervise, and pay them off, it is evident that no authority was reserved to direct the laborers where to work, or to prescribe the time or manner of their service. It is also manifest, we think, that Young John was not the person contemplated by the parties as the representative of the Wing Chin Lung Company "to oversee said laborers:" for the transportation of the former was stipulated for in another clause of the contract, to the effect that Johnson would pay one half of the fare of the first quota of laborers, including the "bookman," from Portland to Union. This deduction seems to be established by the fact that it was stipulated by the parties that the "bookman" would remain with the laborers during the time they worked for Johnson, while the agent who was to represent the Wing Chin Lung Company was expected to visit Union, or the place where the laborers were working, on the 15th of each month only; and hence we conclude that Lee Tung Yin did not have the supervision of the said laborers, but that, as far as he was able, he had surrendered the control thereof to Johnson, whose orders, as interpreted by Young John, they were bound to and did obey. The decision we have reached in respect to the control of the laborers narrows the inquiry to whether Lee Tung Yin, who was in no manner interested in the construction of the railroad, and had no knowledge of the trespass prior to its commission, and never thereafter ratified it, is liable therefor because the servants engaged by his firm, and to which they looked for their compensation, did the cutting complained of in executing the orders of the person to whom they were hired. Notwithstanding there is a decided contrariety of judicial utterance upon the subject, it may be said, by way of illustration, though not involved therein, that it has been held that a master who hires his servants to another, to whom he has surrendered the entire control, is nevertheless liable for their negligence, upon the assumption that, having the selection of the servants chosen, it is reasonable that he who made the choice of a disqualified or careless person should be responsible for any injury that may result from the negligence or want of skill of the person so employed. *Hobbit v. London & N. W. R. Co.* 4 Exch. 254; *Stewart v. California Improv. Co.* 131 Cal. 125, 52 L. R. A. 205, 63 Pac. 177. If it be admitted that the rule just adverted to is applicable in this state, it could have no bearing upon the case at bar; for the injury of which the plaintiff complains did not result from any want of care on the part of Lee Tung Yin, or of the firm of which he was a member, in the selection of the laborers hired to Johnson. In *Ames v. Jordan*, 71 Me. 540, 36 Am. Rep. 352, the plaintiff hired to the defendant a pair of horses and furnished a driver therefor, who was to use the team in hauling logs, and while so employed the horses were drowned. In an action to recover the damages thus sus-

tained, it was held that, if the loss was occasioned by the negligence of the driver, no recovery could be had, but that if it resulted from the defendant's want of care in providing a safe landing place, he was liable therefor. Mr. Chief Justice Appleton, speaking for the court in deciding the case, says: "It is true, the horses and driver were under the control and management of the defendant, and he was responsible for whatever was done in pursuance of his orders. He was to see that the landing place provided for logs was a safe one, and, if not so, he was responsible therefor. The driver, in obeying his orders, is his servant, for whose acts he is liable so far as within the scope of his employment; but the results of his incompetency the plaintiff must bear, for he should have furnished a suitable servant." Johnson, having directed the laborers to cut the timber, is liable for the injury which resulted from the execution of his order, and, as Lee Tung Yin had no knowledge of the trespass prior to its commission, did not ratify it thereafter, was not interested in the construction of the railroad, and had no voice in directing the laborers how, when, or where to work, he cannot be responsible for the injury which he was powerless to prevent, and hence the decree is reversed, and the suit dismissed.

Thomas J. BROSINAN, Appt.,
v.

W. P. HARRIS, Resp't.

(39 Or. 148.)

The right to appropriate the water of a spring which has no natural stream flowing therefrom exists under a statute providing that all ditches constructed for the purpose of utilizing the spring waters of the state shall be governed by the same laws as ditches constructed for the purpose of utilizing the waters of running streams.

(August 5, 1901.)

APPEAL by complainant from a decree of the Circuit Court for Malheur County in favor of defendant in a suit to enjoin the diversion of the water from a spring. *Reversed.*

The facts are stated in the opinion.

Messrs. Will R. King and F. M. Saxton, for appellant:

The act of Congress of July 26, 1866 (14 U. S. Stat. at L. 252, chap. 262) together with the act of July 9, 1870 (16 U. S. Stat. at L. 218, chap. 236), expressly gives to the

prior appropriator of water upon the public domain a vested right thereto, and any person afterwards acquiring title to land affected thereby takes the same subject to any vested and accrued water right.

Long, Irrigation, 1901, § 28; *De Neocoea v. Curtis*, 80 Cal. 397, 20 Pac. 564, 22 Pac. 198.

This act of Congress is aided by an act of the legislative assembly of Oregon (Sess. Laws 1893, p. 150) relative to the appropriation of "waste, spring, and seepage waters."

At the time appellant made the diversion of the water from the spring in question the land on which the spring arose did not belong to the respondent, and he had no claim thereto. Respondent therefore took said lands subject to the vested and accrued water right of appellant.

Kaler v. Campbell, 13 Or. 596; *Carson v. Gentner*, 33 Or. 517, 43 L. R. A. 130, 52 Pac. 506; *Drake v. Earhart*, 2 Idaho, 716, 23 Pac. 543; *Geddis v. Parish*, 1 Wash. 587, 21 Pac. 314; *Hill v. Lenormand* (Ariz.) 16 Pac. 268; *De Neocoea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Basey v. Gallagher*, 20 Wall. 683, 22 L. ed. 454; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240; *Bruening v. Dorr*, 23 Colo. 195, 35 L. R. A. 640, 47 Pac. 290; *Mahoney v. Neiswanger* (Idaho) 59 Pac. 561.

Even in the absence of the statutory provisions of our state, water flowing from springs may be appropriated by means of a ditch taking the water from the spring, and the owner of the land on which the spring rises may be restrained from diverting the water therefrom.

Long, Irrigation, 1901, §§ 32, 60; *Gross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; *Ely v. Ferguson*, 91 Cal. 187, 27 Pac. 587; *Taylor v. Abbott*, 103 Cal. 421, 37 Pac. 408; *Williams v. Harter*, 121 Cal. 47, 53 Pac. 405; *De Neocoea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Gould, Waters*, 3d ed. §§ 281, 543; *Cole Silver Min. Co. v. Virginia & G. H. Water Co.* 1 Sawy. 470, Fed. Cas. No. 2,989; *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54.

To constitute a valid appropriation, there must be an actual diversion of the water from its source of supply, with intent to apply it to some beneficial use, followed by an actual application of the water to the use designed, or to some other useful purpose, within a reasonable time.

Long, Irrigation, § 36; *Gould, Waters*, 3d ed. 235, 236; *Black's Pomeroy, Riparian Rights*, §§ 47-50, 53; *Low v. Risor*, 25 Or. 551, 37 Pac. 82; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472; *Hindman v. Risor*, 21 Or. 112, 27 Pac. 13; *Sieber v. Frink*,

NOTE.—For cases in this series as to right to appropriate waters of spring, see also *Bruening v. Dorr* (Colo.) 35 L. R. A. 640; *Southern P. R. Co. v. Dufour* (Cal.) 19 L. R. A. 92; *Paine v. Chandler* (N. Y.) 19 L. R. A. 99; *Lord v. Meadville Water Co.* (Pa.) 8 L. R. A. 202; and *Eckerson v. Crippen* (N. Y.) 1 L. R. A. 487.

As to rights in percolating waters and subterranean streams, see *Sullivan v. Northern Spy Min. Co.* (Utah) 30 L. R. A. 186, and note; 54 L. R. A.

Southern P. R. Co. v. Dufour (Cal.) 19 L. R. A. 92, and note; *Tampa Waterworks Co. v. Cline* (Fla.) 33 L. R. A. 376; *Wheelock v. Jacobs* (Vt.) 43 L. R. A. 105; *Willis v. Perry* (Iowa) 26 L. R. A. 125; *Smith v. Brooklyn (N. Y.)* 45 L. R. A. 664; *Vineland Irrig. Dist. v. Azusa Irrig. Co.* (Cal.) 46 L. R. A. 820; *Willow Creek Irrig. Co. v. Michaelson* (Utah) 51 L. R. A. 280; and *Forbell v. New York* (N. Y.) 51 L. R. A. 695.

7 Colo. 148, 2 Pac. 901; *King v. Edwards*, 1 Mont. 235; *Fort Morgan Land & Canal Co. v. South Platte Ditch Co.* 18 Colo. 1, 30 Pac. 1033; *Basey v. Gallagher*, 20 Wall. 683, 22 L. ed. 454.

Appellant is entitled to a reasonable time in which to complete his appropriation, and, when perfected, his rights relate back to the date when the first step was taken, and he is entitled to protection in his rights, under the law, during such time.

Black's Pomeroy, Riparian Rights, § 55; Gould, Waters, 3d ed. § 236; Long, Irrigation, § 51; *Cole v. Logan*, 24 Or. 304, 33 Pac. 568; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472.

Messrs. J. L. Rand, R. G. Wheeler, and Smith & Heilner, for respondent:

The water of springs which are the source of supply to running streams forms a part of any appropriation of the waters of such streams, and the prior appropriator will be protected in its use.

Low v. Schaffer, 24 Or. 239, 33 Pac. 678; *Straut v. Brown*, 16 Nev. 317, 40 Am. Rep. 251.

In such case the waters of such springs must flow in well-defined, natural channels to such stream.

Low v. Schaffer, 24 Or. 239, 33 Pac. 678; *Simmons v. Winters*, 21 Or. 35, 29 Pac. 7; Black's Pomeroy, Riparian Rights, 1st ed. § 62. See Sess. Laws 1893, § 1, p. 150.

Bean, Ch. J., delivered the opinion of the court:

This is a suit to restrain the diversion of and interference with the water of a certain spring in Malheur county, known as "Fox Spring." Prior to August 4, 1899, the land upon which it is situated was unoccupied public land of the United States. In November, 1898, the plaintiff cut a ditch or trench some 30 feet long through the rim or embankment inclosing the spring, through which, in April, 1899, he conducted its waters into a "kind of a trail or swale that the snow water had made through there, and run it through this channel to" his premises, a quarter to half a mile distant, to be used, and which was used, for watering stock and other purposes, the surplus evaporating or disappearing in the ground without reaching any natural watercourse. In May, 1899, he filed what he intended to be a notice of location of all the waters of the spring, but which proved insufficient for want of a definite description, and soon thereafter contracted with some workmen to enlarge and develop the spring, and lay pipe therefrom to his premises, so as to preserve all the water for use during the summer months, when it was his only natural supply. Before, however, any of this work was done, with the exception of opening out and enlarging the trench previously dug, the defendant took up the land on which the spring is situated as a homestead, and forbade plaintiff from taking or using the water therefrom. The defendant, in his answer and testimony, admits the existence of the spring, and says that at the time he en-

tered upon the premises there was about an inch and a half of water flowing from it through an opening in the rim or embankment down to the plaintiff's premises. The court below decided in favor of the defendant, holding that the waters of the spring were not subject to appropriation, for the reason that there is no natural stream flowing therefrom, and it is not tributary to, nor does it form a part of, any natural watercourse. The argument is, in effect, that the waters of a perennial spring are not subject to appropriation unless they flow in a natural channel or form part of a watercourse. There seem to be but few cases in which the rights of the appropriator of the waters of such a spring, as against a subsequent grantee of the government, have been considered. If the water rises to the surface so as to form a stream, it may, of course, be appropriated (*De Neccochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198), even by the construction of ditches up to the spring (*Ely v. Ferguson*, 91 Cal. 187, 27 Pac. 587). And in *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409, the right to acquire title to percolating waters by appropriation is recognized, so far, at least, as to entitle the grantee of the water right to hold the same against a subsequent grantee of the mining claim on which the water was brought to the surface. But it was subsequently held that no right can be acquired by appropriation to the waters of a spring formed by percolation. *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783. In the latter case, however, the question was as to the sufficiency of an alleged appropriation of water on state land under the statute of California, and may, perhaps, on that ground, be distinguished from the case in hand. A decision directly in point is that of *Sullivan v. Northern Spy Min. Co.* 11 Utah, 438, 30 L. R. A. 186, 40 Pac. 709, in which it is held that the discoverer of a flow of percolating water on public lands may, by digging wells and improving them, and constantly using the water for beneficial purposes, acquire a right to take it from such wells as against one who, by subsequent location acquires title to the land. The principle upon which this decision is grounded is that, where one goes upon public, unoccupied land of the United States, and diverts the water thereon from its natural source, and puts it to some beneficial use, he thereby acquires a right (which has been recognized by the legislation of Congress,—U. S. Rev. Stat. §§ 2339, 2340) to continue such diversion and use as against a subsequent settler upon the land; and it is unimportant whether the diversion is from a natural watercourse, or a spring, or a well formed by percolation. Whatever doubt may exist elsewhere upon the question, it would seem that the right to make such an appropriation of waste, spring, or seepage water finds recognition in the legislation of this state. The act of 1893 (Sess. Laws 1893, p. 150) governing the right of priority to waste, spring, and seepage waters provides that all ditches now constructed, or

hereafter to be constructed, for the purpose of utilizing the waste, spring, or seepage waters of the state, shall be governed by the same laws relating to priority of right as ditches constructed for the purpose of utilizing the waters of running streams. Under this provision there would seem to be no distinction between the right to appropriate the waters of running streams and those of springs.

The decree of the court below is therefore reversed, and one will be entered here in plaintiff's favor.

George JONES *et al.*

v.

George CONN.

(39 Or. 30.)

1. The right of a riparian proprietor to use the water for irrigating purposes is not limited to the tract of land bordering on the stream, as first segregated and sold by the government, but extends to lands lying back of such tract and purchased by him from other persons.
2. Irrigation of riparian land cannot be prevented by the fact that it is divided from the stream by a natural ridge over which the water will not flow through ditches wholly on the proprietor's own land, and which will prevent its return to the stream.
3. A lower riparian proprietor cannot complain of the use by an upper proprietor of water for irrigating purposes, if the amount taken is not sufficient to materially injure him or to interfere in any substantial way with his right as a riparian proprietor.
4. Water cannot be taken from a stream to irrigate riparian land, in such quantities as to materially injure lower proprietors on the stream.

On rehearing.

5. A suit to enjoin threatened diversion of water to a certain amount for irrigating purposes, under a claim of absolute right, through a ditch already constructed, will not be dismissed merely because that amount has not been used and the complaining party has not proved actual injury.
6. Costs may be awarded against one who has constructed a ditch with the avowed purpose of diverting a certain quantity of water from a stream, in an action to enjoin him from so doing, although at the time of trial he has not done so and in fact has caused no injury to the complaining party.

(April 29, 1901.)

CROSS-APPEALS from a judgment of the Circuit Court for Lake County enjoining defendant from taking water from a

NOTE.—For another case in this series as to right to take water from stream for use on non-riparian lands, see *Gould v. Eaton* (Cal.) 88 L. R. A. 181.

As to right to divert water from stream for irrigation purposes generally, see *Charnock v. Higuerra* (Cal.) 82 L. R. A. 190, and *Wiggins v. Muscupiabe Land & Water Co.* (Cal.) 82 L. R. A. 667.
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stream for irrigation purposes to the injury of the rights of riparian proprietors on the stream below; the plaintiffs appealing from so much of the decree as refused to enjoin the use of the water on certain land, and defendant appealing from so much as refused to dismiss the bill and awarded costs against him. *Affirmed.*

Statement by *Con, Ch. J.:*

This is a suit to enjoin the defendant, Conn, from diverting the waters of Chewaucan river through a ditch recently constructed by him. The plaintiffs are riparian proprietors on the river, and the owners in severalty of divers tracts of arid land, aggregating several thousand acres. These lands are level, and, when irrigated, very fertile, but valueless without. The defendant is an upper riparian proprietor, owning 875 acres, through which the river flows a distance of 1½ to 2 miles, dividing on his premises into two main channels, flowing north-easterly and southeasterly, which in turn subdivide into numerous channels and sloughs, through each of which the waters of the river have been wont to flow from time immemorial. The greater portion of defendant's land is elevated from 75 to 80 feet above the river. Three hundred and twenty acres of it are contiguous to, but acquired by different conveyances from, land immediately bordering on the stream. In the fall of 1896 and spring of 1897 the defendant constructed the ditch in question for the purpose of irrigating his upland, and furnishing better power to a grist mill, situated on the river a short distance below its forks, which he had theretofore owned and operated with water conveyed through a ditch about ½ mile long, located on his own premises. The new ditch taps the river 1½ or 2 miles above his property, and has a carrying capacity of about 2,500 inches. The upland he proposes to so irrigate is somewhat lower than the bluff between it and the river, and slopes slightly away therefrom, so that it is contended that any water used thereon for irrigation cannot find its way by percolation back into the river. The object of this suit is to enjoin the defendant from using water through this ditch, on the theory that it is a wasteful and unnecessary means of supplying power to his mill, and that the land he proposes to irrigate is nonriparian. The defendant avers that all his lands are riparian, and that, as a riparian proprietor, he is entitled to 2,675 inches of water for domestic, stock, irrigating, and manufacturing purposes; that all of his land is arid, and capable of being irrigated from the river, which carries a large amount of water during the irrigating season; that the amount he proposes to take and consume therefrom is reasonably necessary for the purposes indicated, and will not be of any material injury to the plaintiffs, or any of them. The court below found that the defendant was entitled to take water through the ditch in question, but not to use it for the irrigation of lands contiguous to, but acquired by different

conveyances from, land abutting directly on the stream, when such use will actually and sensibly affect the rights of the plaintiffs as riparian proprietors, and entered a decree perpetually enjoining and restraining him from diverting any of the waters of the river to irrigate such land, "to the actual and perceptible injury of the plaintiffs as riparian proprietors upon their riparian lands." From this decree both parties appeal.

Messrs. E. D. Sperry, E. M. Brattain, and Austin S. Hammond, for plaintiffs:

The waters of permanent running streams and of inland lakes are sacred to the common use, alike, of all the riparian owners upon their borders, and "even the state, by its power of eminent domain, cannot give any more extensive or exclusive rights to one proprietor under color of a public use, without making provisions for compensation to all the proprietors whose natural rights would thus be invaded."

Pom. Riparian Rights, § 4; Gould, Waters, 2d ed. 204-209; *Hayden v. Long*, 8 Or. 245; *Weiss v. Oregon Iron & Steel Co.* 13 Or. 496, 11 Pac. 255.

Use of water by a riparian owner must be reasonable and by reasonable means.

Pom. Riparian Rights, § 138; Gould, Waters, 2d ed. 205-207, 217.

The right to use never extends to nonriparian lands.

Pom. Riparian Rights, 147; *Hayden v. Long*, 8 Or. 244; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879; *Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577.

The right to the water is indivisible; there can be no severance into parts.

Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199; *Vandenburgh v. Van Berger*, 13 Johns. 212; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.

Riparian proprietors' rights are not limited by use.

Gould, Waters, 221; Pom. Riparian Rights, 4-7.

The right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it.

Pom. Riparian Rights, 9; *Lus v. Haggins*, 69 Cal. 255, 10 Pac. 753; *Cooper v. Williams*, 5 Ohio, 391, 24 Am. Dec. 300; *Fuller v. Shedd*, 161 Ill. 462, 33 L. R. A. 146, 44 N. E. 286; note to *Gardner v. Newburgh* (N. Y.) 7 Am. Dec. 531.

A riparian owner does not lose any of his rights by becoming an appropriator.

Faull v. Cooke, 19 Or. 455, 26 Pac. 662; *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. 308, 598.

The owner of a stream where a break occurs may restore it to its channel.

Pom. Riparian Rights, 10; *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301; *Pierce v. Kinney*, 59 Barb. 56; *Slater v. Fox*, 5 Hun, 544; note to *Wholey v. Caldwell* (Cal.) 30 L. R. A. 820.

The law of riparian rights is unchanged by the law of appropriation.

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Pom. Riparian Rights, 44; Gould, Waters, 228; *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350.

While riparian rights exist without reference to use, right by appropriation depends upon use.

Pom. Riparian Rights, 1-10, 16, 25, 33, 37, 44, 102, 133; Gould, Waters, 226, 227.

A riparian proprietor acquires no rights by prior appropriation, and, of course, cannot lose any.

Pom. Riparian Rights, 4, 5, 33, 42, 70, 148; *Faull v. Cooke*, 19 Or. 455, 26 Pac. 662.

The plaintiff's right to an injunction does not depend upon injury. Being a riparian owner, he has the right to the flow of the entire stream, and he may invoke this remedy to prevent a claim from ripening into a right.

Gould v. Eaton, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577; 1 High, Inj. 697-702; Gould, Waters, 215, 512, 513; Pom. Riparian Rights, 7; *Parker v. Griswold*, 17 Conn. 238, 42 Am. Dec. 739.

To take from one third to one tenth of the water from a stream is a material injury.

Heilbron v. Fowler Switch Canal Co. 75 Cal. 426, 17 Pac. 535.

That defendant proposes to so limit his use of the stream as to do plaintiffs no damage is no defense.

Ibid.

An injunction will be granted against infringement of a right, whether damage will result or not.

Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Gould, Waters, 2d ed. § 513; *Woodall v. Cartersville Min. & Manganese Co.* 104 Ga. 156, 30 S. E. 665; *Keller v. Strauss*, 88 Fed. 517; *Neal v. Rochester*, 156 N. Y. 213, 50 N. E. 803. Affirming 88 Hun, 614, 35 N. Y. Supp. 1112.

An injunction will be granted to prevent repeated trespass and multiplicity of suits.

Smithers v. Fitch, 82 Cal. 153, 22 Pac. 935; *Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577; *Williams v. Harter*, 121 Cal. 47, 53 Pac. 405; *Platte Valley Irrig. Co. v. Buckers Irrig. Mill. & Improv. Co.* 25 Colo. 77, 53 Pac. 334.

Mr. Rufus Mallory, with Messrs. C. A. Cogswell, W. A. Wilshire, and L. F. Conn, for defendant:

A riparian owner is a person who owns land bordering on a watercourse.

Angell, Watercourses, 3d ed. p. 4; Gould, Waters, 2d ed. § 148; Kinney, Irrigation, §§ 57-59; Bouvier, Law Dict. *Riparian Proprietor*; *Hayden v. Long*, 8 Or. 244; *Tyler v. Wilkinson*, 4 Mason, 400, Fed. Cas. No. 14,312; *Coffman v. Robbins*, 8 Or. 278; *Taylor v. Welch*, 6 Or. 198; *Shively v. Hume*, 10 Or. 76; *Shook v. Colohan*, 12 Or. 239, 6 Pac. 503; *Hindman v. Risor*, 21 Or. 112, 27 Pac. 13; *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645; *Modoc Land & Live Stock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431.

A riparian proprietor of lands may divert water from a stream to irrigate lands not riparian, provided the amount diverted does not perceptibly diminish the volume of the

stream, or injuriously affect other riparian proprietors on the same stream.

28 Am. & Eng. Enc. Law, p. 954, title *Watercourses*; *Norbury v. Kitchin*, 7 L. T. N. S. 685; Gould, *Waters*, §§ 215, 217; *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66; *Pine v. New York*, 76 Fed. 418; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Anthony v. Lapham*, 5 Pick. 175; *Cary v. Daniels*, 8 Met. 477, 41 Am. Dec. 532; *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Runnels v. Bullen*, 2 N. H. 532; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Garwood v. New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Sandwich v. Great Northern R. Co.* L. R. 10 Ch. Div. 707; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 6 So. 78; *Baker v. Brown*, 55 Tex. 377; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636; Kinney, *Irrigation*, §§ 67, 276; *Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371.

Being a riparian proprietor, a court of equity will not interfere by injunction to prevent defendant's using the water of Che-waucan river to irrigate the land in question, whether riparian or not, unless it is clearly shown that such use appreciably diminishes the flow of the water in the river to the injury of plaintiffs' riparian rights.

Moore v. Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816, 5 Pac. 494; *Modoc Land & Live Stock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431; *Eagar v. Stevenson*, 70 Cal. 286, 11 Pac. 704; *Heilbron v. 76 Land & Water Co.* 80 Cal. 189, 22 Pac. 62; *Luo v. Haggin*, 69 Cal. 284, 10 Pac. 674; *Brown v. Smith*, 10 Cal. 509; *Nevada County & S. Canal Co. v. Kidd*, 37 Cal. 282; *Black's Pom. Waters*, § 75; *Oreighton v. Kaweah Canal & Irrig. Co.* 67 Cal. 221, 7 Pac. 658; *Barrows v. Fox* (Cal.) 30 Pac. 768; *Wintermute v. Tacoma Light & Water Co.* 3 Wash. 727, 29 Pac. 444; *Rassett v. Salisbury Mfg. Co.* 47 N. H. 426; *Head v. James*, 13 Wis. 641; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; Kinney, *Irrigation*, § 321; Gould, *Waters*, § 214; *Watson v. New Milford Water Co.* 71 Conn. 442, 42 Atl. 265; *North Powder Mill Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Lake-side Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Shook v. Colohan*, 12 Or. 239, 6 Pac. 503; *Hindman v. Risor*, 21 Or. 112, 27 Pac. 13.

Beam, Ch. J., delivered the opinion of the court:

This is a controversy between riparian proprietors upon a natural watercourse. There is virtually but one question involved in the case, and that is whether the lands which the defendant seeks to irrigate are riparian in character. It is practically conceded that up to the commencement of the suit the plaintiffs had not been substantially injured or damaged on account of the use of the water by the defendant, and, as a consequence, are not entitled to an injunction if the lands are riparian; but the contention is

that they are nonriparian, and therefore the plaintiffs are entitled to an injunction restraining the use of the water thereon without proof of damage. It is common learning that every person through whose premises a stream of water flows has a right to its use and enjoyment as it passes through his land; but, as all other proprietors have a similar right, it necessarily follows that one cannot use or divert the water to the injury of another. The right of each must be exercised in subordination to that of all the others. Within these limits, each proprietor is entitled to such use of the stream as may be conformable to the usages and wants of the community. It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality; and that, if an upper proprietor takes it from the stream, he must return substantially the same quantity again before it leaves his premises. This rule, however, is subject to the limitation now well established that each proprietor is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes, and such use is not to be denied him on account of the loss necessarily consequent upon its proper enjoyment. In short, he has a right, in the language of Vice Chancellor Bacon in *Sandwich v. Great Northern R. Co.* L. R. 10 Ch. Div. 707, 712, "to make all the use he can—to derive every benefit he can—from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself;" or, as said by Lord Kings-down in *Miner v. Gilmour*, 12 Moore, P. C. C. 131, 156: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." The right of a riparian proprietor to the use of the water of a stream flowing through his premises, and its limitations, are well expressed in a Maryland case, where the court says: "The right of every riparian owner to the enjoyment of a stream of running water in its natural state in flow, quantity, and quality is too well established to require the citation of authorities. It is a right incident and appurtenant to the ownership of the

land itself, and, being a common right, it follows that every proprietor is bound so to use the common right as not to interfere with an equally beneficial enjoyment of it by others. This is the necessary result of the equality of right among all the proprietors of that which is common to all. As such owner, he has the right to insist that the stream shall continue to run *uti currens solebat*; that it shall continue to flow through his land in its usual quantity, at its natural place, and at its usual height. Without a grant, either express or implied, no proprietor has the right to obstruct, diminish, or accelerate the impelling force of a stream of running water. Of course, we are not to be understood as meaning there can be no diminution or increase of the flow whatever, for that would be to deny any valuable use of it. There may be, and there must be allowed to all of that which is common, a reasonable use; and such a use, although it may, to some extent, diminish the quantity, or affect, in a measure, the flow, of the stream, is perfectly consistent with the common right. The limits which separate the lawful from the unlawful use of a stream it may be difficult to define. It is, in fact, impossible to lay down a precise rule to cover all cases, and the question must be determined in each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil and a variety of other facts. It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others." *Baltimore v. Appold*, 42 Md. 442, 456. It is accordingly now quite generally held in this country and in England that, after the natural wants of all the riparian proprietors have been supplied each proprietor is entitled to a reasonable use of the water for irrigating purposes. Washb. Easements, 2d ed. *240; Gould, Waters, 3d ed. § 217; Long, Irrigation, § 11; Black's Pom. Riparian Rights, § 154; Kinney, Irrigation, § 273; 17 Am. & Eng. Enc. Law, 2d ed. p. 487; *Coffman v. Robbins*, 8 Or. 278; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Weston v. Alden*, 8 Mass. 136; *Lus v. Haggin*, 69 Cal. 255, 394, 10 Pac. 674; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Benton v. Johncoo*, 17 Wash. 277, 39 L. R. A. 107, 49 Pac. 495; *Baker v. Brown*, 55 Tex. 377; *Davis v. Gatchell*, 79 Am. Dec. 636, 643, note (50 Me. 602). The doctrine, as applied to the arid regions of the west, is thus stated by Mr. Justice McFarland in *Harris v. Harrison*, 93 Cal. 676, 680, 29 Pac. 326: "According to the common-law doctrine of riparian ownership as generally declared in England and in most of the American states, upon the facts in the case at bar the plaintiffs would be entitled to have the waters of Harrison cañon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the western and southwestern states and territories, where 54 L. R. A.

the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or, rather, enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor. . . . Of course, there will be great difficulty in many cases to determine what is such reasonable use; and 'what is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.' . . . The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each,—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neighbor." For the protection of the rights of the several riparian proprietors it has even been held that a court of equity may in a proper case apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances. *Harris v. Harrison*, 93 Cal. 676, 680, 29 Pac. 326; *Wiggins v. Muscupiabe Land & Water Co.* 113 Cal. 182, 32 L. R. A. 667, 45 Pac. 160; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725.

The plaintiffs admit the rule that, after the natural wants of all the riparian proprietors have been supplied, each is entitled to a reasonable use of the water for irrigating purposes, but insist that the exercise of the right must be limited to the tract of land through which the stream flows as first segregated and sold by the government of the United States, and that, even in such a case, where there are natural barriers within the tract which would prevent a portion of the land from deriving any benefit from the flow of the stream, the portion lying beyond the barrier should be excluded. But, as we understand the law, lands bordering on a stream are riparian, without regard to their extent. After a considerable search, we are unable to find any rule determining when part of an entire tract owned by one person ceases to be riparian. The discussions in the books are restricted to a definition of riparian proprietors and their respective rights. A riparian proprietor is one whose land is bounded by a natural stream, or through whose land it flows, and riparian rights are those which he has to the use of the water of the stream. They are derived entirely from the ownership of the land, and not from its area or the source of its title. Mr. Angell remarks: "The owners of watercourses are denominated by the civilians riparian proprietors, and the

use of the same significant and convenient term is now fully introduced into the common law." Angell, *Watercourses*, 6th ed. § 10. Gould says: "Riparian rights proper depend upon the ownership of land contiguous to the water." Gould, *Waters*, 3d ed. § 148. And Kinney says that "the rights of riparian proprietors are such as grow out of, or are connected with, their ownership of the banks of the streams and rivers." Kinney *Irrigation*, § 57. And, again (§ 58): "Whether riparian rights attach or not, the principal question depends upon the ownership of the land which is contiguous to and touches upon the water. And as to whether the land is in actual contact with the flow of the stream, whether that contact be lateral or vertical, it is necessary that it should exist." Bouvier defines riparian proprietors as "those who own land bordering upon a watercourse." Mr. Long, in his recent work on *Irrigation*, in discussing this question, says: "Some questions have been raised as to what lands are to be considered riparian, within the sense of the preceding section. Literally, of course, riparian lands are lands bordering upon a stream, but it is sometimes a question as to how far back from the stream the land may be considered riparian. There is very little judicial authority on the question. It is plainly not possible to define the distance to which the riparian proprietor's right to use the water for irrigation or other purposes extends, but this will depend upon the circumstances of each case. The only general rule that can be laid down is that the distance and use should be reasonable." Long, *Irrigation*, § 14. It would seem, therefore, that any person owning land which abuts upon or through which a natural stream of water flows is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. The fact that he may have procured the particular tract washed by the stream at one time and subsequently purchased land adjoining it, will not make him any the less a riparian proprietor, nor should it alone be a valid objection to his using the water on the land last acquired. The only thing necessary to entitle him to the right of a riparian proprietor is to show that the body of land owned by him borders upon a stream. This being established, the law gives to him certain rights in the water, the extent of which is limited and controlled less by the area of his land than by the volume of water and the effect of its use upon the rights of other riparian proprietors. By virtue of the ownership of land in proximity to the stream, he is entitled to a reasonable use of the water, which is defined as "any use that does not work actual, material, and substantial damage to the common right which each proprietor has, as limited and qualified by the precisely equal right of every other proprietor." Kinney, *Irrigation*, § 276. In the determination of what will be considered such a use in a particular case, the character and extent of the land,

its location, and the time of acquiring the title may all become, and are, no doubt, important factors to be considered; but they are not controlling, and each case must depend entirely upon its own facts and circumstances. The case of *Boehmer v. Big Rock Irrig. Dist.* 117 Cal. 19, 48 Pac. 908, would seem to make the extent of riparian rights depend upon the source of title, rather than the fact of title; but in *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645, it was expressly held that all land bordering upon a stream which is held by the same title—in that instance consisting of 1,280 acres—is riparian, and no distinction was made on account of the source of title. Again, in *Wiggins v. Muscupia-be Land & Water Co.* 113 Cal. 182, 32 L. R. A. 667, 45 Pac. 160, and *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, the right of a riparian proprietor to use the waters of a stream for irrigation was limited to the watershed. But, as we understand these cases the court in each instance was determining the rights of the parties then before it, and not attempting to lay down an inflexible rule as a guide in all cases. Nothing more was held or decided than that under the claim alone of riparian rights the owner of land cannot, to the injury of another riparian proprietor, take the water beyond the watershed, or onto lands held by a title different from the title of those through which the stream flows; and this all will concede. The right to make a reasonable use of the water of a stream is a right of property, depending on the ownership of the land abutting on or through which the stream flows; and whether a given use is reasonable or not is a question of fact, to be determined under the circumstances of each particular case. The right to use the water belongs to the owner of the land, and the extent of its exercise is not to be determined by the area or contour of his land, but by its effect upon other riparian proprietors.

A reference to a few of the adjudged cases will illustrate this principle. In *Norbury v. Kitchin*, 9 Jur. N. S. 132, the defendant, a riparian proprietor, erected pumps and conduit pipes to conduct the water of a stream across a hill into a reservoir, to await the use of a house built by him on property he had acquired subsequently to his riparian property. It was held that the question whether his use of the stream was reasonable under all the circumstances was properly left to the jury. In one of the opinions it is said: "The defendant has built himself a house on the side of a hill, and he formed a reservoir to supply his house with water from the stream. This exercise of his right seemed somewhat strong, and the plaintiff's counsel were at one time inclined to rely upon the distance of the house from the stream, but, probably, on reflection, they found it immaterial. The real question in the case is whether a man who has 321,000 gallons of water coming down to him, can complain if 10,000 are taken before." *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85, was an action to recover dam-

ages for the diversion of water by a railroad company, an upper proprietor, for the use of its locomotives, engines, and other similar purposes. It was contended at the trial that, if the jury were satisfied of the existence of the stream and the diversion of the water by the defendant, plaintiff was entitled to a verdict for nominal damage, without proof of actual damage; but the presiding judge instructed the jury that, unless plaintiff suffered actual perceptible damage in consequence of the diversion, the defendant was not liable in the action, and this direction was held to be right by the entire court. In the course of the opinion, Mr. Chief Justice Shaw says: "The right to flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris* of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and, so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply, or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent, a question of degree. Still the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes." In *Garwood v. New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452, a riparian proprietor was allowed to maintain an action to recover damages against a railroad company for diverting the waters of a stream and conveying them by pipes to reservoirs, where its locomotives were supplied with water, the proof showing that the water so diverted was sufficient "to perceptibly reduce the volume of water" in the stream, and to "materially reduce or diminish the grinding power of plaintiff's mill," in consequence of which he sustained damage to a substantial amount. In *Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18, it is held that a riparian owner is not liable for a reasonable use of water passing his land, whether for his own purposes or for sale to others, and the reasonableness of his use is a question of fact. In this case it is said: "Each riparian proprietor having the right to a just and rea-

sonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged of by the jury, and must be determined at the trial term as a mixed question of law and fact." In *Fifield v. Spring Valley Waterworks*, 130 Cal. 552, 62 Pac. 1054, it was held by the supreme court of California that a lower riparian proprietor, who is not injured by the diversion of water by a corporation conducting and carrying on the business of supplying the inhabitants of a city with water, cannot restrain such diversion. In *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 6 So. 73, a riparian proprietor filed a bill to enjoin the diversion of water from the stream by an upper riparian proprietor, a water company, for the use of its waterworks, constructed to supply the inhabitants of a city with water. The testimony in the case established that the diversion of water for the purpose mentioned would result in a sensible diminution in the flow of the stream itself in the dry season or summer months, but that the complainant was making no particular use of the stream, and therefore suffered no special damage by the act of the defendant; and it was held that as the defendant was taking the water for the purpose of supplying the wants of a neighboring town, and not returning it to its natural channel, the plaintiff was entitled to an injunction in vindication of his rights, without any special proof of damages; but, as he was not making any particular use of the water, the injunction should be so framed as only to restrain its use "to the sensible injury or damage of the complainant for any purpose for which he may now or in the future have use for it."

It is apparent, therefore, that the rule, so often stated and reiterated in the books, that a riparian proprietor is entitled to have the entire flow of the stream come down to his premises, is subject to the important limitation that an upper riparian proprietor may make such a use thereof as does not work any actual, material, and substantial damage to the common right which each proprietor has; and, whether a proposed use is of the character referred to, and therefore reasonable, does not depend so much upon the area of the land of the offending proprietor, or the place of the use, as upon the effect it has upon the correlative rights of the other proprietors. Under this doctrine the defendant was not a wrongdoer when he used the waters of the stream for the purpose of irrigation, nor does the fact that his land lies above the level thereof, so that it cannot be irrigated by means of ditches wholly on his own premises, affect his right to the use of the water. *Charnock*

v. *Higuera*, 111 Cal. 473, 32 L. R. A. 190, 44 Pac. 171, although it might have a material bearing upon the reasonableness of the use, if that question was here for decision. Gould, Waters, 3d ed. § 217. But there is no reason shown by this record why the defendant should be confined in the use of the water to any particular portion of his land. The amount of water taken and used by him before the trial was not sufficient to materially injure the plaintiffs, or to interfere in any substantial way with their rights as riparian proprietors. There seems to have been abundant water left in the stream after his diversion for the use of all the other riparian proprietors. There is some conflict in the authorities as to whether a riparian proprietor can enjoin the use of water for the irrigation of nonriparian lands without showing damage (*Modoc Land & Live Stock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431; *Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577; *Fifield v. Spring Valley Waterworks*, 130 Cal. 552, 62 Pac. 1054); but it is clear that a court of equity will not restrain the use of water by a riparian proprietor to irrigate his lands unless it is shown that such use will injure the other riparian proprietors (Gould, Waters, 3d ed. § 214). The plaintiffs, therefore, were not entitled to an injunction restraining the defendant from using the waters of the stream for the purpose of irrigation, because such use was no injury to them. But, as the defendant has set up in his answer, and attempted to maintain by his testimony, the absolute right to sufficient water to irrigate his land, regardless of the effect it may have upon the other proprietors, the plaintiffs are entitled to such a decree as will prevent his use from ripening into an adverse title. Gould, Waters, 3d ed. § 214; Kinney, Irrigation, § 329; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 6 So. 78; *Neuchall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790.

It is suggested that the court ought to ascertain and determine the rights of the respective parties, and fix them in the decree, so that hereafter there may be no controversy concerning the matter. In the very nature of things, however, it is impossible in a case of this character to make such a decree. The rights of the several riparian proprietors are equal, each being entitled to but a reasonable use of the water for irrigating purposes, and what constitutes such use must necessarily depend upon the season, the volume of water in the stream, the area and character of the land which each riparian proprietor proposes to irrigate, and many other circumstances; so that it seems to us there is no basis upon which the court could frame any other decree than one enjoining and restraining the defendant from diverting the water from the stream to the substantial injury of the present or future rights of the plaintiffs, and, as the decree of the court below is to that effect, it will be affirmed.

Petitions for rehearing having been filed,
54 L. R. A.

Beam, Ch. J., handed down the following response:

Both parties have filed petitions for rehearing. The plaintiffs insist that the court erred in not holding that the right of a riparian proprietor to use the waters of a stream for irrigating purposes does not extend beyond the watershed, or to lands not first segregated and sold by the government. This question was examined with great care before the opinion was formulated. No authorities are cited or arguments advanced in the petition for rehearing not then fully examined and considered, and therefore the conclusion heretofore reached will be adhered to. The defendant contends that the court erred in affirming that part of the decree which restrained him from using the water to the actual and perceptible injury of the plaintiffs, and in not decreeing that he recover costs and disbursements in the court below. The argument is that since the court held that he is entitled to use the water to irrigate all of his land if he does not thereby interfere with the correlative rights of the other riparian proprietors, and as the evidence did not show that he had actually so interfered up to the time of the trial, the complaint should have been dismissed. This position overlooks the fact noted in the original opinion that the defendant sets up in his answer an absolute right to divert 2,675 inches of water from the stream, and had actually constructed a ditch for that purpose tapping the stream $1\frac{1}{2}$ or 2 miles above his premises, through which he was threatening to take the water at the time the suit was commenced. It was to prevent any future contention that this claim or the use of the water thereunder had ripened into an adverse right as against the plaintiffs that the decree was so framed. And such a decree is manifestly within the power of a court of equity. The fact that defendant had not used the entire amount of water up to the time of the trial, and that plaintiffs did not prove actual damage, constitutes no objection to the maintenance of the suit or the form of the decree. *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.* 27 Colo. 532, 62 Pac. 420. It was this avowed determination of the defendant, no doubt, that influenced the trial court to decree that he pay the costs, and its conclusion will not be disturbed, as there does not seem to have been any abuse of discretion. *Dimmick v. Rosenfeld*, 34 Or. 101, 55 Pac. 100.

The petitions for rehearing are therefore denied.

Re Petition of Case WYGANT, *Respt.*,
v.

D. M. McLAUCHLAN, Chief of Police of
Portland, *Appt.*

(.....Or.....)

1. Charter power to declare what shall

NOTE.—For other cases in this series as to right of municipality to declare what shall con-

constitute nuisances will not authorize a municipal corporation to declare generally that to inter a dead body in any portion of the inhabited district of the city shall be a nuisance, when such interment may be made in the usual way in some of such sections without giving offense to the senses of any human inhabitant, or endangering in the least measure the health of the community.

2. Neither the general police power, nor charter authority to provide for the health and cleanliness of the city, will authorize a municipal ordinance prohibiting all interments within the city limits, unless such prohibition is reasonable.
3. The prohibition of the interment of dead bodies within the city limits is unreasonable where they include large tracts of land used exclusively for farming purposes, some of which contain several hundred acres on which interments could be made, which would be distant a half mile or more from any human habitation or thoroughfare.
4. An ordinance prohibiting the interment of dead bodies within the city limits, which is unreasonable as applied to sparsely inhabited sections, and general in its scope and operation, must fall in its entirety.

(May 4, 1901.)

APPEAL by respondent from a judgment of the Circuit Court for Multnomah County releasing petitioner under a writ of habeas corpus from the custody of respondent, to which he had been committed for alleged violation of a municipal ordinance. *Affirmed.*

Statement by **Wolverton, J.:**

The plaintiff was convicted in the municipal court of the city of Portland of a violation of city ordinance No. 9,188, and sentenced to pay a fine of \$35, in default of the payment of which he was committed to jail under a commitment issued, directed, and delivered to the defendant, McLauchlan, who is the chief of police. The complaint upon which the conviction was had charged the plaintiff with a violation of the ordinance by wilfully and unlawfully interring and causing to be deposited a certain dead body within prohibited territory in the city of Portland, "thereby creating a nuisance," contrary to the ordinance, etc. The ordinance under which the complaint was drawn provides, by § 1, that it shall be unlawful, and it is declared a nuisance and misdemeanor, for any person or persons, at any time after the 1st day of April, 1895, to dig, or cause to be dug or opened, any grave, or to inter or deposit, or cause to be deposited, in such grave, any dead body, within the city of Portland, except within certain specified districts; and, by section 2, that no person or persons shall, after the day named, dig, or cause to be dug or opened, any grave, or cause to be deposited or interred in such grave any dead body, except in those portions of the city designated in § 1. Section

6 prescribes a penalty for a violation of the ordinance. The charter empowers the city to prevent the introduction of contagious diseases, etc., and "to provide for the health, cleanliness, ornament, peace, and good order of the city," and, by a subsequent clause, to prevent and remove nuisances, and to declare what shall constitute the same." Section 32, subds. 6, 9. The plaintiff, being imprisoned, sued out a writ of habeas corpus, alleging that he is unlawfully restrained of his liberty by the defendant, to which the latter made return that he is lawfully detaining the plaintiff under and by virtue of the commitment to him issued and directed. The judgment being favorable to the plaintiff, the defendant appeals.

Messrs. J. M. Long and Ralph R. Duniway, for appellant:

The city had the authority to pass the ordinance in question by virtue of the police power. This authority is specially given to the city by its charter, passed in 1898, in § 32, subdvs. 6, 9, 17.

The city has the power to declare burials within the city to be nuisances, and detrimental to the health and welfare of the city.

Portland v. Terwilliger, 16 Or. 465, 19 Pac. 90; *Dill. Mun. Corp.* §§ 141, 142, 372-375, 379; *Cooley, Const. Lim.* 6th ed. 740; *Austin v. Austin City Cemetery Asso.* 87 Tex. 330, 28 S. W. 528 (Tex. Civ. App.) 28 S. W. 1023; *New York v. Slack*, 3 Wheeler, C. C. 237; *People ex rel. Oak Hill Cemetery Asso. v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564; *Charleston v. Wentworth Street Baptist Church*, 4 Strobb. L. 306; *Humphrey v. Front Street M. E. Church*, 109 N. C. 132, 13 S. E. 793; *Campbell v. Kansas*, 102 Mo. 326, 10 L. R. A. 593, 13 S. W. 897; *Es parte Bohem*, 115 Cal. 372, 36 L. R. A. 618, 47 Pac. 55, Beach, Pub. Corp. § 996; *Horr & B. Mun. Pol. Ord.* § 220; 5 Am. & Eng. Enc. Law, 2d ed. pp. 791, 793; *Went v. Methodist Protestant Church*, 80 Hun, 267, 30 N. Y. Supp. 157; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *Loice v. Prospect Hill Cemetery Asso.* 58 Neb. 100, 46 L. R. A. 237, 78 N. W. 468.

A cemetery within the city limits is not conclusively shown not to be a nuisance by the fact that the city itself operates a cemetery in the same locality under similar conditions.

Austin v. Austin City Cemetery Asso. 87 Tex. 330, 28 S. W. 528.

The ordinance under consideration in this case is valid, and the complaint is sufficient.

Grossman v. Oakland, 30 Or. 478, 36 L. R. A. 593, 41 Pac. 5; *Portland v. Meyer*, 32 Or. 368, 52 Pac. 21; 5 Am. & Eng. Enc. Law, 2d ed. pp. 791, 793; *Went v. Methodist Protestant Church*, 80 Hun, 267, 30 N. Y. Supp. 157; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *Horr & B. Mun. Pol. Ord.* § 220; Beach, Pub. Corp. § 996.

stitute a nuisance, see *Grossman v. Oakland* (Or.) 36 L. R. A. 593, and note; *Evansville v. Miller* (Ind.) 88 L. R. A. 161; *Harrington v. Providence* (R. I.) 88 L. R. A. 806, and cases 54 L. R. A.

in note on page 828 as to right to control burial of the dead; and *St. Louis v. Edward Heitzberg Pkg. & Provision Co. (Mo.)* 89 L. R. A. 551.

Slaughterhouses, burial of the dead, or anything else which may be detrimental to health, can be excluded under the police power by a municipal corporation, which has general authority over nuisances.

Harmison v. Lewistown, 153 Ill. 313, 38 N. E. 628; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Davenport v. Richmond City*, 81 Va. 636, 59 Am. Rep. 696; *Charleston v. Wentworth Street Baptist Church*, 4 Strobb. L. 306; *Campbell v. Kansas*, 102 Mo. 326, 10 L. R. A. 593, 13 S. W. 897; *Dill. Mun. Corp.* § 372.

The city of Portland does not need any more specific authority in order to exclude burials from a given district than that giving it power over nuisances and contagious diseases.

From the passing of the ordinance there is a presumption that there is such a nuisance, or the ordinance would not be passed.

Hubbard v. Medford, 20 Or. 315, 25 Pac. 640; *Davenport v. Richmond City*, 81 Va. 636, 59 Am. Rep. 696; *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A. 267, 45 Pac. 266; *Harmison v. Lewistown*, 153 Ill. 313, 38 N. E. 628; 17 Am. & Eng. Enc. Law, pp. 247, 248; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

That which the legislature has specifically declared may be done, the courts cannot declare is unreasonable.

17 Am. & Eng. Enc. Law, pp. 247, 248; *Dill. Mun. Corp.* 3d ed. § 328; *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A. 267, 45 Pac. 266; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Beiling v. Evansville*, 144 Ind. 644, 35 L. R. A. 272, 42 N. E. 621; *Kansas City v. Trieb*, 76 Mo. App. 478; *State, Raffetto, Prosecutor, v. Mott*, 60 N. J. L. 413, 38 Atl. 857.

When the thing declared to be a nuisance may be a nuisance, the courts cannot declare, as a matter of law, that it is not a nuisance.

North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788.

A municipal ordinance which is general in its scope may be adjudged reasonable as applied to one state of facts, and unreasonable when it is sought to be applied to a different state of facts.

Ex parte Ah Hoy, 23 Or. 89, 31 Pac. 220; *State, Pennsylvania R. Co., Prosecutor, v. Jersey City*, 47 N. J. L. 286; *State, Consolidated Traction Co., Prosecutor, v. Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146; *State Trenton Horse R. Co., Prosecutor, v. Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; *State v. Botkin*, 71 Iowa, 87, 60 Am. Rep. 780, 32 N. W. 185; *State v. Sheppard*, 64 Minn. 287, 36 L. R. A. 305, 67 N. W. 62; *Ford v. Standard Oil Co.* 32 App. Div. 596, 53 N. Y. Supp. 48.

The public have a right to control and oversee and regulate the proper interment of the dead. That is all that this ordinance does. Such an ordinance is clearly not unreasonable or beyond the power of the city to enact.

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The ordinance being within the power of the city to enact, it is valid.

Pflegger v. Groth, 103 Wis. 104, 79 N. W. 19; *Sprigg v. Garrett Park*, 89 Md. 406, 43 Atl. 813.

Messrs. Stott, Boise, & Stout for respondent.

Wolverton, J., delivered the opinion of the court:

The plaintiff bases his argument in support of the judgment of the circuit court upon the ground that ordinance 9,188 is invalid, for the reason that the charter does not authorize the city of Portland to declare the burial of the dead within the city limits, outside of the excepted districts, to be a nuisance, or to punish persons for doing the acts thereby declared to be offenses against the city. It may be premised that a cemetery is not a nuisance, except conditions be present which corrupt or foul the atmosphere by unwholesome or noxious stenches, or impregnate the water of wells or springs in the vicinity by percolation through the soil, thereby endangering the public health; hence the authorities agree that it is not nor can it be regarded a nuisance *per se*. *Wood, Nuisances*, § 6; 1 *Dill. Mun. Corp.* 4th ed. § 373; 5 Am. & Eng. Enc. Law, 2d ed. p. 791; *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; *Henry v. Perry Twp.* 48 Ohio St. 674, 30 N. E. 1122; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71. And whether the act of depositing a dead body in its place of sepulture is the commission of a nuisance depends entirely upon its proximity to the habitations of the living and the manner in which it is accomplished. In so far as the language of the charter conferring power upon the city to declare what shall constitute a nuisance is involved by the contention, the case of *Grossman v. Oakland*, 30 Or. 478, 36 L. R. A. 593, 41 Pac. 5, is precisely in point. Within the scope of the doctrine there announced and settled, the city is not thereby authorized to declare that to be a nuisance which is neither such *per se* nor under the common law, nor made so by statutory enactment. It would seem to follow, therefore, that the city council was not authorized to declare generally that to deposit a dead body in any portion of the inhabited district shall constitute a nuisance, when it is conceded, as here, that such an interment may be made in the usual way in some sections thereof, without giving offense to the senses of any human inhabitant, or endangering in the least measure the health of the community.

Defendant's counsel insist, however, that the authority requisite for excluding burials from within the city limits may be referable to the general police power incident to all municipal corporations, and, beyond this, it is urged that the words of the charter, "to provide for the health, cleanliness, ornament, peace, and good order of the city," are commensurate for the purpose. The power thus conferred is no doubt ample to authorize the city to adopt reasonable measures prescribing rules and regulations, as it re-

spects the place and manner of burials within the city limits; but the city cannot arbitrarily prohibit them, unless such prohibition be a reasonable exercise of the power. The legislature, in its wisdom, may, by express delegation of authority, empower the city to adopt measures of a specified and defined character, and the exercise of such authority cannot be questioned on the ground of its unreasonableness. *People, Oak Hill Cemetery Asso. v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564; *Oates v. New York*, 7 Cow. 585,—are illustrative of the principle. In the first, the authority delegated was "to make, modify, and repeal ordinances and by-laws to regulate the burial of the dead;" and it was held that the power to regulate was tantamount to the power to prohibit, the court referring to *Cronin v. People*, which involved the authority to prohibit the operation of slaughterhouses in certain portions of the city of Albany as conclusive of the point. So, in the last case cited, the authority extended to making by-laws "for regulating or . . . preventing the interring of the dead" within the city, which language is so express and explicit as to leave no doubt touching the power to prohibit. But where the authority to adopt specific measures is referable merely to the general power, or where the authority to legislate with respect to a given subject is conferred and the mode of its exercise is not prescribed, there goes with it the condition that the exercise thereof, to be valid and efficacious, must be reasonable, and not oppressive. 1 Dill. Mun. Corp. 4th ed. § 328; *State, Trenton Horse R. Co., Prosecutor, v. Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; *Haynes v. Cape May*, 50 N. J. L. 55, 13 Atl. 231; *A Coal-Float v. Jeffersonville*, 112 Ind. 15, 13 N. E. 115; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Tugman v. Chicago*, 78 Ill. 405; *Kirkham v. Russell*, 76 Va. 956. It is for the court to determine, in view of the facts of each particular case as it arises, whether or not an ordinance is reasonable. 17 Am. & Eng. Enc. Law, p. 248. The prevailing presumption, however, is in favor of its reasonableness, which must be overcome by legal and competent proof to the contrary before its invalidity can be declared. *State, Trenton Horse R. Co. Prosecutor, v. Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; *Com. v. Patch*, 97 Mass. 221; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85.

We are thus brought to the question whether the ordinance involved evinces a reasonable exercise of the general police power vested in the city, or of such as is attendant upon the power accorded to provide for the health, cleanliness, and good order thereof. The court may take judicial knowledge of the acts of incorporations and charters of municipal corporations, and as a logical consequence of the territorial limits of such municipalities, especially where they are fixed and defined by the acts giving them life, or acts amendatory thereof. 17 Am. & Eng. Enc. Law, 2d ed. pp. 936, 938; *Fauntleroy v. Hannibal*, 1 Dill. 118, Fed. 54 L. R. A.

Cas. No. 4,691; *Binkert v. Jansen*, 94 Ill. 283; *Hornberger v. State*, 47 Neb. 40, 66 N. W. 23; *De Baker v. Southern California R. Co.* 106 Cal. 257, 39 Pac. 610; *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773.

Now, it is an admitted fact that there are considerable tracts of land, comprised within the limits of the city, which are sparsely inhabited. As was said by the court below, "there are within the corporate limits of the city of Portland several large tracts of land, which are used solely for farming purposes, some of them containing several hundred acres, and on some of them interments could be made which would be distant a half mile or more from any human inhabitant or public thoroughfare." Under these conditions, it is assuredly not a reasonable regulation, as a police provision, or for the conservation of the health or good order of the community, to exclude burials from the whole territory, save the districts enumerated by the ordinance. If, however, as before indicated, the legislature had granted special and express power to exclude burials from within the city limits, the adoption of such an ordinance would be a legitimate exercise thereof, and no one could question its validity, yet, when the nature of the power delegated enjoins upon the city the duty of adopting such measures only as are reasonable, that becomes the measure and limit of the power, and any act in excess thereof is without legal efficacy. The ordinance being unreasonable as applied to those sparsely-inhabited portions of the city, and general in its territorial scope and operation, it is invalid as to the whole, and must fall in its entirety. As sustaining the conclusions here reached, see *Austin v. Murray*, 16 Pick. 121; *Kneidler v. Norristown*, 100 Pa. 308, 45 Am. Rep. 384; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239. This statement of the law is not impinged upon by the doctrine maintained in *State, Pennsylvania R. Co., Prosecutor, v. Jersey City*, 47 N. J. L. 286; *State v. Sheppard*, 64 Minn. 287, 36 L. R. A. 305, 67 N. W. 62, and other cases cited by counsel. One of the primary essentials of a valid ordinance is that it must be general in its operation; that is, it must affect all persons alike, under like circumstances and conditions. 1 Dill. Mun. Corp. 4th ed. § 322. It may, and often does, become a question whether certain persons or corporations, acting in peculiar capacities or special emergencies, come within the legitimate purview or spirit of the ordinance, and such was the question presented and determined by the above cases. The ordinance in each case was general in its scope, affecting all persons alike, but in the first the business of the railroad concentrated in a small compass, but had grown to such proportions that the ordinance became unreasonably embarrassing and burdensome, and it was held, therefore, that it should not be enforced against the company as to the particular *locus in quo*. So, in the latter case, the ordinance prohibited the driving of animals in the street at

a rate of speed exceeding 6 miles an hour, and it was held that a fireman, acting in the discharge of his duties in hastening to the scene of a conflagration, did not come within the inhibition. The doctrine is operative in the establishment of an exception rather than that of a general rule, and can have no application in the case at bar.

Reliance is had upon the case of *Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 90, as being an adjudication sustaining the power of the city to exclude burials from within the city limits. The court there had under consideration the effect of an ordinance prohibiting the burial of the dead within the city, and consequently upon an estate conceded, for the purpose of the case, to have been vested in the municipality upon a condition subsequent as to the continued use and occupation thereof by it for cemetery purposes. The power to adopt the ordinance in that case seems to have been taken for granted, or at least, it was not a matter of controversy in the course of the hearing. In announcing the opinion, Mr. Justice Stra-

han incidentally says: "That power was delegated by the state to the city of Portland under the general description of police power;" referring, we presume, to the power of prohibiting burials within the city limits. The learned justice then proceeded to an elaboration of the idea that every citizen holds his property subject to the proper exercise of the power, but the question whether the charter did or did not confer the power to adopt the ordinance was not mooted, so far as we are informed by the record, much less can it be said to have been decided. The idea of declaring the act of burial a nuisance, and the power commensurate to that particular purpose, does not seem to have been suggested at any time during the proceeding. The case is therefore not controlling as a precedent. If, however, it ever had any vitality in the direction claimed for it, it must be considered as overruled in its general scope by the subsequent case of *Grossman v. Oakland*.

There will be an affirmation of the judgment.

PENNSYLVANIA SUPREME COURT.

Charles L. FLACCUS

v.

W. J. SMITH *et al.*, *Appts.*

(199 Pa. 128.)

1. Injunction will be granted at the instance of the manufacturer whose apprentices are under express contract not to join a labor union, to restrain representatives of such union, who are not employed by him, from enticing his apprentices to break their contracts and become members of the union to the injury of the business.
2. Statutory authority to workmen to form associations for mutual aid, and to refuse to work for any employer under certain conditions without being subject to prosecution for conspiracy, will not justify members of a labor union in enticing employees to break their contracts not to become members of such unions to the injury of their employer's business.

(April 15, 1901.)

A PPEAL by defendants from a decree of the Court of Common Pleas, No. 2, for Allegheny County in favor of plaintiff in a suit to enjoin defendants from interfering with plaintiff's apprentices. *Affirmed.*

The facts are stated in the opinion.

Messrs. Johns McCleave, D. T. Watson, and W. J. Brennen, for appellants: Under the act approved May 8, 1869, § 1 (P. L. 1260), it is provided as follows: It shall be lawful for any and all classes of

mechanics, journeymen, tradesmen, and laborers to form societies and associations for their mutual aid, benefit, and protection.

And the act approved June 14, 1872, § 1 (P. L. 1175), provides: It shall be lawful for any laborer or laborers, workingman or workmen, journeyman or journeymen, acting either as individuals or as the members of any club, society, or association, to refuse to work or labor for any person or persons whenever in his, her, or their opinion the wages paid are insufficient, or the treatment of such laborer or laborers, workingman or workmen, journeyman or journeymen, by his, her or their employer is brutal or offensive, or the continued labor by such laborer or laborers, workingman or workmen, journeyman or journeymen, would be contrary to the rules, regulations, or by-laws of any club, society, or organization to which he, she, or they may belong.

It is one of the indefeasible rights of a mechanic or laborer in this commonwealth to fix such a value on his services as he sees proper, and under the Constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept.

Cote v. Murphy, 159 Pa. 420, 23 L. R. A. 135, 28 Atl. 190; *O'Neil v. Behanna*, 182 Pa. 236, 38 L. R. A. 382, 37 Atl. 843.

No minor can, by the provision of the acts of assembly, be bound as an apprentice longer than until the age of twenty-one.

Bonnel v. Brotsman, 3 Watts & S. 178.

A minor bound as an apprentice may abandon the master's service when he attains full age, although the term has not expired.

Wood, Mast. & S. p. 92; *Wray v. Wray*, 15 L. T. N. S. 180; *Drew v. Peckwell*, 11 E. D. Smith, 408.

NOTE.—For earlier cases in this series as to liability for inducing servant to break his contract, see cases in note to *Boysen v. Thorn* (Cal.) 21 L. R. A. on page 238; also cases in note to *Chambers v. Baldwin* (Ky.) 11 L. R. A. on page 548.

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Plaintiff had provided for failure to comply with the conditions of indenture by the forfeiture of certain sums of money held by him, which were his liquidated damages.

Where the damages are incapable or very difficult of being ascertained except by mere conjecture, they will usually be considered liquidated if they are so denominated in the instrument.

2 Sedgw. Damages, p. 248.

Equity will not enjoin an act that is not in violation of any legal right, or that is not an actionable wrong at law. At law no action lies for inducing a servant to leave his employment or to break his contract with his master, whether he is an apprentice under indenture or otherwise, where the master has recovered from him a stipulated penalty for leaving the service, or where the time for which he was hired has expired, though he had no previous intention of leaving.

Schouler, Dom. Rel. § 487; *Bird v. Randall*, 3 Burr, 1352; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Nichol v. Martyn*, 2 Esp. 734; *Boston Glass Manufactory v. Binney*, 4 Pick. 425.

It has never yet been held that inducement to join a labor organization, without any suggestion of abandoning the service of the master, is an actionable wrong, though the servant has undertaken with the master to the contrary.

No case can be found where a court of equity has assumed jurisdiction to enjoin a third party from inviting or inducing one of the parties to a contract to violate its terms. This is extending government by injunction to a point that the courts have not yet reached.

Reynolds v. Everett, 67 Hun, 294, 22 N. Y. Supp. 306.

Messrs. J. S. Ferguson and E. G. Ferguson, for appellee:

Statutes relating to apprenticeship rest largely upon the idea that a minor is incapable of having a will of his own before reaching maturity, and, having no will in the matter, is to be cared for and protected in such a way as in the judgment of the state will best subserve the interests both of himself and the public.

Robertson v. Baldwin, 165 U. S. 298, 41 L. ed. 732, 17 Sup. Ct. Rep. 326.

The whole course of legislation on the subject shows that to a large extent apprentices are regarded as wards of the commonwealth.

The acts of 1869 and 1872, and all kindred acts, have nothing to do with the question in this case.

If precedent precisely in point were necessary for every exercise of equity jurisdiction, equity jurisprudence would never have grown to its present high estate.

Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; *United States v. Debs*, 5 Inters. Com. Rep. 163, 64 Fed. 724.

If the remedy at law is doubtful, a court of equity will not decline cognizance of the suit.

Davis v. Wakelee, 156 U. S. 686, 39 L. ed. 583, 15 Sup. Ct. Rep. 555.
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If the remedy at law falls short of that which the party is entitled to, that founds a jurisdiction in equity.

American Ins. Co. v. Fisk, 1 Paige, 92.

Where equity can give relief, the complainant will not be compelled to speculate upon the chances of his obtaining relief at law.

Boyce v. Grundy, 3 Pet. 215, 7 L. ed. 657; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Watson v. Sutherland*, 5 Wall. 79, 18 L. ed. 582; *Westmoreland & C. Natural Gas Co. v. De Witt*, 137 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Conemaugh Gas Co. v. Jackson Farm Gas. Co.* 186 Pa. 443, 40 Atl. 1000.

A bill in equity may be sustained solely on the ground that it is the most convenient remedy.

Brush Electric Co.'s Appeal, 114 Pa. 574, 7 Atl. 794; *Kirkpatrick v. M'Donald*, 11 Pa. 393; *Drake v. Lacoe*, 157 Pa. 17, 27 Atl. 538; *Warner v. McMullin*, 131 Pa. 370, 18 Atl. 1056.

Brown, J., delivered the opinion of the court:

The appellee is the proprietor of glass works at Tarentum, in the county of Allegheny. In his complaint he sets forth that he has been engaged in the business of manufacturing glass bottles of various kinds, and, in and about their manufacture, has been compelled to employ divers workmen and apprentices; that the appellants and others are members of an association known as the American Flint Glass Workers' Union, affiliated with the American Federation of Labor; that for a long time prior to the year 1894 he had been greatly hampered and annoyed in his business by the control sought to be exercised over his workmen and apprentices by the said American Flint Glass Workers' Union and the American Federation of Labor, with which it is affiliated; that in the year 1894 he established his factory on an independent basis, employing no workmen or apprentices who were connected with either of the associations named, and expressly requiring his said workmen and apprentices not to be connected with the said American Flint Glass Workers' Union, and from that time until the filing of his bill of complaint he had conducted his factory as an independent one, with mutual satisfaction to himself and the men and apprentices employed by him; that the appellants knew his factory was so being conducted as an independent one, and that his workmen and apprentices were not connected with the said American Flint Glass Workers' Union, and had agreed not to connect themselves with the same, and, particularly, that his apprentices were under agreement not to so connect themselves; that his workmen and apprentices were working in harmony until about September 15, 1899, when the said appellants, acting under orders of the said American Flint Glass Workers' Union, claiming the right of declaring strikes and otherwise interfering with the employment of labor, well knowing that his apprentices were under covenant and agreement not to be con-

nected with the said American Flint Glass Workers' Union, began to entice, and did entice, a number of them to break their covenants or agreements and to become members of the said union, and to become subject to the orders thereof, paramount to his orders as their employer; and that the appellants, by so enticing and endeavoring to entice his apprentices to break their covenants with him by becoming members of the said union, have done that which is contrary to equity, for which he has no adequate remedy at law. On the answer to the appellee's bill of complaint, and upon testimony taken, the court below found that Skelley, one of the appellants, had gatherings of the apprentices of the appellee at his room in a hotel and persuaded them to join the union referred to; that he knew the character of the appellee's works as an independent factory, in which members of the union were not employed, and that his apprentices were bound in their indentures not to join or become subject to the rules or regulations of any such organization as he represented; that he knew these facts at the time he swore in these apprentices as members of the union; that the apprentices who joined the union violated the covenant of their indenture and subjected themselves to the orders of the union, which made obedience to it paramount to obedience to their employer; that the object of Skelley was to break down the appellee's factory as a nonunion factory, either by preventing the operation of his works or compelling him to join the union; that the apprentices who joined the union, enticed and persuaded so to do by Skelley, violated an express covenant of their indenture, which was one of great importance to the appellee, and Skelley so knew at the time he so enticed them; that Skelley's conduct and actions were very injurious to the appellee and his business, and, if repeated and persisted in, would in all probability utterly ruin his business; that Skelley's codefendants, by their counsel, openly and boldly justified him in all he did, contending that, as an officer or agent of the union, he had a perfect right to interfere with plaintiff's apprentices, persuade them to join the union, and secretly swear them in as members; that, if the union had that right, either Skelley or some other agent could go to Tarentum at any time and interfere with the appellee's apprentices and business until it would be destroyed. To this last finding there is no exception.

This is not a controversy between the employer and his employees, but between him and certain individuals associated as a labor union, unfriendly to the employment of independent labor, and seeking to induce the apprentices of the employer to violate the terms of their indentures with him. No question is here raised by the employer as to what his employees may or may not do, and the complaint sets forth no misconduct by them for which relief is asked. The appellants, outsiders, having no connection with the business of the appellee, are charged with enticing and endeavoring to entice the young men employed by him to violate the covenants of

their apprenticeships with him, and protection is prayed for against the threatened ruin of his business, as found by the court below. Having reviewed all the evidence, we are not persuaded that any of the court's findings of fact ought to be disturbed, and, with them before us, the only question to be determined is whether the injunction should go out. In the several statutes called to our attention by the learned counsel for appellants, we can find nothing to aid us. The act of September 29, 1770 (1 Smith's Laws, 309), simply provides that a minor may enter into a valid contract of apprenticeship; by that of May 8, 1869 (P. L. 1869, p. 1260), the legislature properly declared that "it shall be lawful for any and all classes of mechanics, journeymen, tradesmen, and laborers to form societies and associations for their mutual aid, benefit, and protection, and peaceably meet, discuss and establish all necessary by-laws, rules, and regulations to carry out the same;" and the act of June 14, 1872 (P. L. 1872, p. 1175), is that "it shall be lawful for any laborer or laborers, workingman or workmen, journeyman or journeymen, acting either as individuals or as the members of any club, society, or association to refuse to work or labor for any person or persons, whenever, in his, her, or their opinion, the wages paid are insufficient, or the treatment of such laborer or laborers, workingman or workmen, journeyman or journeymen, by his, her, or their employer, is brutal, or offensive, or the continued labor by such laborer or laborers, workingman or workmen, journeyman or journeymen, would be contrary to the rules, regulations, or by-laws of any club, society, or organization to which he, she, or they might belong, without subjecting any person or persons so refusing to work or labor to prosecution or indictment for conspiracy under the criminal laws of this commonwealth." But nowhere does it appear in the foregoing enactments that these intermeddling appellants had warrant for their interference between employer and employed, as charged in the complaint against them; and with no apprentice, even if he is to be regarded as a "laborer" or "workingman," within the meaning of the last two acts, complaining that his employer has denied him any right under either of them, further demonstration of the inapplicability of any one of these statutes to the question before us is certainly not needed. The appellee had an unquestioned right, in the conduct of his business, to employ workmen who were independent of any labor union, and he had the further right to adopt a system of apprenticeship which excluded his apprentices from membership in such a union. He was responsible to no one for his reasons in adopting such a system, and no one had a right to interfere with it to his prejudice or injury. Such an interference with it was an interference with his business, and, if unlawful, cannot be permitted. The court found that the interference was injurious to him, and, if allowed to continue, would utterly ruin his business. The damages resulting from such an injury are inca-

pable of ascertainment at law, and justice demands that specific relief be furnished in a court of equity. The test of equity jurisdiction is the absence of a plain and adequate remedy at law to the injured party, depending upon the character of the case as disclosed in the pleadings. If equity alone can furnish relief, the injunction must be is-

sued. *Watson v. Sutherland*, 5 Wall. 79, 18 L. ed. 582. With this test applied to the pleadings and the facts found by the learned judge in the court below, the decree which he made was proper.

It is now affirmed, and the appeal from it is dismissed at the costs of the appellants.

RHODE ISLAND SUPREME COURT.

Stella W. WINTER

v.

Lewis L. HARRIS.

(.....R. I.....)

The macadamized portion alone of a street 40 feet wide, of which about 25 are paved with cobble stones and the remainder macadamized, cannot be treated as the traveled part within the meaning of a statute requiring travelers by carriage to keep to the right of the center of the traveled part of the road, and therefore a traveler injured by collision while needlessly on the left of the center of the whole width of road cannot absolve himself from fault by showing that he was to the right of the center of the macadamized part.

(May 28, 1901.)

APPPLICATION by plaintiff for a new trial after verdict in favor of defendant in an action brought to recover damages for injuries alleged to have been caused by a collision in a highway through the negligence of one in charge of defendant's horse and carriage. *Denied*.

The facts are stated in the opinion.

Messrs. Page, Page, & Cushing for plaintiff.

Mr. E. O. Pierce, for defendant:

The statute of this state provides:

Chap. 74, § 1. "Every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or bridge, shall seasonably drive his carriage or vehicle to the right of the center of the traveled part of the road."

One who violates the law of the road by driving on the wrong side of the way assumes the risk of all such experiments, and must use greater care than if he keeps upon the right side of the road.

Elliott, Roads & Streets, § 830.

By "the traveled part" of the road is intended that part which is usually wrought for traveling.

Clark v. Com. 4 Pick. 125; *Jaquith v. Richardson*, 8 Met. 213; *Com. v. Allen*, 11 Met. 403; *Daniels v. Clegg*, 28 Mich. 32; *Potter, Road & Roadside*, p. 72.

Rogers, J., delivered the opinion of the court:

This is an action of trespass on the case for the alleged negligence of the defendant through his servant's so unskillfully and carelessly driving and managing his carriage on a public highway, in the outskirts of the city of Providence, as to cause it to collide with the plaintiff's buggy, whereby said buggy was damaged, and the plaintiff herself was thrown out and injured, while claiming to be in the exercise of due care. It appeared from the evidence that the accident occurred on Broad street, in Cranston, just over the city line, on March 9, 1898, between 6:30 and 7 o'clock P. M., when the plaintiff, accompanied by Mrs. Helen R. Herrick, was driving a horse and Goddard buggy down Broad street, away from the city, and the defendant's horse and carriage, also a Goddard buggy, was being driven towards the city by his coachman, Edward Ford, who was the sole occupant thereof; that Broad street at the place of the accident is a curbed street, 40 feet wide from curb to curb, running northerly towards Providence, and southerly towards Edgewood, in Cranston; that the westerly portion of the driveway for 24 feet 8 inches is paved with cobblestones, while the remainder of the width of the driveway, 15 feet 4 inches, is macadamized; that the paved surface of Broad street is traversed by double tracks for electric cars, the space between the separate rails of each track being 4 feet 10 inches, and the space between the separate tracks (i. e. between the west side of the east track and the east side of the west track) being 4 feet 2 inches; that all the space, being 9 feet 4 inches, between the west rail of the west track and the west curb of the street, is paved, while extending along the east side of the east rail of the east track is a paved strip 1 foot 6 inches wide; that the width of a Goddard buggy between the outside rims of the hubs is 5 feet 5 inches; that the defendant's coachman was driving on the right-hand (or east) side of the road, near the east curb, but as to how near the evidence is contradictory; that the plaintiff was driving upon

Norm.—As to law of the road generally, see *note* to *Brochart v. Tuttle* (Conn.) 11 L. R. A. 88.

As to negligence in turning to or being upon wrong side of road in violation of statute, see, in this series, *Brember v. Jones* (N. H.) 26 L. R. A. 408, and *note*; *Relpe v. Elting* (Iowa) 26 54 L. R. A.

L. R. A. 769; *Cook v. Fogarty* (Iowa) 89 L. R. A. 488; *Peltier v. Bradley, D. & C. Co.* (Conn.) 82 L. R. A. 651; *Footo v. American Product Co. (Pa.)* 49 L. R. A. 764; and *Perlstien v. American Exp. Co. (Mass.)* 52 L. R. A. 959.

the macadamized part of the road, and consequently was driving, as to her, on the left-hand side of the center, measuring from curb to curb; that it was dark, and the street lights were lighted; and that at the time of the accident no electric cars were approaching that were in sight. The evidence showed that the easterly or macadamized portion of the road was the favorite side for travelers, but that the whole width of the street was in order and condition for travel, and was used more or less, though not so much as the macadamized portion. Only the occupants of the two buggies witnessed the accident, and their statements are utterly variant. The plaintiff swore that she was driving on her right, being the westerly portion of the macadamized part of the street, though on the left of the center from curb to curb; that her horse was walking; that Ford was driving recklessly and unsteadily,—“this way and that,” to use her own expression, “but just which way he was driving when I first saw him I cannot say.” Mrs. Herrick supports the plaintiff in her claim that her horse was walking, and also that Ford was not keeping a straight course, and she testified: “As I remember it, Mrs. Winter pulled her right rein to the car track. I do not know how he pulled his, but his horse ran right into our shaft.” Ford, the defendant’s coachman, swore that he first noticed the plaintiff’s carriage 40 feet away, coming onto him. “They simply run in and locked wheels,” to use his own words. “I hollered to them first, and saw them coming directly towards the horse. I was away out then to the gutter.” In reply to the question how he came to drive into the gutter, he swore: “Because I saw they were coming into me, and I could not get over. If I could get on the sidewalk I would. I did not have time. I could not get on that high bank there. I drove in the gutter, and tried to avoid them.” He also swore that his horse was walking, while the defendant “was going as fast as she could, and did not let up any.” After a verdict for the defendant, the plaintiff petitioned for a new trial, upon the sole ground that is now urged, of error in the charge of the justice presiding at the jury trial.

The plaintiff requested the court to charge as follows: “(1) The plaintiff was not bound to turn her horse and vehicle across the car track and tracks if that portion of the street where the car tracks were located was not ordinarily and habitually traveled, and if, at the same time, the macadamized portion of the road was ordinarily and habitually traveled, and if, on this occasion, the plaintiff seasonably turned her horse and vehicle to the right of the center of the macadamized portion of the street, leaving ample room for the coachman to pass with his vehicle and horse on her left-hand side. (2) The traveled part of the highway means that part which is regularly and ordinarily used by travelers with carriages, vehicles, and horses.”

The judge refused so to charge, but after referring to the character of Broad street, 54 L. R. A.

and to the varying character of highways, and especially to highways in the country that were not traversable throughout their whole width, he charged as follows, to which the plaintiff objected, *viz.*: “The traveled part of Broad street for carriages is between the curbstones on the east and west; there is the traveled part of that road. It includes the macadamized part of it, and it includes the paved part of it, over into the center, and over to the curbstone of the other side. That is the traveled portion of said Broad street, and to the right of the traveled portion of that it was the duty of Mrs. Winter to turn her team seasonably. In regard to the traveled portion of the way, I have stated that that portion of the highway which was laid out between the curbstones was the traveled portion of that highway. No matter how frequently or how infrequently people traveled over the paved portion of it, that makes no difference. Where a cart goes it was the traveled way, and some point past the center was the traveled part, and so there was a portion that was traveled on the westerly side of the center of the road, if the testimony is not misunderstood by me.”

The sole question now before us is whether the charge, or the refusal to charge, as above set forth, in the circumstances of the case, affords sufficient ground to entitle the plaintiff to a new trial. R. I. Gen. Laws, chap. 74, § 1, provides as follows: “Every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or bridge, shall seasonably drive his carriage or vehicle to the right of the center of the traveled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption.” The plaintiff admits that she was driving on the left-hand side of the center, as measured from curb to curb, but claims that she was traveling on the right-hand side of the center of the macadamized portion of the road, and that the macadamized portion alone constituted the traveled part of the road, as used in the statute above set forth. In *Olark v. Com.* (decided in 1826) 4 Pick. 125, which was a criminal prosecution for a penalty under a statute requiring travelers in carriages who meet in a road to drive their carriages seasonably to the right of the middle of the traveled part of the road, the court said: “By the ‘traveled part’ of the road is intended that part which is usually wrought for traveling. A traveler is not obliged, because a track happens to have been made on one side of the part so wrought, to turn to the right of the center of this track. If he turns to the right of the center of the wrought part, so that there is room on the wrought part for the other traveler to pass, it is sufficient, and the penalty is not incurred.” In *Com. v. Allen* (decided in 1846) 11 Met. 403, 405, and which was a criminal prosecution for a penalty, the court, without anywhere referring to *Olark v. Com.* 4 Pick. 125, says: “So far as any question is raised, in the present case, as to the duty of persons trav-

eling, when they are about to meet, to drive to the right of the middle of the traveled part of the road,—in distinction from the wrought part of the road,—where the traveled way is of less width than the wrought way, the statute seems very plain and direct in its provisions, and prescribes, as the duty of the traveler, the turning to the right of the middle of the traveled path." In *Daniels v. Olegg* (decided in 1873) 28 Mich. 32, which was an action for damages caused by a collision on the highway, the supreme court of Michigan, in construing the statute of that state, held that the "traveled part of the road," referred to in the statute, meant that part which is wrought for traveling, and is not confined simply to the most traveled wheel track; and the court, through Christiancy, Ch. J., delivering the opinion, in referring to the Massachusetts cases, after citing *Clark v. Com.* 4 Pick. 125, with approval, uses this language (p. 44), *vis.*: "And though the supreme court of that state seem to have since, in 1846 (*Com. v. Allen*, 11 Met. 403), adopted the contrary interpretation now contended for by the plaintiff in error, we are not satisfied with the correctness of the decision, and think such an interpretation of the statute, as applied to common roads in this state, would be extremely pernicious, and contrary to the legislative intent." The law of the road is thus laid down in *Shearm. & Redf. Neg.* § 649: "It is a universal custom in America for travelers, vehicles, and animals under the charge of man to take the right hand of the road when meeting each other, if it is reasonably practicable to do so; and this rule is enforced by statutes in many states, so far as it relates to travelers in vehicles or on horseback. The statutes upon this subject generally prescribe that travelers shall pass to the right of the 'center of the road.' This means the center of the lawfully worked part of the road." And to the same effect see *Elliot, Roads & Streets*, § 830.

The case at bar well illustrates the reasonableness of the construction that the traveled part of the highway means the part worked and in order and condition for travel. Broad street, a main avenue leading from a large city to thickly-settled suburbs, with a driveway 40 feet in width from curb to curb, paved or macadamized, and usable throughout its whole width, is sought to be contracted to a passage 15 feet 4 inches wide on its extreme easterly or macadamized strip. As a Goddard buggy is 5 feet 5 inches wide, two such buggies, passing abreast, would take up 10 feet 10 inches, so that if the plaintiff's buggy was crowded as closely as possible to the paving on the west, and the defendant's buggy was scraping the curbstone on the east, there would remain between them but 4 feet 6 inches, or a yard and a half,—not a very liberal space to allow in the nighttime in passing a stranger the steadiness of whose horse, and the expertness of whose driving, are unknown; and yet there remained of said driveway over 24 feet on the plaintiff's right, taking her evidence as strictly cor-

rect, which was obstructed by no other team or car, and was available for her to use.

If it is objected that the car track was undesirable or unsafe to travel on, as compared with the macadamized portion of the street, the answer may be fitly given in the words of Sutherland, J., in *Earing v. Lansing*, 7 Wend. 185, 187, *vis.*: "It is not the center of the smooth or most traveled part of the road which is the driving-line, but the center of the worked part, although the whole of the smooth or most traveled path may be upon one side of that center, unless the situation of the road is such that it is impracticable or extremely difficult for the party to turn out. No such difficulty existed in this case. The road on the defendant's side was rough, from having been rutted and frozen, but not so much so as to present any serious obstacle to his riding or driving over it." In *Goldrick v. Union R. Co.* 20 R. I. 128, 37 Atl. 635, this court, through Matteson, Ch. J., delivering the opinion, said: "If it be conceded that the railroad company has a paramount right to use that portion of the street occupied by its track, since its cars are necessarily confined to its rails, and cannot turn to the right or left, the public, nevertheless, also have the right to use the street, including the portion occupied by the track; and it is incumbent on the railroad company, notwithstanding its paramount right, to exercise due care, in the operation of its cars, not to injure those who may be traveling on the street." We think that the weight of both reason and authority favors the construction that the traveled part of Broad street, at the time and place of the accident, was the whole width from curb to curb, and it is admitted that the plaintiff's buggy at the time in question was on the left of the center of said traveled part as thus construed. In *Angell v. Lewis*, 20 R. I. 391, 393, 39 Atl. 521, this court, through Tillinghast, J., delivering the opinion, says: "In thus taking the wrong side of the road, the defendant took the risk of the consequences which might arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injuries sustained by the latter while exercising ordinary care. In other words, one who violates the 'law of the road' by driving on the wrong side assumes the risk of such an experiment, and is required to use greater care than if he had kept on the right side of the road, and, if a collision takes place in such circumstances, the presumption is against the party who is on the wrong side. And this is especially true where the collision takes place in the dark. . . . In *Brooks v. Hart*, 14 N. H. 307, 311, the court says: 'It is legal negligence in anyone to occupy the half of the way appropriated by law to others having occasion to use it in traveling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause.'" The plaintiff showed no sufficient cause or excuse for being on the wrong side of the road at the time of the accident, and the injuries she complained

of were attributable mainly, if not wholly, to her own failure to exercise due care; hence, under the circumstances of this case, we find no error in the charge of the justice to which exception was taken.

New trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

Catharine KOLB, Admx., etc., of Gottlieb Kolb, Deceased,
v.

UNION RAILROAD COMPANY.

(.....R. I.....)

A woman suing to recover damages for the negligent killing of her husband, for the benefit of herself and her minor children by him, cannot be compelled to testify on cross-examination to the fact that she has given birth to an illegitimate child since his death, for the purpose of affecting her credibility as a witness.

(June 3, 1901.)

PETITION by plaintiff for new trial after judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of her intestate. *Granted.*

The facts are stated in the opinion.

Messrs. George R. Macleod and John W. Hogan, for plaintiff:

Treating the plaintiff purely as a witness in the case, and her misconduct as fornication, it was a misdemeanor which could be shown, for the purpose of affecting her credibility as a witness, only after conviction of the offense. No suggestion of such conviction was made or attempted.

Gen. Laws, chap. 244, § 40; *State v. McGuire*, 15 R. I. 23, 22 Atl. 1118; *State v. Conway*, 20 R. I. 270, 38 Atl. 656.

The character of a female witness for chastity can be impeached in only two instances, to wit: (1) In a criminal proceeding, where the witness is prosecutrix against a man for a sexual offense against her; and, (2) in a civil proceeding, to affect damages in a case where the amount of the damages depends upon the character or conduct of such female witness.

1 Thomp. Trials, § 525; 1 Greenl. Ev. §§ 372-375; 3 Greenl. Ev. § 214; McKelvey, Ev. §§ 112, 115; Rapalje, Witnesses, § 197.

Where the law permits the character of a witness for truth and veracity to be impeached, the impeaching evidence is strictly limited to the reputation of the witness for truth and veracity, and it has been uni-

formly held that evidence of particular acts upon that point is never permissible.

Evidence of bad character of a female witness is inadmissible.

Weathers v. Barksdale, 30 Ga. 888; *Gilchrist v. M'Kee*, 4 Watts, 380, 28 Am. Dec. 721; *Com. v. Moore*, 3 Pick. 194; *People v. Yslas*, 27 Cal. 630; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 435.

The admission of irrelevant testimony which would be likely to prejudice the jury against one of the parties to a suit, and may have injuriously affected him in the trial of the cause, is a sufficient ground for granting a new trial.

Graham v. Coupe, 9 R. I. 478; *King v. Colvin*, 11 R. I. 582.

Messrs. David S. Baker, Lewis A. Waterman, and Arthur M. Allen, for defendant:

Witness on cross-examination may be interrogated as to his past life for the purpose of discrediting him and impeaching his credibility.

People v. Webster, 139 N. Y. 73, 34 N. E. 730; *Stephen*, Digest of Ev. p. 185; *Real v. People*, 42 N. Y. 270; *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *Foster v. People*, 18 Mich. 266; 2 Elliott, Gen. Pr. § 656; *Hollingsworth v. State*, 53 Ark. 387, 14 S. W. 41; *State v. McCartney*, 17 Minn. 76, Gil. 54; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *State v. O'Brien*, 81 Iowa, 93, 46 N. W. 861; *State v. Bacon*, 13 Or. 143, 57 Am. Rep. 8, 9 Pac. 393; *Georgia v. Bond*, 114 Mich. 196, 72 N. W. 232; *Leslie v. Com.* 19 Ky. L. Rep. 1201, 42 S. W. 1095; *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; 8 Enc. Pl. & Pr. 117; *State v. Row*, 81 Iowa, 138, 46 N. W. 872; *Muller v. St. Louis Hospital Asso.* 73 Mo. 243, Affirming 5 Mo. App. 390; *People v. Arnold*, 40 Mich. 710; *Bernstein v. Singer*, 1 App. Div. 63, 36 N. Y. Supp. 1093; *Silvis v. Oltmann*, 53 Ill. App. 392; *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5; *People v. Rice*, 103 Mich. 350, 61 N. W. 540; *Territory v. DeGutman*, 8 N. M. 92, 42 Pac. 68; 3 Jones, Ev. § 841; *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482; 1 Thomp. Trials, § 458.

A witness may be cross-examined as to her chastity in order to impeach her credibility.

Shepard v. Parker, 36 N. Y. 517; *Prescott v. Ward*, 10 Allen, 203; *United States v. Wood*, 4 Dak. 455, 33 N. W. 59; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *Muller v. St. Louis Hospital Asso.* 5 Mo. App. 390, Affirmed in 73 Mo. 243; *Cundell v. Pratt*, 1 Moody & M. 108; *Territory v. DeGutman*, 8 N. M. 92, 42 Pac. 68; *People v. Harrison*, 93 Mich. 584, 53 N. W. 725; *People v. White*, 53 Mich. 537, 19 N. W. 174.

The protection against its abuse is twofold: First, in the privilege of the witness to refuse to answer, and, second, in the discretion of the judge. She did not claim her privilege; the judge did not think it necessary to interfere, but, in his discretion, deemed the question proper.

Shepard v. Parker, 36 N. Y. 517.

NOTE.—For other cases in this series as to questions on cross-examination to show bad character of witness, see *Muetze v. Tuteur* (Wis.) 9 L. R. A. 86; *State v. Pancoast* (N. D.) 85 L. R. A. 518; and *Zanone v. State* (Tenn.) 85 L. R. A. 556.

As to extent of and restrictions upon cross-examination generally, see *Hobart v. Young* (Vt.) 12 L. R. A. 693, and note.
54 L. R. A.

The presiding judge has a right, in his discretion, to rule out or admit questions on cross-examination relating to the character or past life of the witnesses.

3 Taylor, Ev. Chamberlayne's ed. 978; *Langley v. Wadsworth*, 99 N. Y. 61, 1 N. E. 106; *Hollingsworth v. State*, 53 Ark. 387, 14 S. W. 41; *Long v. Booe*, 106 Ala. 570, 17 So. 716; *Miller v. Smith*, 112 Mass. 470; *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Hathaway v. Crocker*, 7 Met. 266; *Com. v. Lyden*, 113 Mass. 452; *Muller v. St. Louis Hospital Asso.* 5 Mo. App. 401; *Amos v. State*, 96 Ala. 120, 11 So. 424; *Threadgood v. Litogot*, 22 Mich. 271; *State v. McCarty*, 17 Minn. 76, Gil. 54; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *State v. O'Brien*, 1 N. D. 30, 44 N. W. 861; *State v. Bacon*, 13 Or. 143, 57 Am. Rep. 8, 9 Pac. 393; *Georgia v. Bond*, 114 Mich. 196, 72 N. W. 232; *Leslie v. Com.* 19 Ky. L. Rep. 1201, 42 S. W. 1095; *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; *Prescott v. Ward*, 10 Allen, 203.

If the answer of the witness would tend to criminate her, she can claim her privilege and refuse to answer. This privilege, however, is personal to the witness, and must be claimed by her.

State v. McCarty, 17 Minn. 76, Gil. 54; *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; *Stephen, Digest of Ev.* p. 185; 1 Wharton, Ev. § 535; *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *Territory v. DeGutman*, 8 N. M. 92, 42 Pac. 68; *People v. Arnold*, 40 Mich. 710.

The court is not bound to notify the witness of her privilege.

1 Wharton, Ev. § 535; *Greenl. Ev.* § 451; *Roberts v. Allatt*, 1 Moody & M. 192; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122.

Tillinghast, J., delivered the opinion of the court:

One of the grounds relied on by the plaintiff in her petition for a new trial in this case is that the justice presiding at the jury trial thereof erred in the admission of certain testimony. The action was brought by the plaintiff, who is the widow of Gottlieb Kolb, for the benefit of herself and her three minor children by said Gottlieb living at the time of his decease, and all of whom were living when this action was begun, which was nearly two years after his decease. The declaration alleges that the action was brought for the benefit of the plaintiff administratrix, as widow of the deceased, and also for the benefit of John Kolb, George Kolb, and Julia Kolb, all surviving minor children of said Gottlieb Kolb, deceased, living at the time of his decease, and now still surviving. At the trial of the case the plaintiff was called as a witness for the purpose, among other things, of proving her marriage, her qualification as administratrix, and who, as beneficiaries in this action under the statute, were entitled to the damages, if any, which should be re-

covered for the death of her husband. Upon her examination in chief, she was asked about the members of her family at the date of her husband's death, January 3, 1894, and also at the date of the commencement of this action, December 30, 1895, which was nearly two years after his decease. The questions asked, in so far as they are pertinent to the present inquiry, were these:

Q. At the time of your husband's death, and at the time you began this suit, how many children had you by Gottlieb Kolb?

A. Three children.

Q. That are living?

A. Yes, sir.

Q. How many children did you have by Gottlieb Kolb?

A. Three.

Then follows testimony giving the names of these children as set forth in the declaration, and the age of each.

Q. Did you ever have any other children by Gottlieb Kolb?

A. No, sir.

In cross-examination, counsel for defendant was permitted against the objection of the plaintiff, and after some discussion as to the evident purpose of the inquiry, to ask the following question: "Q. You have more than three, haven't you?" The court ruled that it would be proper for the defendant to show what children the deceased left, and, as affecting the plaintiff's character for truth and veracity, to show that there had been improper conduct on her part since her husband's death. The ground of objection on the part of plaintiff was that the evidence was immaterial and irrelevant, and was specially obnoxious to the objection that it was an attempt to impeach the plaintiff's character for chastity without first showing a conviction of the offense involved in her misconduct notwithstanding the plaintiff's objection, however, she was compelled to admit that she gave birth to an illegitimate child October 20, 1895, more than twenty-one months after her husband's death. The admission of this evidence was duly excepted to by the plaintiff, and the question presented, therefore, is whether the court erred in admitting it. We think this question must be answered in the affirmative. Whether or not the plaintiff had given birth to a bastard child was entirely irrelevant to any issue involved in the case on trial. Nor do we understand it to be seriously contended by defendant that it was. But it is vigorously contended that it was competent for the defendant to prove the unchastity of the plaintiff for the purpose of affecting her credibility as a witness in the case.

The broad claim advanced by counsel for defendant in support of the ruling complained of is that a witness may be interrogated upon cross-examination in regard to any vicious or criminal act of his life, and may be compelled to answer unless he claims

his constitutional privilege. We think this position is clearly untenable, and that, while it finds support in some of the cases relied on by the defendant, the contrary view is overwhelmingly sustained by the authorities. We agree that specific acts of misconduct committed by a party to the suit may be shown in that class of cases where the act has some relation to, or some bearing upon, the issue involved in the case, and also that the general reputation of the party as to the particular trait of character involved may also be shown. Thus, in *Mitchell v. Work*, 13 R. I. 645, which was an action to recover damages laid at \$5,000, for an indecent assault, it was held that testimony showing the plaintiff to have been unchaste in her relations with men, and also testimony that her reputation for chastity was bad, were properly admitted. The plaintiff in that case was suing for something more than compensation for bodily injuries. Indeed, the gravamen of the assault consisted, according to her testimony, in the insult, the personal indignity, and in the mental suffering and sense of shame and wrong consequent upon it. It was therefore clearly pertinent for the defendant to show that she was a vulgar, licentious, and unchaste woman, and hence that the damages to which she would be entitled, if any, would be much less than if she had been upright and chaste in her character. But no such question is presented in the case at bar. Here the plaintiff is suing for damages sustained by the death of her husband through the alleged negligence of the defendant. And the fact that she has given birth to an illegitimate child since the death of her husband in no way whatever affects the question of damages involved in the case; nor, indeed, does it affect any other question involved therein. Nor can said fact be properly shown for the purpose of affecting the plaintiff's credibility for truth and veracity. The credit of a witness can be directly impeached only by showing that his general reputation for truth and veracity is bad. "Certainly it is a fixed and established rule in the law of evidence," as said by the court in *Holbrook v. Dow*, 12 Gray, 358, "that it is not competent, for the purpose of creating a distrust of his integrity, and of thus disparaging his testimony, to prove particular acts of alleged misbehavior and dishonesty in relation to matters foreign to all the questions which are involved in the trial. 'This point,' says Mr. Greenleaf, 'has heretofore been much the subject of discussion, but it must now be considered as settled and at rest.' 1 Greenl. Ev. § 461." In the latest edition of 1 Greenl. Ev. § 461a, the rule, as laid down by the present editor, relating to the impeachment of a witness, is stated as follows: "The fundamental trait desirable in a witness is the disposition to tell truth, and hence the trait of character that should naturally be shown in impeaching him is his bad character for veracity. But there has always been more or less support for the use of bad general character, i. e., the man as a whole, not specifically the trait

of veracity, as necessarily involving an impairment of veracity. This was the original English doctrine, but it was replaced in the early 1800's by the first-mentioned principle, with the exception that the witness was allowed to base his statement as to the other's veracity upon his knowledge of the other's general character. In this country, the better doctrine, that the trait of veracity only could be considered, was early introduced, and this is the rule in the great majority of jurisdictions."

In 29 Am. & Eng. Enc. Law, pp. 804-806, the rule as to the admissibility of particular acts of misconduct, and also as to particular traits of character, is well stated in the following language: "Whether the inquiry into the character of the witness be confined to his reputation for truth and veracity, or extend to his general moral character, the rule is uniform that evidence of specific crimes or of particular acts of misconduct on his part is not admissible for the purpose of impeaching his credit. The impeaching evidence must be confined to the general reputation of the witness. It is also a general rule that peculiar traits of character, aside from that of habitual lying, shall not be made the subject of inquiry for the purpose of impeaching a witness. Thus, a witness may not be impeached by evidence that he is in the habit of associating with lewd and unchaste women; neither is it permissible, as a rule, to impeach a female witness by attacking her reputation for chastity, even where it is proposed to prove that she is a common prostitute." The author adds, however, that "in a few cases . . . the wholesome restraints of this rule have been disregarded." The cases cited which are to this effect are from Missouri, Georgia, and Kentucky. The general doctrine above announced is sustained by Wharton, Ev. 3d ed. § 541; Rapalje, Witnesses, § 197; Thomp. Trials, §§ 524, 525; and is also in accord with the great majority of decisions throughout the country. As specially pertinent to the particular question here involved, we cite the cases of *Com. v. Churchhill*, 11 Met. 538, 45 Am. Dec. 229; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 437; *Gilchrist v. M'Kee*, 4 Watts, 380, 28 Am. Dec. 721; *State v. Carson*, 66 Me. 116; *Rudsill v. Slingerland*, 18 Minn. 380, Gil. 342; *Atwood v. Impson*, 20 N. J. Eq. 157; *Bucklin v. State*, 20 Ohio, 18; *Mustee v. Tuteur*, 77 Wis. 243, 9 L. R. A. 86, 46 N. W. 123; *Dimick v. Downs*, 82 Ill. 570; *Moore v. Moore*, 73 Tex. 382, 11 S. W. 396.

That a trial court may properly exercise a large discretion in permitting matters which are not strictly relevant to the issue involved in the trial to be brought out in the cross-examination of witnesses there can be no doubt. It is through cross-examination that the whole truth is generally brought out, and that the motives of the witness in testifying are made apparent. The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery

of truth. 1 Greenl. Ev. 16th ed. § 446. If the witness is biased or prejudiced in favor of the party calling him, that may be made to appear in cross-examination. If he has previously made statements contrary to those made upon the witness stand, this fact may be brought out in the same way. His relation to the case, if any; his interest in the result; his relationship to the parties or to either of them; how he came to be a witness; his intelligence; means of knowledge; his business; place of residence; the accuracy of his memory; and many other things, which need not be enumerated,—may be thus brought out for the purpose of enabling the jury to rightly estimate and weigh his testimony. But that the past life of a witness may be ransacked, and his misdeeds paraded before the jury, for the purpose of disgracing and degrading him in their eyes, is so obnoxious to our sense of what is justly due to a person on the witness stand that we cannot consent thereto. If unrestricted liberty were allowed in this respect, no witness, however modest or however venerable, could be sworn without being required, if it should please the opposing counsel, to submit to an investigation into his or her past history, however offensive and humiliating this might be, and notwithstanding the fact that the particular acts of misconduct which might thus be brought out were long ago atoned for and generally forgotten. Such inquisitions the great majority of the

courts refuse to permit, and we think rightly so refuse.

The previous rulings of this court, so far as we are aware, have always been in harmony with the position which we have thus taken. An examination of the numerous cases cited in the well-prepared briefs of the respective counsel in this case conclusively shows that the authorities are hopelessly divided on the question at issue, and hence it would serve no useful purpose to further discuss their relative merits. We therefore content ourselves by adopting that view which most strongly commends itself to our judgment, and which, as already said, is supported by the great preponderance of authority.

As the admission of the irrelevant and improper testimony referred to was of such a character as to be very likely to prejudice the jury against the plaintiff,—indeed, in view of the record in the case, it is not too much to say that it probably had this effect,—and as it is not clear from the evidence that the defendant was entitled to a verdict in any event, a new trial must be granted. *Graham v. Coupe*, 9 R. I. 478; *King v. Colvin*, 11 R. I. 582; *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9. We express no opinion as to the merits of the petition, in so far as it is based on the ground that the verdict is against the evidence.

Petition for new trial granted, and case remitted to the common pleas division.

WASHINGTON SUPREME COURT.

F. C. DOREMUS, *Respt.*,

v.

Samuel ROOT,

and

OREGON RAILROAD & NAVIGATION
COMPANY, *Appt.*

(23 Wash. 710.)

1. In an action against a railroad company and its conductor for an injury caused by the alleged negligence of the conductor a verdict in favor of the latter will preclude a judgment against the company.
2. The action of the trial court in construing a verdict silent as to one of two sued jointly for injuries caused by the al-

leged negligence of one acting as agent for the other, as a verdict in his favor, and rendering judgment to that effect, is, at most, error rendering the judgment voidable if properly attacked, but leaving it conclusive against collateral attack.

3. Appeal by defendant against whom judgment is rendered in an action against two for an injury caused by the alleged negligence of one acting as agent for the other, in which judgment is rendered against one and in favor of the other, will take up only that part of the judgment which affects appellant, and the appellate court will have no power over the other judgment on such appeal.

4. Judgment absolute must be entered upon appeal, in favor of the principal,

NOTE.—Judgment in favor of employee as bar to recovery against employer for employee's act or default.

- I. The general rule.
- II. Identity or privity as to parties.
- III. Identity of issues.
- IV. Effect of action beyond or without authority.
- V. The rule in the principal case.
- VI. Conclusion.

I. The general rule.

Where the relations between two parties are analogous to that of principal and agent, or principal and surety, or master and servant, the 54 L. R. A.

rule is, that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against the plaintiff's right of action against the other. *Featherston v. Newburgh & C. Turnp. Road*, 71 Hun, 109, 24 N. Y. Supp. 603; *Warfield v. Davis*, 14 B. Mon. 40; *Kansas City v. Mitchener*, 85 Mo. App. 86.

And where the relation of master and servant, or principal and agent, exists between parties, and an action is brought against the agent or servant, and it is the right or duty of the principal or master to appear when called upon and assume the defense of the agent or servant, grounded upon his implied obligation to save him harmless, and he actually does defend him, he has the same legal rights as though he had been

In an action against principal and agent for an injury caused by the alleged negligence of the agent, where judgment was entered in the trial court in favor of the agent and against the principal, and the principal alone appeals, since the judgment in favor of the agent precludes a recovery against the principal, and the appellate court has no power to revise such judgment.

(January 7, 1901.)

APPEAL by defendant transportation company from a judgment of the Superior Court for Whitman County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Cotton, Teal, & Minor, for appellant:

actually a party to the action, under the principles of *res judicata*, and a judgment in favor of the agent is conclusive against the same claim subsequently made in an action by or against the principal or master. *Castle v. Noyes*, 14 N. Y. 329; *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401.

The rule that a principal when his agent is sued in a transaction can set up a judgment in favor of the agent as a bar to an action against himself by the same plaintiff for the same cause of action is based upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to such opportunity. *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401.

A master or principal is liable for the wrongful act of his servant or agent because such act is his act through the instrumentality of the servant or agent. A determination, therefore, exonerating the servant or agent, and establishing that his act was not wrongful, or that it was excusable, is necessarily a like determination in favor of the master or principal; and, were the person claiming to have been injured permitted to proceed against the master or principal after such a determination in favor of the servant or agent, he would be given a second opportunity to establish a right of recovery for the same act.

A former judgment in favor of a servant or agent, however, to be a bar against a subsequent action against the master or principal for the same cause must have been a judgment upon the merits. This was held, in effect, in *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401.

Thus, a plea of a former judgment in favor of an agent as a bar to a subsequent action against the principal for the same cause is bad, where it appears that the former judgment was rendered upon a nonsuit of the plaintiff, and not upon the merits. *Ibid.*

And a nonsuit in an action against a deputy sheriff for default in attaching certain property under a writ of attachment is not a bar to a subsequent action by the same plaintiff for the same cause brought against the sheriff, as in such case the nonsuit would be no bar to a second action against the sheriff himself. *Clapp v. Thomas*, 5 Allen, 158.

In *Ferrers v. Arden*, Cro. Eliz. pt. 2, p. 668, however, the rule was stated that in personal actions a recovery upon demurrer, confession, or verdict is a bar to every other personal action for the same cause, and the party has no remedy but by error or attain; but the action was one of trespass for taking an ox, and it 54 L. R. A.

No joint cause of action existed against the railroad company and Root.

When a servant negligently does an injury, he is liable because of his own direct trespass. For the wrongful act of the servant, however, the master may or may not be liable. Before liability can arise in any case, it must be made to appear that the negligent act of the servant was within the scope of his authority.

Hart v. Maney, 12 Wash. 271, 40 Pac. 987; *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355.

Where the injured person is himself a servant of the same common master, then, before the master can be held liable it must not only appear that the act was within the scope of the wrongdoer's authority, but that such wrongdoer was a servant occupying the position of a vice-principal.

Sayward v. Carlson, 1 Wash. 29, 23 Pac.

appeared that the taking in that and in the former action were one and the same, and that the trover and conversion supposed in the latter action to be by the defendant only was committed by the other defendants with him, and that they had been omitted and not named in the latter action.

II. Identity or privity as to parties.

Two actions are between the same parties so as to be within the principle of *res judicata*, not only when the same persons are parties, but when they have appeared by their agents and representatives. *Gallagher v. Moundsville*, 34 W. Va. 730, 12 S. E. 859.

In the term "parties to an action," within the meaning of the law of *res judicata*, is included, not only the persons named and privies in law, but those persons whose rights have been legally represented by them. *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627.

And a judgment in favor of the owner of property abutting upon a highway, in an action brought by a person who suffered a personal injury upon such highway by coming in contact with an obstruction in front of such premises, rendered upon the ground of the contributory negligence of the plaintiff, is a bar to a subsequent action brought by the person injured against the turnpike company having charge of the highway, since, if the property owner was not liable because of the plaintiff's own negligence, then the turnpike company could not be, under the rule that a judgment in favor of one of two parties occupying the relation of principal and agent, principal and surety, or master and servant upon a ground equally applicable to both, should be accepted as conclusive against the plaintiff's right of action against the other. *Featherston v. Newburgh & C. Turnp. Road*, 71 Hun, 109, 24 N. Y. Supp. 608.

So, there is sufficient privity between a sheriff and his deputy to make a judgment in a suit against the deputy for a wrongful attachment rendered in favor of the deputy a bar to a subsequent action against the sheriff for wrongful seizure of the same goods. *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675.

And a judgment in an action for mandamus brought against a city treasurer to compel him to apply a sum of money in his hands as such to pay certain overdue coupons clipped from bonds issued by the city, determining that the coupons were illegal, and dismissing the mandamus proceeding, is a bar to a subsequent proceeding by mandamus brought directly against the city for the recovery of judgment on the

830; *Hughes v. Oregon Improv. Co.* 20 Wash. 294, 55 Pac. 121.

A cause of action against the servant, and one against the master because of his relation to the servant, are so different in their characteristics that such separate causes of action cannot be joined and apparently made the foundation of a joint single cause of action against both.

Bennett v. Fifield, 13 R. I. 139, 43 Am. Rep. 17; *Trowbridge v. Forepaugh*, 14 Minn. 133, Gil. 100; *Oogswell v. Murphy*, 46 Iowa, 44; *Detroit v. Chaffee*, 70 Mich. 80, 37 N. W. 882; *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745; *Page v. Parker*, 40 N. H. 47; *Mulchey v. Methodist Religious Soc.* 125 Mass. 489; *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; *Beuttel v. Chicago, M. & St. P. R. Co.* 26 Fed. 50; *Waras v. Cincinnati, N. O. & T. P. R. Co.* 72

Fed. 637; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 745; *Ferguson v. Chicago, M. & St. P. R. Co.* 63 Fed. 177; *Hartshorn v. Atchison, T. & S. F. R. Co.* 77 Fed. 9; *Doremus v. Root*, 94 Fed. 760.

The court erred in instructing that the jury might return a verdict against either of the defendants.

In view of the relation sustained by the railroad company to Root, it was entitled to have the entire issues found, including a finding against Root, so as to have recourse against him, had it so desired.

28 Am. & Eng. Enc. Law, pp. 281-292.

The verdict in this case cannot be made the basis of a judgment against the railroad company.

In order to support a judgment a special verdict must pass upon all of the material issues made by the pleadings.

same coupons, as the proceeding against the city treasurer was against him in his official capacity, and not as an individual. *Ransom v. Pierre*, 41 C. C. A. 585, 101 Fed. 665.

And a determination in an action by five taxpayers on behalf of themselves and of other taxpayers of the city for an injunction to restrain the issue and sale of municipal bonds on account of their invalidity, brought against the mayor and clerk of the city, authorized by an ordinance to sign, countersign, and sell such bonds and deliver them to commissioners authorized to receive and sell them, dissolving the injunction, is a bar to a subsequent action brought by two of the five taxpayers in behalf of themselves and of other taxpayers against the city and its marshal to restrain the collection of taxes to pay interest on such bonds, the invalidity of the bonds being alleged in each case, as the agents of the city represented it fully in the first case. *Gallaher v. Moundsville*, 34 W. Va. 730, 12 S. E. 859.

Likewise, a determination, in an action by a property owner against the civil engineer and marshal of a city for extending improvements so as to include a strip of his land, made in favor of the defendants therein, awarding them judgment for costs, is *res judicata* as to a subsequent suit brought by the property owner against the city and its civil engineer and marshal to enjoin the extension of such improvement so as to include such strip of land, as the city in both cases is the real party in interest, and the other defendants are its servants merely, acting under its authority, and the right and authority of the city to make the improvement was settled in the former suit, that adjudication being conclusive against the property owner, not only as to the city, but also as to such servants and agents. *Faust v. Baumgartner*, 113 Ind. 189, 15 N. E. 337.

So, in *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627, it was said that the technical rule, that a judgment can only be admitted between the parties to the record or their privies, expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others; but the case was one in which the previous judgment was in an action against the principal, and not against the agent.

And in *Hill v. Bain*, 15 R. I. 75, 23 Atl. 44, it was held that a town sued for damages by a person injured while driving on a highway by coming in collision with certain teams and carts placed in the road by third parties may set up, by way of estoppel, a verdict and judgment recovered by the third parties in an action brought against them by the same plaintiff for the same

injury, upon the ground that the town, though not a party to the former judgment, was so connected in interest with the parties to the former action that the judgment, when recovered therein, could be regarded as virtually recovered by the town for the purpose of estoppel; but the relationship between the persons placing the teams and carts in the road and the town does not appear in the case.

And *Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231, holds that a determination in an action that the plaintiff take nothing as against the defendant and for the recovery by the defendant of the costs of the action, is a bar to a subsequent action in which the same matters are brought in issue though the parties to the two actions are not identical, there having been two defendants in the first action, while the determination was in favor of but one, and though the former action counted on a joint obligation, while the latter action counted on a separate obligation of the party in whose favor the first judgment was obtained; but it does not appear that the party in whose favor the judgment was obtained was the agent of the other defendant.

So, in *State use of Hempstead v. Coste*, 36 Mo. 437, 38 Am. Dec. 148, in which a former judgment in favor of an administrator was set up as a bar to a subsequent action against his sureties upon the same subject-matter, it was said that it is not true that the term "parties," within the meaning of the rule which renders a prior judgment conclusive on those who sustain that character, is restricted to those who appear as parties on the record, but, on the contrary, includes all who have a direct interest in the subject-matter of the suit, or a right to make a defense or control the proceedings; and that it has been held that the relation of master and servant and principal and surety constitutes such privity as would enable one of the parties to avail himself of a judgment rendered in favor of or against the other party on the same question; but the court omitted to cite the cases in which it had been so held.

And substantially the same thing was said in *McKinsie v. Baltimore & O. R. Co.* 23 Md. 161; but the relationship between the defendants in the two actions would appear to have been that of bailor and bailee, and not of principal and agent.

And the same statement was made in *Bates v. Stanton*, 1 Duer, 79; but the action was one for the recovery of damages for the loss of goods, brought against the owners and master of a ship, in which a judgment in a prior action of trover was pleaded relating to the same goods, brought against persons to whom, as owners, the goods had been delivered by the defendants.

28 Am. & Eng. Enc. Law, p. 383.

A jury should determine each issue involved, and the whole of each issue.

28 Am. & Eng. Enc. Law, pp. 281-292.

Where a general verdict is silent, or fails to find upon any of the issues involved, such verdict, like a special verdict, is necessarily regarded as a finding against the party upon whom the burden rests of establishing the issue not found.

28 Am. & Eng. Enc. Law, p. 285.

If the action is one in which the defendants are jointly liable, but have a right of contribution among themselves, then silence as to one of them is such a defect as will render it necessary to set aside the verdict and also to vacate any judgment founded thereon.

Jenkins v. Parkhill, 25 Ind. 473; *Schweichhardt v. St. Louis*, 2 Mo. App. 571; *People*

ex rel. Ellison v. Marquette County Circuit Judge, 41 Mich. 222; *Bissell v. Cushman*, 5 Colo. 76; *Ward v. Stanley*, 41 Ill. App. 417.

Where the tort charged is a joint tort committed by all of the parties, so that no right of contribution exists, the silence of the verdict as to one of them is regarded as a verdict upon all of the issues in favor of the defendant not named.

Wilderman v. Sandusky, 15 Ill. 59; *Westfield Gas & Mill. Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399; *Missouri P. R. Co. v. Kingsbury* (Tex. Civ. App.) 25 S. W. 322; *Howard v. Johnson*, 91 Ga. 322, 18 S. E. 132.

The silence of the jury as to Root was a finding in his favor. The action of Root was proper. He was entitled to have the issues found either for him or against him.

28 Am. & Eng. Enc. Law, pp. 281, 292.

And in *Lyon v. Stanford*, 42 N. J. Eq. 411, 7 Atl. 869, in which a wife was held bound by a judgment at law against her husband, rendered in a suit instituted against her husband alone, with relation to property of which she was the owner, on the ground that she was a real, though not a nominal, party to the litigation, it was said that the defense made was in reality her defense, interposed with her consent by her agent, and substantially on her behalf; and that, if it had prevailed, she could have insisted with justice that it estopped the plaintiff from any further denial of her right in the premises which her husband had secured and maintained for her.

A defense in an action, however, that in an action brought by a third party against the plaintiffs they set up the same matter, and that the third party recovered judgment therein, is bad as not showing privity between the third party and the defendants, unless it is made to appear that there existed an identity of interest between them which would make the defense equally conclusive in their favor, the rule being that privies, within the meaning of the law with relation to estoppel, are such persons only as are represented by the parties, and who claim under them or in privity with them. *Godard v. Benson*, 15 Abb. Pr. 191.

And while a judgment in favor of an agent, in an action for trespass for removing the household goods of an occupant of premises, in which it was alleged that the agent, at the request of the owners and as their agent, removed the occupant and her goods from the premises, but not alleging that he was the agent, or that the removal was made by him as such agent, is an adjudication as to the trespass, it does not estop the principal from contesting the question of his agency in a suit brought against him. *Marks v. Sullivan*, 8 Utah, 406, 20 L. R. A. 590, 32 Pac. 668.

And the Missouri courts, in some of the cases at least, would seem to have adopted a more strict construction of the term "parties" in this connection.

Thus, a judgment in a proceeding by mandamus by a stockholder in a corporation against the vice president and transfer agent of the company, brought to enforce a stockholder's right of inspection of the books of the corporation, rendered in favor of such vice president and transfer agent, is not a bar against a subsequent proceeding by mandamus brought by the same stockholder against the corporation to compel the corporation to allow the relator to inspect its books, as the parties are not the same. *State ex rel. Wilson v. St. Louis & S. F. R. Co.* 29 Mo. App. 801.

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So, a proceeding by mandamus brought by an underground service company under city ordinances to compel a street commissioner to grant to it permission to make certain excavations in certain streets pursuant to charter rights of the company, determined against the company and in favor of the commissioner, is not a bar to a subsequent proceeding by mandamus brought by a subway company to compel the city and its board of public improvements to take action upon plans and specifications submitted by the relators for service and supply pipes connecting manholes in the subway constructed by virtue of such ordinances, and to grant a permit to do the work contemplated, though the ordinances were determined to be *ultra vires* in the former proceeding, as the parties to the two suits in question were not the same. *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 42 L. R. A. 113, 46 S. W. 981.

But see *supra*, *State use of Hempstead v. Coste*, 36 Mo. 437, 88 Am. Dec. 148.

III. Identity of issues.

The question on a plea of former adjudication in favor of an agent in an action against the principal by the same party for the same cause is whether the former suit against the agent was for precisely the same cause as the present suit, and the test is whether the issue actually determined in the former suit is identical with that upon which the complainant must recover in the latter suit if he is entitled to recover at all. *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401.

And where a previous judgment in an action against a principal or agent is set up as a bar to a subsequent action against the agent or principal, it is effectual for that purpose, if, upon a trial upon the merits, both suits might be determined upon the same testimony presented by the same parties or those by whom they were legally represented. *Emery v. Fowler*, 39 Mo. 326, 68 Am. Dec. 627.

And where one has such an interest in the matter involved in an action as to be entitled to share in the fruits of the judgment, and intrusts it to another for settlement by suit, he will be estopped to deny the matters adjudicated therein, as in such case the latter will be the agent of the former, with authority to prosecute the suit for his principal's benefit, and the principal will be bound by the judgment. *Conger v. Chilcote*, 42 Iowa, 18.

Thus, a judgment in favor of one who acted as the servant of a mortgagee, in seizing and appropriating a load of lumber, which was a

The verdict was against law because it was a verdict in favor of Root and also one against the railroad company. Such a verdict, being against law, must necessarily be set aside.

Pepperall v. City Park Transit Co. 15 Wash. 176, 45 Pac. 743, 46 Pac. 407.

Mr. M. O. Reed, for respondent:

To require a party injured to point out how much of the injury was done by one person and how much by another, or what share of responsibility is fairly attributable to each as between themselves, and to leave this to be apportioned among them by the jury, according to the mischief found to have been done by each, would in many cases be equivalent to a practical denial of justice.

While the law permits all the wrongdoers to be proceeded against jointly, it also

leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others. While the wrong is joint it is also, in contemplation of law, several.

Mechem, Agency, §§ 571, 572; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Kane v. Indianapolis*, 82 Fed. 770; *Pugh v. Chesapeake & O. R. Co.* 101 Ky. 77, 39 S. W. 695; *Cuddy v. Horn*, 46 Mich. 603, 41 Am. Rep. 173, 10 N. W. 34; *Colegrove v. New York & N. H. R. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418; *Barrett v. Third Ave. R. Co.* 45 N. Y. 628; *Flaherty v. Minneapolis & St. L. R. Co.* 39 Minn. 328, *sub nom. Flaherty v. Northern P. R. Co.* 1 L. R. A. 680, 40 N. W. 160; *Bunting v. Hogsett*, 139 Pa. 376, 12 L. R. A. 208, 21 Atl. 31, 33, 34; *Carterville v. Cook*, 129 Ill. 155, 4 L. R. A. 721,

part of the property covered by the mortgage, in which the validity of the mortgage was brought in issue, is conclusive against the title of the party from whom it was taken, who claimed it as purchaser under an execution against the mortgagor, in a subsequent action brought by the executors of the mortgagee, in which the mortgage was attacked as fraudulent as against creditors. *Castle v. Noyes*, 14 N. Y. 329.

And a judgment in favor of an officer who replevied goods sold, in an action in which the claim was that the sale was made with intent to defraud the creditors of the vendor, is a bar to an action on a note given by the purchaser of the vendors, the sole consideration for which was the pretended sale. *Bailey v. Foster*, 9 Pick. 189.

And a plaintiff in an action against a deputy sheriff for seizing certain oats under attachment claimed by the plaintiff under a mortgage in which a judgment was rendered in favor of the deputy sheriff cannot afterwards maintain an action against the sheriff for seizure of the goods in question, setting up another title on the theory that no other title was tried in the former action except the mortgage title, as the matter in issue in the former action was the title to the oats and the conversion thereof by defendant in that case, and the jury found that the plaintiff had no title, and that therefore the defendant could not convert them, which covers the issue in the subsequent action. *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675.

So, a determination in a proceeding by petition brought by a holder of matured coupons of township bonds against the county commissioners of the county who were the official agents of the township, for a mandamus requiring them to levy a tax for the payment of such coupons, determining the bonds to be invalid, is a bar to a subsequent action at law against the township on such coupons to recover payment thereof. *Gorham v. Broad River Twp.* 109 Fed. 772.

And a determination in two actions tried together, one brought against a board of supervisors to obtain a writ of certiorari to test the authority and power of the board to pass a certain resolution declaring a tax abated and directing the county treasurer not to collect it, and the other brought against the treasurer to obtain a writ of mandamus to compel the collection of the tax, that the tax was valid, and that there was no authority in the board of supervisors to abate it, is conclusive, in the absence of fraud or collusion, against a proceeding by petition of taxpayers in whose interest the defense in the former actions was made by their officers, brought against the treasurer of the county to enjoin the

collection of the tax on the ground that it was illegal and void, the issues being identical, since the former actions were brought to enforce the tax, collection of which was sought to be enjoined in the subsequent action, and it cannot be said that there was no privity between the taxpayers and the officers who were made defendants in the former action. *Lyman v. Faria*, 53 Iowa, 498, 5 N. W. 621.

Likewise, in *Glaze v. Citizens' Nat. Bank*, 116 Ind. 492, 18 N. E. 450, it was held that a determination, in an action by a husband against his wife for the recovery of moneys which were the proceeds of lands sold, and which came to the possession of the wife and were deposited by her and afterwards drawn after notice by the husband to the bank that the moneys belonged to him, rendered in favor of the wife, establishing title thereto, in her, after which she obtained a divorce, in effect determines that the husband had no title to the moneys, and is a bar to a subsequent action brought by him against the bank for the recovery thereof.

So, a mere difference in the mode of stating the same fraud in two actions brought therefor, in the former of which the agent recovered judgment and the principal was afterwards sued by the same plaintiff, or in stating the acts done in furtherance and execution of the same alleged fraudulent purpose or design, does not prevent the judgment in favor of the agent from being *res judicata*. *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401.

And a judgment in favor of an agent or servant of a mortgagee, in an action brought against the agent or servant for seizing property under the mortgage under directions of his principal, is not prevented from being conclusive against a title claimed by a third person derived from the mortgagor by purchase, so as to bar a claim in a second action that the mortgage was fraudulent and void as to creditors, by the fact that the bona fides of the mortgage was not passed upon or decided in the former case. *Castle v. Noyes*, 14 N. Y. 329.

Or by the fact that the subject-matter of the second action was different from that of the other. *Ibid.*

And the fact that the act of a servant or agent in seizing lumber on behalf of his principal constituted a trespass does not prevent a judgment in his favor, in an action brought by the party from whom it was taken against him for the seizure from being conclusive against the same claim of title in a subsequent action by or against the principal or master, where the agent acted in good faith and in obedience to the express direction of his principal, as in such case the law would imply a promise on the part

22 N. E. 14; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 702, 27 L. ed. 267, 1 Sup. Ct. Rep. 493; *Brown v. Coae Bros. & Co.* 75 Fed. 689; *Phelps v. Wait*, 30 N. Y. 78; *Harriman v. Stowe*, 57 Mo. 93; *Oreagh v. Equitable Life Assur. Soc.* 88 Fed. 1; Bliss, Code Pl. § 83a; *Doremus v. Root*, 94 Fed. 760.

The Oregon Railroad & Navigation Company at no time denied that Root was liable to this plaintiff, and the real purpose of the instructions asked was to produce an inconsistent verdict. If it wanted a judgment over against Root for contribution it could and would have had it but for its own requested instructions.

The jury might return a verdict against one defendant though they could not agree as to the others.

Lockwood v. Bartlett, 27 N. Y. S. R. 93, 7 N. Y. Supp. 481; *Ward v. Taylor*, 1 Pa. St.

of the principal to indemnify his agent, and the case would not fall within the rule prohibiting contribution between joint trespassers. *Ibid.*

But the general rule is, that a former judgment in favor of a servant or agent is conclusive in a subsequent action against the master or principal only upon a matter which was directly in issue upon the former trial. *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675.

And the matter in issue, within the meaning of the rule that a judgment is a bar to a subsequent action as to the matter in issue in the former trial, is the matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, and not the facts offered in evidence to establish the matter in issue, though they may be controverted on the trial. *Ibid.*

And where suit was brought against an agent, and the agent recovered judgment therein, and suit is subsequently brought by the same party against the principal, if there is any fact which must have been established in the former suit to authorize a verdict and judgment which the complainant is not obliged to prove to entitle him to a decree in the latter suit, or if the decree in the latter suit may pass upon proof of any of the allegations of the bill not necessarily determined against the complainant in the former suit, then the judgment in the former suit is no bar. *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401.

And a judgment rendered in favor of agents in an action brought against them for damages for fraud in procuring a contract in which, in order to make the facts a basis for recovery, the jury must have been satisfied by a fair preponderance of the evidence that the fraudulent acts alleged to have been done were done with an actual intent to defraud the complainant, is not a bar to a subsequent action brought by the complainant against the principal for a rescission of the contract, where such rescission might be had without proof of any such fraudulent intent. *Ibid.*

So, a judgment and verdict in favor of a servant or agent may be used as evidence between the same parties and their privies as a bar in another action against the master or principal for the same cause, and the matter may be pleaded, if there is any opportunity to plead it, and when thus pleaded it is conclusive; and where there is no opportunity to plead it, it may be given in evidence, and is equally conclusive of the matter which is established by it, and if from the general nature of the pleading the matter which has been before tried does not appear upon the face of the record, it may be shown by other evidence, and it may be shown 54 L. R. A.

238; *Kaufman v. People's Cold Storage & Warehouse Co.* 10 Misc. 53, 30 N. Y. Supp. 813.

If the meaning of the jury can be ascertained, and on the point in issue made out, the court will mold it into form and make it serve.

Miller v. Shackelford, 4 Dana, 271.

A verdict should be construed with extreme liberality, and, if possible, it should be allowed to stand.

Small v. Hicks, 81 Ga. 691, 8 S. E. 628; *Wilderman v. Sandusky*, 15 Ill. 59; *Missouri P. R. Co. v. Kingsbury* (Tex. Civ. App.) 25 S. W. 322.

No exception was taken either to the form or the substance of the verdict, either before or after it was returned into court by the appellant railroad company.

Unless an objection is taken to the form

by parol evidence, if necessary, upon what ground a verdict in a former judgment proceeded, in order to determine whether the same matter was in issue. *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675.

See also *Gallaher v. Moundsville*, 34 W. Va. 730, 12 S. E. 859; *Faust v. Baumgartner*, 113 Ind. 139, 15 N. E. 837, *supra*, II.

IV. Effect of action beyond or without authority.

The foregoing rules apply only where the servant or agent was authorized to act and bind his master or principal with reference to the matters complained of (estoppels being mutual). If the person procuring the judgment in the former action was not the servant or agent of the person sought to be proceeded against in the subsequent action, or if he acted in excess of his authority with reference to the subject-matter of the actions, there is no estoppel; and an agent or servant cannot estop his principal or master by procuring judgment in his own name without authority on claims of his principal or master, so as to prevent the principal or master from himself seeking a recovery thereon.

Thus, where notes of a deceased person are delivered by the holder to an agent with a limited agency for the purpose of collecting them, but no agency, real or apparent, to sell or dispose of them, and the agent procures the allowance of the claims against the estate of the deceased in his own name, and afterwards assigns them to a bank, the allowance of the claims by the county court does not constitute an adjudication in favor of the agent's ownership which will bar an action by the owner and holder of the notes against the bank for the procurement of a declaration of trust in favor of the owner in that portion of a judgment held by the bank thereon representing such notes. *Lederer v. Union Sav. Bank*, 52 Neb. 133, 71 N. W. 954.

And a judgment of a probate court allowing a demand of an agent and treasurer of a religious corporation against an insolvent partnership for moneys belonging to the religious corporation which had been deposited by him with the partnership without the knowledge of the president of the corporation, the claim for which was made in his own name, does not bind the religious corporation so as to prevent a proceeding by it in equity to charge the partnership estate with a lien for such moneys and interest thereon, under the allegation that they were the moneys of the religious corporation which had been converted by the partnership, where, in presenting the claim for allowance,

of a special verdict before the verdict is rendered and recorded, it will not be considered on appeal.

Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379.

Fullerton, J., delivered the opinion of the court:

This is an action brought by the respondent against the appellant, the Oregon Railroad & Navigation Company, and the defendant Samuel Root, to recover damages for a personal injury alleged to have been caused by the negligence of Root while acting as conductor on one of the appellant's freight trains. The respondent and the defendant Root were employees of the appellant, the one in the capacity of fireman and the other as conductor. On November 13, 1898, a freight train known as "Extra 149,"

drawn by the engine on which respondent was acting as fireman, left Starbuck, in Columbia county, and proceeded in the direction of Winona, in Whitman county, both places being in this state. At about the same time a freight train known as "Extra 151," on which Root was conductor, left Winona, and proceeded in the direction of Starbuck. The conductor and engineer on each train were notified, before leaving their respective stations, of the approach of the other train, and were instructed to meet and pass at a station known as "Canyon Siding," where there was a side track, by means of which trains running in opposite directions could pass each other with safety. The rules of the company, as shown by the evidence, required the train first reaching a station where opposing trains were ordered to meet to enter the side track, and

the treasurer acted without authority from the corporation, and the corporation at no time approved or in any way ratified his action. *Evangelical Synod of N. A. v. Schoeneich*, 143 Mo. 652, 45 S. W. 647.

So, a nonsuit in an action to recover the possession of a horse on the alleged ground that it had been taken and wrongfully detained from the plaintiff by the defendant, granted on the ground that the plaintiff was estopped from prosecuting the defendant for the recovery of the horse by a judgment before rendered in an action brought by the defendant against the sheriff who had taken the horse from him by virtue of an execution issued upon a judgment in favor of a third party against the plaintiff, is not proper, as the sheriff, who was defendant in the former action, was not in a legal sense the agent or trustee of the plaintiff in the latter case in regard to the property, but was the agent of the plaintiff's adversary, and there was no privity as master and servant or principal and agent between him and the plaintiff. *Yorks v. Steele*, 50 Barb. 397.

Likewise, in *Worley v. Heath*, 1 Mo. App. 378, it was held that a judgment in an action of trespass brought against an officer for seizing goods, rendered in favor of the officer, is not such an adjudication as will bar proceedings against the sureties on a bond given for the security of the person whose property was taken.

And in *Bailey v. Sundberg*, 1 C. C. A. 387, 1 U. S. App. 101, 49 Fed. 533, which was a libel in admiralty *in personam* for a collision, brought against the master of a steamship, in which a previous proceeding had been had against the owner, it was said that the master and owner were not in privity within the rule which binds privies as well as parties to the estoppel of a judgment; privity denoting mutual or successive relationship to the same rights of property.

And *Lockett v. Buckman*, 12 Ky. L. Rep. 242, 1 S. W. 391, holds that a judgment rendered in an action of trespass against two school trustees sued, not as trustees, but jointly with patrons of the school, is not *res judicata* against the school district so as to estop the district from asserting title to grounds upon which the schoolhouse was erected, or so as to divest the titles of the district to them under the rule of law that one acting in one right cannot be benefited or injured by a judgment for or against him when acting in some other right, but the former judgment was against, and not in favor of, the trustees.

V. The rule in the principal case.

The rule of the principal case would seem 54 L. R. A.

to be that where a verdict is rendered in an action against a principal and agent for an act of the agent against the principal, but saying nothing as to the agent, it is to be construed as a verdict in favor of the agent, and that such a determination in favor of the agent would amount to an adjudication which would preclude a judgment against the principal on the verdict against him. The only similar case found in which the relation of master and servant or principal and agent existed is *Schweickhardt v. St. Louis*, 2 Mo. App. 571, which supports the principal case, holding that a verdict finding the issues against the city and some of the other defendants, but saying nothing as to a contractor, should not be reversed, and a judgment rendered on such a verdict will be reversed.

Master and servant and principal and agent, however, are treated in actions against them for the wrongful act of the agent as joint tortfeasors, and rules laid down in actions against joint tortfeasors might therefore be deemed to be applicable on the question of the correctness of the rule of the principal case, though the joint tortfeasors were not principal and agent, or master and servant. Taking such cases into consideration, a conflict of authority appears, some of the cases taking the ground that a judgment may be entered in favor of the one party and against the other.

Thus, in *Williams v. McGrade*, 13 Minn. 46, Gil. 39, on the one hand, and in partial support of the rule of the principal case, the rule was laid down that in actions of tort, as trespass, etc., where the wrong is joint and several, and the plea of one of the defendants is such as shows that the plaintiff could have no cause of action against any of them if the plea be found against the plaintiff, it will operate to the benefit of all the defendants, and the plaintiff cannot have judgment for damages against those who let judgment go by default; but the action was one of replevin, and the acts constituting the wrongful taking were alleged to be levies upon property by one of the defendants as deputy sheriff under and by virtue of executions, and it was claimed that the deputy sheriff was the only defendant who had pleaded the judgment and executions and justified the taking under them, and that therefore he only could review the rulings of the court upon the questions arising in the case.

Upon the other hand, in *Brown v. Burrus*, 8 Mo. 26, the rule was laid down that if several persons are sued in trespass, and some are acquitted and others are found guilty, the latter may move for a new trial without being joined in such motion by the former, and the verdict

there wait until the opposing train passed. For some reason Conductor Root did not obey his orders, but permitted his train to run past Canyon Siding, and collide a short distance from that place with extra 149. The collision caused the injury to the respondent for which this action was brought. In his complaint the respondent alleges that Root, by virtue of his employment, had the charge and control of all trains on which he was employed as conductor, and of all persons employed on it, and is responsible for its movements while on the road; that as such conductor he had charge of the train hereinbefore mentioned known as extra 151, and negligently, carelessly, and recklessly permitted said train to run past Canyon Siding, well knowing that the same was liable to collide with the train on which the respondent was acting as fireman; that "by reason of the carelessness, negligence, and recklessness of the said Samuel Root, and through no fault of this plaintiff whatsoever," the injuries suffered by said plaintiff were received. While there is a general allegation in the complaint that the appel-

lant itself was negligent, the complaint as a whole negatives the idea that there was any negligence on the part of the appellant, or any of its officers or employees other than the negligence of the defendant Root. Issue was taken upon the allegations of the complaint by both the appellant and the defendant Root, each answering separately, denying the allegations of negligence. A trial of the cause was had on the issues as thus framed, and the following verdict was returned by the jury: "We, the jury sworn and impaneled to try the above-entitled cause, find for the plaintiff and against the defendant the Oregon Railroad & Navigation Company, and assess his damages at the sum of \$15,100 and the costs of this action." After the verdict was read, but before the jury were discharged, the attorney for defendant Root inquired of the court what construction the court would place upon the verdict with respect to the defendant Root, "and thereupon," to quote from the record, "the court ruled that said verdict was and should be considered as a verdict in favor of defendant Root." The verdict was then

may be set aside as to those found guilty without affecting the validity of the finding as to the others; but the action was one of trespass brought against several for seizing and taking away a slave, and there is nothing in the case to show the relation of the defendants to each other.

And in *Westfield Gas & Mill. Co. v. Abernathy*, 8 Ind. App. 73, 85 N. E. 399, which was an action for a personal injury alleged to have been caused by the negligent construction and excavation of an open ditch along a highway, in which a verdict was found against two corporations which were defendants, without making any finding as to other individual defendants, thus constituting a finding of not guilty as to them, upon which the court entered judgment against all the defendants, it was held, on appeal, that the court should have sustained a motion of the individual defendants to arrest the judgment, since, though the injury was the result of independent acts of negligence, the plaintiff was entitled to but one recovery for the single injury, and the damages were not divisible, and judgment was reversed as to the individual defendants and affirmed as to the two corporations, thus in effect holding that the verdict in favor of the individual defendants was not *res judicata* so as to prevent the entry of a judgment upon the verdict against the corporation defendants.

Attention is called, however, to the fact that in case of ordinary joint tortfeasors the act of one is not necessarily the act of the other, as in case of master and servant. The act of one joint tortfeasor might not have been wrongful while that of another was. But if the act of the servant is determined not to have been wrongful the same act, treated as the act of the master through the instrumentality of the servant, could not be so. See *infra*, VI.

VI. Conclusion.

The sole question in this note is as to the application of the general rule that a verdict and judgment in an action is conclusive as to the matters in issue as between the parties and their privies in any subsequent suit, to judgments rendered in favor of a servant or agent, in actions for the act of the servant or agent with

reference to subsequent actions for the same cause against the master or principal, and the general rule is that they are conclusive.

While servants and agents are not usually regarded as falling within the legal definition of privies, a previous determination in favor of a servant or agent is deemed conclusive upon a subsequent action against the master or principal as having been between the same parties, the term "parties" to an action within the meaning of the law of *res judicata* including, not only the persons named, but also persons whose rights have been legally represented by them. Some of the Missouri cases, however, seem to have adopted a somewhat more strict construction of the term "parties."

With reference to identity of the issues the matter in issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, and not the facts offered in evidence, to establish the issue, though controverted. And the question whether or not the issues in the two suits are the same depends upon whether both might be determined upon the same testimony presented by the same parties or those by whom they were legally represented. A mere difference in the method of statement, or in the subject-matter, or the mere fact that other issues were involved, is of no effect.

The prior determination, to be a bar, however, must have been one on the merits, and of course the agency must have existed and included the right to represent the principal. The rule of the principal case, that a failure to find as to a servant in an action against a master and servant for an act of the servant is equivalent to a verdict in favor of the servant and a bar to a judgment upon a verdict against the master therein, is opposed by several cases of joint tortfeasors holding that judgment may be rendered in favor of one and against another. But while master and servant are held to be joint tortfeasors in tort cases it is thought that the rule of severance could not apply, since the act for which the master is proceeded against is the act of the servant, and a determination that that act is one upon which liability cannot be predicated must necessarily apply and be conclusive as to the master as well as to the servant.

F. H. B.

recorded, and the jury discharged. Afterwards, and on June 19, 1899, a judgment was entered in favor of Root and against the plaintiff for the amount of Root's costs. Within the statutory time after the return of the verdict the appellant moved for a new trial and in arrest of judgment, which motion being overruled, it moved for judgment in its favor on the whole record, which was also overruled, and on July 23, 1900, judgment was entered against it for the amount of the verdict. This appeal is from the last-mentioned judgment.

The general rule undoubtedly is that, where one has received an actionable injury at the hands of two or more persons acting in concert, or acting independently of each other, if their acts unite in causing a single injury, all of the wrongdoers, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and he may enforce the liability in an action against them all jointly, or in any one of them severally, or against any number of them less than the whole. While the wrong committed is the joint wrong of the several parties participating therein, it is also, in contemplation of law, the several wrong of each of the participants. Cooley, Torts, 2d ed. p. 153. On this principle, at common law, a jury in actions *ex delicto* against several persons, contrary to the rule in actions *ex contractu*, were permitted to find against one or more of the defendants and in favor of the others. The rule with regard to actions *ex delicto* remains the same under the Code; and the practice now permits the jury in an action for tort against several defendants to return a verdict against so many of them as the proofs show are guilty of the wrong charged and in favor of the others. As it is the peculiar province of the jury to determine the guilt or innocence of the several defendants, a verdict finding in favor of some and against others, even though there may be no very apparent reason for the distinction made, is not for that reason alone so far arbitrary or inconsistent as to require a reversal of the judgment entered thereon against those who have been found guilty. *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744. It seems to be equally well settled, also, that silence of the verdict as to one of the defendants will not vitiate it as against the others. Such a verdict is treated as a finding in favor of the defendant not named on all of the issues, on which he is entitled to a judgment that plaintiff take nothing by his action. *Howard v. Johnson*, 91 Ga. 319, 18 S. E. 132; *Kinkler v. Junica*, 84 Tex. 120, 19 S. W. 359; *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744; *Jones v. Grinnet*, 4 W. Va. 104; *Westfield Gas & Mill. Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399. These general rules are relied on by the respondent to sustain the judgments entered in the court below. It must be borne in mind, however, that there are wide distinctions between the ordinary action for injuries, where all of the defendants participated in the wrongful act which

caused the injury, and actions like the one before us, where one is liable because he committed the act and the other by operation of law, both with respect to the relations of the defendants to each other and to the injured person. Joint tortfeasors are liable to the injured person (other than that he may have but one satisfaction) as if the act causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of action are in no sense joint tortfeasors, nor does their liability to the plaintiff rest on the same or like grounds. The act of an employee, even in legal intentment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employee not directed or ratified by the employer the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of *respondent superior*,—the rule of law which holds the master responsible for the negligent act of his servant committed while the servant is acting within the general scope of his employment, and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employee, and when the employer is compelled to answer in damages therefor he can recover over against the employee. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987; note to *Carterville v. Cook* (Ill.) 16 Am. St. Rep. 248; *Shearm. & Redf. Neg. 5th ed. § 242*; 2 Van Fleet, Former Adjudication, p. 1162. So, where the employer is sued separately for the wrong, he can bind the employee in any judgment that may be obtained against him by notifying the employee to come in and defend the action. This rule is well stated in *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759, in the following language: "But when a person is responsible over to another, either by operation of law or by express contract, . . . and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, . . . will be conclusive against him, whether he has appeared or not." See also *Strong v. Phoenix Ins. Co.* 62 Mo. 289, 21 Am. Rep. 417; *Boston v. Worthington*, 10 Gray, 486. So, also, in such an action, whether brought against the employer severally or jointly with the employee, the gravamen of the charge is, and must be, the negligence of the employee; and no recovery can be had unless it be proved, and found by the jury, that the employee was negligent. Stated in another

way; if the employee who causes the injury is free from liability therefor, his employer must also be free from liability. This was held in *New Orleans & N. E. R. Co. v. Jones*, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109. In that case the plaintiff below was a passenger on the train of the defendant, and while such passenger was shot by the conductor of the train, and seriously injured. The trial court ruled that the plaintiff was entitled to recover compensatory damages from the company, even though it was made to appear that the conductor had reasonable cause to believe that an assault with a knife was about to be made on him by the plaintiff, and that it was necessary to shoot the plaintiff in order to protect himself from great bodily harm; holding that such belief on the part of the conductor would not relieve the company if the facts were that the plaintiff had no design to injure the conductor, and was not intentionally acting so as to indicate such design. This was held error by the Supreme Court. In the course of the opinion it was said: "It would seem, on general principles, that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity. . . . If the immediate actor is free from responsibility because his act was lawful, can his employer—one taking no direct part in the transaction—be held responsible? Suppose we eliminate the employee, and assume a case in which the carrier has no servants, and himself does the work of carriage. Should he assault and wound a passenger in the manner suggested by the instruction, it is undeniable that, if sued as an individual, he would be held free from responsibility, and the act adjudged lawful. Can it be that, if sued as a carrier for the same act, a different rule obtains, and he be held liable? Has he broken his contract of carriage by an act which is lawful in itself, and which, as an individual, he was justified in doing? The question carries its own answer; and it may be generally affirmed that, if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor." See also Wharton, Neg. § 157. So, too, from the principle that there can be no liability on the part of an employer for the act of his employee in which he took no part, if the employer is free from liability, it follows that a judgment in favor of the employee in an action brought against him for an injury caused by such an act is a bar to a recovery against the employer in an action brought against him for the same cause of action. And it has been held that an employer can avail himself of a judgment in favor of his employee, when subsequently sued, without calling on the party primarily liable to come in and plead the judgment for him. In the case of *Emma Silver Min. Co. v. Emma Silver Min. Co.* 7 Fed. 401, the rule was announced as follows: "The weight of authority, however, is that where

an agent in a transaction is sued after the termination of his agency, and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against his former agent, or made responsible for the agent's bad pleading or blunders in the trial of the cause because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both." In *Dill v. Bain*, 15 R. I. 75, 23 Atl. 44, the action was for personal injuries received by plaintiff while driving on a highway, caused by coming into collision with an obstruction left in the highway by two persons named Budlong. The defendant pleaded in bar of the action a judgment in favor of the Budlongs, rendered on the verdict of a jury in an action brought by the plaintiff against them for the injury complained of, alleging that the Budlongs were the authors of the obstruction or defect. On demurrer this was held a good plea by way of estoppel. The court, after citing and reviewing a number of cases, said: "We think, on the authority of these cases, it is competent for the defendant town to set up, by way of estoppel in the case at bar, the judgment recovered by the Budlongs. Certainly, if the town had notified the Budlongs of the pendency of this action, and the Budlongs had, in consequence of the notice, assumed the defense, it would be competent for them, on the authority of these cases, to plead the former judgment in bar; for they would then be the real defendants, though defending in the name of the town, and ought not to be required to try over a question which they have already tried, with the result of a final judgment against the plaintiff in their favor. But the Budlongs, if they assumed the defense, would have to make it in the name of the town, and we see no good reason why the town should not be permitted to make, without calling upon them, any defense which they could make, if called upon, in the name of the town." In *Featherston v. Newburgh & C. Turnp. Road*, 71 Hun, 109, 24 N. Y. Supp. 603, the facts were similar to the case last cited. There it was said: "The statement in the answer shows that Shafer was the wrongdoer, and that his act was the cause of the injury sustained by the plaintiff. So it seems to follow that, if Shafer was not liable for creating and maintaining the obstruction, the de-

defendant cannot be liable for the failure to remove them. If Shafer was not liable because the plaintiff's own negligence produced the injuries of which she complains, the defendant is not liable for the same reason. Shafer and the defendant were not joint wrongdoers, and the rule that one wrongdoer cannot recover against or compel contribution by another does not apply. The relation between Shafer and the defendant was analogous to that of principal and agent, or principal and surety, or master and servant; and the rule in such cases is that a judgment in favor of the principal or the surety upon a ground equally applicable to both should be accepted as conclusive against the plaintiff's right of action. *Herman, Estoppel*, 169; *Castle v. Noyes*, 14 N. Y. 329. . . . Under this rule of law the turnpike company would be entitled to recover from Shafer any amount the plaintiff might recover against it. Such right would rest upon the principles of subrogation. The turnpike company would be entitled to be subrogated to plaintiff's right of action against Shafer, but the judgment on the merits in Shafer's favor in the plaintiff's suit against him relieves him of all liability to the plaintiff, or any person claiming under her, for the same cause of action. The plaintiff, therefore, by being barred by the judgment in Shafer's favor, is equally barred from any action against the company under the rule that whatever discharges the principal discharges the surety. As she had no cause of action against Shafer, she can have no cause of action against the defendant, and therefore the portion of the answer to which the demurrer relates does set up, in our judgment, a valid defense to the action, and the order appealed from should be reversed." In *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675, it was held that a judgment in favor of a deputy sheriff is conclusive evidence for the sheriff in a subsequent action, where both actions are for the seizure of the same goods. In *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627, it was held that a judgment in favor of a master in an action against him for the act of his servant, rendered in a trial of the action on the merits, is a bar to an action against the servant for the same act. In that case the court said: "To permit a person to commence an action against the principal, and to prove the acts alleged to be trespasses to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others. A familiar example is presented in suits against a sheriff or his deputy, which being determined upon

the merits against or in favor of one will be conclusive upon the other." See also *Atkinson v. White*, 60 Me. 396; *Spencer v. Dearth*, 43 Vt. 98; *Glass v. Citizens' Nat. Bank*, 116 Ind. 492, 18 N. E. 450; *Williams v. McGrade*, 13 Minn. 46; Gil. 39; *Lower Alloways Creek v. Moore*, 15 N. J. L. 146; *Chicago & R. I. R. Co. v. Hutchins*, 34 Ill. 108, 111; 2 Van Fleet, *Former Adjudications*, § 572.

From these considerations it is clear that the trial court erred in entering judgment against the appellant after it had entered judgment in favor of the defendant Root. It becomes important, therefore, to inquire what disposition shall be made of the case by this court. Were the judgment against Root void, or were it before us for review on this appeal, or on a separate appeal by the present respondent, we would have no hesitancy in reversing both judgments, and remanding the cause for a retrial on the whole of the issues. But the judgment in favor of Root is not void. True, the verdict of the jury was silent as to him, and it may be that the rule that silence of the verdict as to one of the defendants is a finding in favor of that defendant is not strictly applicable to this class of cases; yet the action of the trial court in construing the verdict as one in his favor, and entering judgment thereon, was at most error merely, rendering the judgment voidable, and subject to be vacated or reversed if seasonably attacked by some one or more of the methods pointed out by the Code for vacating or reversing erroneous judgments. Inasmuch, however, as it was not so attacked, so far from being void, it stands as a conclusive bar to a recovery against Root, not only in the present action, but also in any action brought against him for the same cause of action. As against a collateral attack it is as conclusive as a judgment would be entered upon a verdict finding directly or in terms in his favor. Nor is the judgment before us for review. This is true no matter what view we may take of the judgments entered by the trial court; that is, whether we consider them as separate judgments, or, taken together, as constituting but one judgment. Under the statutes of this state a party aggrieved may appeal from a part only of a judgment entered against him in an action not triable *de novo* in this court (*Ballinger's Anno. Codes & Statutes*, §§ 6500, 6503, 6521); hence, if the judgments are in law but one judgment, this appeal brings before us only that part of it which affects the appellant. We can, therefore, neither reverse nor ignore the judgment in favor of Root, and are powerless to order a retrial of the issues as between him and the respondent. This being so, there can be no retrial of the issues between the respondent and the appellant. We are aware that the principles of the cases above cited, in so far as they permitted the party secondarily liable to plead directly in estoppel a judgment in favor of his principal on the same cause of action, have been criticised as controverting the rule that estoppels, to be binding,

must be mutual. See, particularly, Mr. Freeman's note to *Hill v. Bain* (R. I.) 2 Am. St. Rep. 873, 876. But, if we were to accept this criticism as just, it can have no application to a case presenting the conditions shown by the record before us. Here the judgment constituting the bar to a recovery was entered in the action then being tried by the court. Certainly there is no rule of law which requires that such a judgment should either be pleaded or proved in order to make it available to all of the defendants against whom or in favor of whom it operates. The contrary view would imply that the court could not judicially notice its orders and judgments entered in the very cause before it.

We have not overlooked the contention made by the respondent to the effect that

the appellant cannot avail itself of the judgment in favor of Root because it did not except to the construction put by the court upon the verdict of the jury. This was not, however, a duty which devolved on the appellant. It was the respondent who was adversely affected by that construction, and, inasmuch as he consented thereto, he must abide by all the consequences which such construction entails.

We conclude, therefore, that *the judgment appealed from must be reversed*, and the cause remanded, with instructions to enter a judgment for the appellant in accordance with the prayer of its answer; and it is so ordered.

Dunbar, Ch. J., and Anders and Beavis, JJ., concur.

SOUTH CAROLINA SUPREME COURT.

Re Estate of James M. MAYO, Deceased.

Ex parte NORTHEASTERN RAILROAD COMPANY, *App't.*

(.....S. C.....)

1. A railroad company against which a right of action exists for negligently killing a person is not entitled to be made a party to proceedings for the appointment of an administrator for his estate.
2. A railroad company against which a cause of action exists for negligently killing a person can attack the appointment of an administrator upon his estate for nonresidence or want of assets only in case want of jurisdiction appears on the record, under a statute forbidding the contesting of jurisdiction assumed by the probate court, so far as it depends on place of residence or location of the estate, except by appeal, or when the want of jurisdiction appears on the record, since it is not entitled to be made a party to the proceedings so as to have a right to appeal.
3. A cause of action against a railroad company for negligently killing a person, which under the statutes is not the old one belonging to decedent, but a new one created for the benefit of the persons named, and is enforceable only by his administrator, will give jurisdiction to the probate court of the county where the killing occurred and where the railroad company had its residence, to grant letters of administration on the estate, although the deceased was not a resident of the state, and owned no other estate within its limits at the time of his death, and the statutes provide, in case of a nonresident, for administration only in the county where the greater part of his estate may be.
4. A new action for the benefit of persons named, and not a continuation of that belonging to decedent, is created by Rev. Stat. 1893, §§ 2315, 2316, 2818,

which provide that, in case of death by wrongful act which, had death not ensued, would have entitled the injured party to maintain an action, the person causing the death shall be liable to an action, notwithstanding the death, for the benefit of the next of kin and heirs at law, to the extent of their injury, to be brought by the executor or administrator, in case the injured person has not recovered judgment before death.

5. Nonresidents are within the protection of Rev. Stat. §§ 2315, 2316, creating a right of action for wrongful death to be enforced by the administrator, so as to justify the appointment of an administrator to enforce the liability, without requiring a resort for such appointment to the state of decedent's residence,—especially where there is no statutory permission for a suit by an administrator appointed there.

(McIver, Ch. J., dissents.)

(April 18, 1901.)

A PPEAL by petitioner from a judgment of the Common Pleas Circuit Court for Florence County denying its petition to revoke letters of administration which had been granted upon the estate of James M. Mayo, deceased. *Affirmed.*

The petition by which the revocation was sought was as follows:

"The Northeastern Railroad Company, petitioner herein, respectfully shows to this court: (1) That your petitioner is a railroad corporation duly organized under the laws of the state of South Carolina, carrying on the business of a common carrier on its line of road in this state. (2) That heretofore, on the 24th day of November, 1897, J. W. McCown filed his petition in this court in the above-entitled proceeding, praying that letters of administration be granted him by this court upon the estate of James M. Mayo, deceased, a copy of which petition is hereto annexed as a part hereof. (3) That on the 10th day of December, 1897, by final order or judgment of this court, letters of administration were granted

NOTE.—As to right of action for death as assets which will give jurisdiction to appoint an administrator, see, in this series, Missouri P. R. Co. v. Lewis (Neb.) 2 L. R. A. 67, and cases in note to Manning v. Leighton (Vt.) 24 L. R. A. 684.

54 L. R. A.

in the above-entitled proceeding to the said J. W. McCown, as administrator upon the estate of the said James M. Mayo, styled and recited in said judgment as 'late of Florence county,' and the said J. W. McCown on the said 16th day of December, 1897, took the usual oath prescribed for administrators, as will appear by a copy of the said judgment and oath hereto annexed as a part hereof. Said judgment so rendered, and said letters so issued, were granted upon the said *ex parte* application of the said J. W. McCown. (4) That the said James M. Mayo, at the time of his death, on the 12th day of June, 1897, was not a resident or inhabitant of this state, nor a citizen thereof, but at the time of his death, and long prior thereto, was a resident, an inhabitant, and a citizen of the state of Florida, with his residence in the city of Ocala, county of Marion, in said state of Florida. (5) That the said James M. Mayo died intestate, leaving no estate or property of any description, real or personal, within the limits of the state of South Carolina, or within the jurisdiction of this court, either at the time of his death, or at the time of the grant of said letters of administration, or since. (6) That it is alleged in the said petition of the said J. W. McCown that the said James M. Mayo died intestate, leaving his widow and children named in said petition residents of the state of Florida, and that he left no property within the jurisdiction of this court. (7) That the said J. W. McCown, so styling himself as administrator of the estate of said James M. Mayo, on or about the 27th day of December, 1897, commenced an action as such against your petitioner for the sum of \$25,000 damages in the court of common pleas for the county of Florence for the alleged negligent killing of said James M. Mayo by your petitioner in the city of Florence on the 12th day of June, 1897, in which action it is alleged by the said J. W. McCown that the said James M. Mayo 'was a stranger in the city of Florence.' Your petitioner has appeared and answered the complaint in said action, and your petitioner alleges that the death of the said James M. Mayo was not caused by the negligence of your petitioner, as alleged in the complaint of said action. By an order in said cause, made on the 8th of February, 1899, the place of trial of said action was changed from the county of Florence to the county of Williamsburg in this state, and said cause is now pending in said court. (8) Your petitioner was not a party to the proceedings herein culminating in the grant of said administration to the said J. W. McCown, and had no notice thereof, but said order was made and said letters were granted solely upon the *ex parte* application of the said J. W. McCown, unsupported by any evidence showing or tending to show that the said James M. Mayo was either a resident or an inhabitant of the county of Florence, or had any property or estate therein to be administered upon or within the jurisdiction of this court. (9) Your petitioner is interested in said final order made herein appointing the said J. W. McCown administrator

of the estate of the said James M. Mayo, and is and will be injured thereby. The said final order and said letters of administration so made and granted are illegal, null, and void, and this court was without jurisdiction to issue the same. Under the authority of the said illegal appointment the said J. W. McCown has already put your petitioner to great inconvenience, costs, and expense by the institution of the said vexatious suit for damages. Said J. W. McCown has and can have no power or authority to commence or prosecute the said action for damages, which said action can only be brought by the party and in the manner prescribed in § 2316 of the Revised Statutes (1893) of South Carolina. Even if said unliquidated claim for damages was a valid claim,—which it is not,—such claim is not an asset of the estate of the said James M. Mayo. Wherefore your petitioner prays that the said final order appointing the said J. W. McCown administrator be vacated and set aside, and the said letters of administration issued to him be revoked and canceled."

Mr. W. Huger Fitzsimons, for appellant:

There was error in holding that a probate court of this state can appoint an administrator to sue for an alleged wrongful killing of a resident of another state without property here.

The right of action given by Lord Campbell's act does not constitute a part of the estate of decedent.

Our probate courts have no jurisdiction or control over the estate of a nonresident, unless a part of the estate is in this state.

Reed v. Northeastern R. Co. 37 S. C. 53, 16 S. E. 289; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

The damages recovered are no part of the estate of the deceased, and cannot pass by his will or be reached by his creditors.

Martin v. Baltimore & O. R. Co. 151 U. S. 673, *sub nom. Gerling v. Baltimore & O. R. Co.* 38 L. ed. 311, 14 Sup. Ct. Rep. 533; 11 Am. & Eng. Enc. Law, 2d ed. p. 834; 8 Am. & Eng. Enc. Law, 2d ed. p. 859; *Berry v. St. Joseph & W. R. Co.* 29 Kan. 420; *Hubbard v. Chicago & N. W. R. Co.* 104 Wis. 160, 80 N. W. 454; *Bradley v. Missouri P. R. Co.* 51 Neb. 653, 71 N. W. 282.

The right of action not being part of the estate of the nonresident decedent, and there being no property of said decedent within the state, the probate court was without jurisdiction to grant the letters.

Administration is defined to be the management, by appointment of a court, of an intestate's estate.

Bouvier, Law Dict.; *Jacob, Law Dict.*; *Croswell, Exrs.* 30.

The existence of assets is a basis of administration in the case of nonresident decedents.

11 Am. & Eng. Enc. Law, 2d ed. p. 762, note.

Mayo's administrator in Florida could bring an action here under our statute, even if Mayo left no property.

Memphis & O. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. 527; *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283.

Administration implies death and goods to be administered.

11 Am. & Eng. Enc. Law, 2d ed. p. 741.

The right of action is not a part of the assets of the deceased person, but is the property of "living persons," consequently the cases elsewhere which hold such rights of action alone sufficient to support administration hold, in effect, that a probate court may base administration upon the assets of a living person, which, under *Moore v. Smith*, 11 Rich. L. 569, 73 Am. Dec. 122, cannot be done.

There is respectable authority for the position that nonresidents without property are not protected by Lord Campbell's act.

Dani v. Pennsylvania R. Co. 181 Pa. 525, 37 Atl. 558; *Brannigan v. Union Gold Min. Co.* 93 Fed. 164.

The administrator to sue in a case like that before the court is the nonresident administrator,—the administrator of the domicile,—for he is the only administrator who can sue.

Dial v. Gary, 14 S. C. 579, 37 Am. Rep. 737; *Heywood v. Williams*, 57 S. C. 241, 35 S. E. 503; *Purple v. Whitted*, 49 Vt. 187; *Wilkins v. Ellett*, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641; *Wilson v. Keels*, 54 S. C. 545, 32 S. E. 702; *Tyer v. Charleston Rice Milling Co.* 32 S. C. 598, 10 S. E. 1067; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Memphis & O. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527; *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48; *Union R. & Transit Co. v. Shacklet*, 119 Ill. 232, 10 N. E. 896; *McCarty v. New York, L. E. & W. R. Co.* 62 Fed. 437; 8 Am. & Eng. Enc. Law, 2d ed. pp. 903, 904.

Appellant is vitally interested in the validity of this administration. It was not a party to the proceedings culminating in the void administration, cannot attack the same collaterally in the damage suit, and has pursued the proper method to revoke this illegal administration.

Hankinson v. Charlotte, C. & A. R. Co. 41 S. C. 17, 19 S. E. 206; *Hendrix v. Holden*, 58 S. C. 495, 36 S. E. 1010; *Hartley v. Glover*, 56 S. C. 69, 33 S. E. 796; *Moore v. Smith*, 11 Rich. L. 569, 73 Am. Dec. 122; *Bradley v. Missouri P. R. Co.* 51 Neb. 553, 71 N. W. 282.

The invalidity of these letters could not be collaterally attacked in the damage suit, because, though void, the defect does not affirmatively appear on the face of the record.

Hankinson v. Charlotte, C. & A. R. Co. 41 S. C. 17, 19 S. E. 206; *Hendrix v. Holden*, 58 S. C. 495, 36 S. E. 1010; *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603; 12 Enc. Pl. & Pr. 196 et seq.

Section 64 of the Code, and the following cases, lay down the rule that the proper method to attack the validity of the grant of administration is by motion in the case:

Ex parte White, 38 S. C. 41, 16 S. E. 286; *Ex parte Crafts*, 28 S. C. 281, 5 S. E. 718; 54 L. R. A.

Gardner v. Chatham, 37 S. C. 73, 16 S. E. 368; *Drake v. Steadman*, 46 S. C. 490, 24 S. E. 458; *Crooker v. Allen*, 34 S. C. 452, 13 S. E. 650; *Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722; *Parr v. Lindler*, 40 S. C. 193, 18 S. E. 636; *Sanders v. Price*, 56 S. C. 1, 33 S. E. 731.

Messrs. Wilcox & Wilcox, also for appellant:

The appointment of an administrator of a deceased by a judge of probate in this state, without the existence of one of the two jurisdictional prerequisites, either residence or property, is void if the jurisdictional defects appear on the face of the record, and voidable if they do not appear.

Code, § 39.

It cannot be argued, because an administrator is authorized to bring a suit for a widow and children, that he acquires any such title in the proceeds as to give them the character of assets.

Reed v. Northeastern R. Co. 37 S. C. 55, 16 S. E. 289.

Every case holding that a foreign administrator cannot seek the jurisdiction of another state is based on the reasoning, not that he is a foreigner and an alien, but that, in addition to his being so, he is attempting to meddle with assets of an estate within the jurisdiction of a state foreign to his appointment, which must look after its own creditors in the administration of assets. In a suit under Lord Campbell's act, by a foreign administrator, no such situation exists, and this reason exists in every case which holds that a foreign administrator cannot sue.

Reynolds v. Torrance, 2 Brev. 59.

An administrator of Mayo in the state of Florida, properly appointed, could sue, in this state, for the death of Mayo, under Lord Campbell's act.

Brown v. Louisville & N. R. Co. 97 Ky. 228, 30 S. W. 639; *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420; *Jeffersonville R. Co. v. Scayne*, 26 Ind. 477; *Blakely v. Frazier*, 20 S. C. 155.

Messrs. C. A. Woods, S. W. G. Shipp, George Galletly, and R. A. Burford, for respondent:

A foreign administrator cannot sue in this state.

Dial v. Tappan, 20 S. C. 167; *Dial v. Gary*, 14 S. C. 573, 37 Am. Rep. 737; *Hamilton v. Levy*, 41 S. C. 374, 19 S. E. 610; *Pollock v. Carolina Interstate Bldg. & L. Asso.* 48 S. C. 74, 25 S. E. 977; *Patterson v. Pagan*, 18 S. C. 584; *Dixon v. Ramsay*, 3 Cranch, 319, 2 L. ed. 453.

A nonresident cannot obtain letters of administration in this state.

Burkheim v. Pinkhusohn, 58 S. C. 469, 36 S. E. 908.

A death claim is sufficient assets to confer jurisdiction on the courts of states where the death occurs and the defendant resides, without reference to the place of residence of the deceased.

Merkle v. Bennington Twp. 68 Mich. 146, 35 N. W. 846; *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 729, 54 Am. Rep.

39, 23 N. W. 143; *Pinney v. McGregory*, 102 Mass. 186; *Goltra v. People use of Goltra*, 53 Ill. 226; *Griswold v. Griswold*, 111 Ala. 572, 20 So. 437; *Lang v. Houston, W. Street & P. Ferry R. Co.* 75 Hun, 151, 27 N. Y. Supp. 90; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 495; *Dennick v. Central R. Co.* 103 U. S. 21, 26 L. ed. 443; *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283; *Brown v. Louisville & N. R. Co.* 97 Ky. 228, 30 S. W. 639; *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 46 N. W. 79; *Findlay v. Chicago & G. T. R. Co.* 106 Mich. 700, 64 N. W. 732; *Woerner, Am. Law of Administration*, § 205, pp. 440, 441.

The probate court is not an inferior court, and it has exclusive jurisdiction in matters of administration.

Petigru v. Ferguson, 6 Rich. Eq. 380; *Ex parte White*, 38 S. C. 45, 16 S. E. 286; *State ex rel. Burnett v. Burnside*, 33 S. C. 276, 11 S. E. 787; *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 18, 19 S. E. 206.

When the administration is absolutely void, a defendant in a case like this will be allowed to move to have it so declared; but where it is merely voidable the petition will not be entertained, because payment to an administrator under an appointment valid on its face will protect the defendant from further demand.

Woerner, Am. Law of Administration, § 272; *Holmes v. Oregon & O. R. Co.* 7 Sawy. 380, 5 Fed. 523; *Blakely v. Frazier*, 20 S. C. 154.

James, J., delivered the opinion of the court:

This is an appeal from the judgment of the circuit court affirming the judgment of the probate court of Florence county, which refused to revoke letters of administration granted to J. W. McCown as administrator of James M. Mayo, deceased. James M. Mayo died intestate in Florence county, South Carolina, on the 12th day of June, 1897. Letters of administration on the estate of Mayo were granted to McCown by the probate court of Florence county on the 16th day of December, 1897. The administrator commenced an action against the Northeastern Railroad Company on the 27th day of December, 1897, under the statute commonly referred to as "Lord Campbell's Act" for damages for the alleged wrongful killing of said intestate by the said company in Florence county. The said railroad company answered, denying the alleged negligence, and subsequently the cause, on motion, was transferred to Williamsburg county for trial. Then on the 29th day of January, 1900, the railroad company made this application for revocation of the grant of administration on the ground that the probate court was without jurisdiction in that said Mayo was a resident of Florida at the time of his death, and owned no estate in South Carolina for administration. The probate court, refusing the revoke, held: (1) That the order granting administration was valid on its face, since it recited the jurisdiction of facts contested, and that the rail-

road company had no such interests as would support its attack upon the judgment of the probate court; and (2) that upon the facts stated in the petition of the railroad company, viz., that Mayo was not a resident of this state, but was killed by a railroad train at Florence, South Carolina, while passing through this state, and that he left no assets in this state to be administrated other than the right of suit given to the administrator by §§ 2315 and 2316 of the Revised Statutes, the probate court of Florence county had jurisdiction to issue letters of administration, as such right of action was a sufficient property to authorize the appointment of an administrator. The circuit court on appeal held that the railroad company had the right to move for revocation of the administration, but affirmed the judgment of the probate court on the second ground. We are now to consider these questions.

1. We notice as first in logical order whether the Northeastern Railroad Company had the right in these proceedings to attack the grant of administration by the probate court. In this matter we agree with the view taken by the probate court. The probate court is a court of record, and has jurisdiction of the grant of letters of administration. Section 49 of the Code of Procedure expressly enacts as follows: "The jurisdiction assumed by any probate court in any case so far as it depends on the place of residence, or the location of the estate, shall not be contested in any suit or proceeding whatever, except in an appeal from the probate court in the original case or when the want of jurisdiction appears on the record." It is also provided in § 57 of the Code of Procedure that "any person interested in any final order, sentence, or decree of any probate court, and considering himself injured thereby, may appeal therefrom to the circuit court . . . within fifteen days after notice of the decision appealed from." The usual citation to kindred and creditors was given in the proceedings to appoint the administrator, and the Northeastern Railroad Company, by the service of the complaint alleging the order of appointment, received actual notice of the order eleven days after it was granted, but, as it does not appear that the said company was made a party to said proceedings, we will not hold that it was compelled to appeal therefrom, or be bound thereby for failure to appeal. *Witte Bros. v. Clarke*, 17 S. C. 323. The railroad company, however, was not entitled to be made a party to such proceedings. It was neither next of kin, distributee, nor creditor of Mayo, the intestate, and therefore does not fall within the class of those interested in the grant of administration. Its relation to the administration was only as a defendant in a suit for damages by the administrator, and its only interest is to defeat the action. Every debtor to an intestate's estate would have a similar interest to defeat administration, but we are not aware that a debtor was ever heard in a probate court in opposition to

proceedings for administration of his creditor's estate. By analogy the position of the Northeastern Railroad Company is no better in this regard than it would be if it were a debtor to the estate of Mayo. *Re Hardy*, 35 Minn. 193, 28 N. W. 219; *Record v. Howard*, 58 Me. 225; *Cummings v. Hodgdon*, 147 Mass. 21, 16 N. E. 734. The effect, therefore, of § 49 of the Code, *supra*, is to exempt the judgment of the probate court in so far as jurisdiction depends on residence of the intestate or the location of assets from any attack by the Northeastern Railroad Company, except for want of jurisdiction appearing on the record. Such want of jurisdiction does not appear on the record. The petition for administration alleged that Mayo departed this life intestate on the 12th day of June, 1897, in the county and city of Florence, South Carolina, and did not allege that he was a resident of any other state. The petition also alleged that Mayo left no personal property within the jurisdiction of the probate court of Florence county, but did not allege whether he left any other estate either in Florence county, or elsewhere in the state, except the right of action for negligent killing of the intestate, which the petition alleged survived for the benefit of his widow and children named, and could only be prosecuted by the administrator. The order granting administration recites, "Whereas, James M. Mayo, late of Florence county, deceased, died intestate, having whilst he lived and at the time of his death divers goods, rights, and credits within the state aforesaid," etc. It could not, therefore, be said that want of jurisdiction appears on the face of the record for leaving out of consideration whether there was any estate for administration, and leaving out of consideration whether the right of action under the statute is a survival one, or whether such right of action alone would constitute a sufficient asset or property to warrant administration in this state. Still the finding that James M. Mayo was a resident of Florence county, in this state, at the time of his death, would authorize administration. Rev. Stat. §§ 2001, 2023. The statutes, relating to the grant of letters of administration are as follows: "In case any person die intestate, the judge of probate of the county where the intestate resided, or he having no residence within the state in the county where the greater part of his estate may be, shall grant letters of administration of the goods, chattels, rights and credits of such person deceased to his or her relatives in the following order," etc. Rev. Stat. 1893, §§ 2001 and 2023 combined. "The granting of administration of the estate of any deceased person shall belong to the judge of probate of the county where such person was last an inhabitant; but if such person was not an inhabitant of this state the same shall belong to the judge of probate in any county in which the greater part of his or her estate may be." Code, § 39. It thus appears that residence in Florence county alone appearing on the face of the record was sufficient, under § 49, *supra*.

to justify dismissal of appellant's petition for revocation. This particular question is not to be regarded as affected by the following recital in the decree of the circuit court: "The fact is, Mayo was at the time of his death a resident of the state of Florida, and that was admitted by counsel for the administration, as well as by the pleadings." This was a misapprehension by the circuit court. The pleadings by the administrator resisting the application for revocation of his letters distinctly declare, "Not admitting any of the allegations of the petition [for revocation] upon which the said order is based which do not appear on the face of the record of the said proceedings in the court resulting in the judgment appointing him such administrator, and reserving the right to answer the same," and then proceeds to state four grounds why the petition should be dismissed upon the record in the probate court. Then as a fifth ground for dismissal the administrator alleged that, "even if all the allegations of the petition be taken as true, it appears on the face thereof that respondent's intestate left sufficient property within the jurisdiction of this court to confer jurisdiction to grant said letters," etc. It is only with respect to this last ground, which is in the nature of a demurrer to the petition, that it can with justice be said that the administrator admits that Mayo was not a resident of the state. Both before the probate court and the circuit court the counsel for the administrator contended that on the face of the record in the probate court in the proceedings for appointment of the administrator no want of jurisdiction appeared, and that the Northeastern Railroad Company had not such interest as warranted its attack upon such judgment, and the question was independent of the next question discussed, and to be determined by the record in the original proceedings.

2. On the other question we agree with the circuit court that, the right of action under the statute being enforceable only by the administrator of the intestate, was warrant for the grant of administration by the probate court of Florence county, where the intestate was killed, and where the railroad company charged with the negligent killing had its residence, even though the intestate was not a resident of this state, and owned no estate for ordinary administration in this state at the time of his death. In so holding we agree also with the circuit court and the contention of appellant that the act in question is not a revival of the old cause of action which belonged to the intestate, but creates a new cause of action for the benefit of the person named. This last point is only incidentally involved in the appeal, since the circuit court so holds, and no appeal is from that ruling; but, as the appellant relies on this proposition as the major premise of the argument for reversal, we notice it. The language of the statute is as follows:

"Sec. 2315. Whenever the death of a person shall be caused by the wrongful act, neg-

lect, or default of another, and the act, neglect, or default is such as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, although the death shall have been caused under circumstances as make the killing in law a felony.

"Sec. 2316. Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused; and if there be none such then for the benefit of the heirs at law or distributees of the person whose death shall have been so caused as may be dependent on him for a support, and shall be brought by, or in the name of, the executor or administrator of such person, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.

"Sec. 2317. All such actions must be brought within two years from the death of such person, and the executor or administrator plaintiff in the action shall be liable to costs in case there be a verdict for the defendant or nonsuit, or discontinuance out of the goods, chattels, and lands of the testator or intestate if any, and if none then out of the proper goods and chattels of such executor or administrator.

"Sec. 2318. The provisions of the three last preceding sections shall not apply to any case where the person injured has for such injury brought action which has proceeded to trial and final judgment before his or her death."

In the case of *Price v. Richmond & D. R. Co.* 33 S. C. 556, 12 S. E. 413, the court held it competent for the defendant, in order to defeat the action by the administrator, to introduce in evidence a release for the injury, executed by the intestate in his lifetime, on the ground that whatever would have barred the intestate of recovery had he lived and brought action would bar his administrator; and on page 562, 33 S. C., and page 414, 12 S. E., the court used this language: "If the purpose was to create a new and independent cause of action, it is a little singular that the legislature should expressly provide as it has done in § 2186 [§ 2318, *supra*] for the defeat of one cause of action accruing to one person by the enforcement of another cause of action which had accrued to another person;" but the court did not deem it necessary to decide "whether the statute gives a new cause of action, or simply continues the original cause of action accruing to the party injured, which would otherwise terminate

with his life, enlarging its scope so as to embrace compensation for the injury resulting from the death." In the case of *Reed v. Northeastern R. Co.* 37 S. C. 42, 16 S. E. 289, the court held that the administrator could maintain action under the statute notwithstanding the death of the intestate was instantaneous. The circuit court had ruled to the contrary on the ground that under the statute the right of action was not a new action, but a revival of such action as the intestate had, and, inasmuch as the intestate's death was instantaneous, he had, while living, no cause of action. Still the court did not expressly decide whether the right of action was a new cause of action or a revival of the right of action had by the intestate, although the following language by Mr. Justice Pope at page 53, 37 S. C., and page 291, 16 S. E., would seem to imply that the court thought the action was a new one: "That the act requires the personal representative (administrator or executor) to sue, need not trouble us. The legislature could as well impose that duty on the sheriff or coroner. The proceeds recovered are not for creditors or the family generally, or for the legatees, but are strictly confined to certain members of the family of the deceased." In the case of *Lilly v. Charlotte, C. & A. R. Co.* 32 S. C. 142, 10 S. E. 932, the court held it essential to a cause of action under this statute to allege that the intestate left surviving him a wife, or children, or parents, or that the action was for their benefit; and that to allow an amendment alleging such facts would entirely change the nature of the action alleged in the complaint. And in the case of *Nohrden v. Northeastern R. Co.* 59 S. C. 107, 37 S. E. 228, the court held that, in estimating damages under this statute, the jury could consider the wounded feelings of the beneficiaries named resulting from the death of the person killed by the wrongful act of another.

This review of decided cases shows that the trend of decisions in this state is towards the view that the right of action under the statute is a new one, and not a mere revival. This view, we think, is the correct one. It is true that under the statute the right of action in the administrator depends upon whether the deceased, if he had lived, would have had a right to recover. *Price v. Richmond & D. R. Co.* 33 S. C. 556, 12 S. E. 413, and *Reed v. Northeastern R. Co.* 37 S. C. 42, 16 S. E. 289. This, however, is the statutory condition upon which the right of recovery in the new created action is based, and does not indicate that the old cause of action is revived or carried forward into the new. The absence of any words showing expressly or by necessary implication an intention to make the action a survival one indicates a contrary intent; for, in the absence of such words, the rule of the common law that actions *ex delicto* die with the death of the injured person operates. In the next place, the damages recoverable are for only such injury as results from the death to the parties for whose benefit the action is brought,

whereas, if it were intended as a survival action, the recovery would very likely have been confined to damages for the loss and suffering of the person directly injured. The object, scope, and measure of damages in the new statutory action are wholly different from the action as it would stand under the common-law action revived. The appellant concedes that, if the action merely survived the intestate, the cause of action would be a sufficient asset to warrant administration, but the contention is that, the action not being a mere revival of the original action, but a wholly new action, such right of action in the administration for the benefit of the statutory beneficiaries is not an asset or property of the intestate upon which administration could be granted. It is doubtless true, as a general proposition, that the existence of assets of the intestate in this state is essential to give the probate court jurisdiction to grant administration on the estate of a nonresident, and it is also true that the usual meaning attached to the word "assets" is any property applicable to the payment of debts. But, in view of the statute under consideration, a broader signification ought to be given to the term "assets," so as to include any right of action which cannot be enforced except by the administrator, and which is made distributable by the administrator under statutory directions. This statute creates a right which cannot be enforced except by grant of administration somewhere. It is argued that administration should be granted in the state where the deceased was domiciled,—Florida in this case. But it does not appear in the record before us what are the statutes of Florida governing such a case, and there is no presumption that the statutes of Florida are like ours in this matter. For all we know to the contrary, it may not be possible in Florida to secure an administration upon such a claim. And, in case administration could be obtained in Florida, the appointment there would not authorize a suit by the administrator in this state in the absence of a statute of this state permitting it, and there is none. *Dial v. Gary*, 14 S. C. 573, 37 Am. Rep. 737, and other cases that might be cited. We do not think the statute in question was intended to be dependent upon the statutes of any other state for its full execution, but is sufficient in itself to carry out its object. To hold that a foreign administration was proper or necessary in this case, when such administration need not be enforced in this state, would be to hold the statute inapplicable to nonresidents, especially to nonresidents owning no property in this state; whereas we think the statute is in terms broad enough to cover any person, resident or nonresident, with or without property in this state. To give such right of action to propertyless residents, and to deny its propertyless nonresidents would be a distinction which we think was not contemplated by the legislature, if, indeed, such a discrimination would be lawful. The statute is remedial, and should be liberally construed so as to accomplish its object. We therefore

hold that the statute creating a right of action which cannot be enforced except by an administrator, and providing for a special distribution by said administrator of the proceeds, will warrant the probate court of the county where the intestate was killed in granting administration for the purpose of enforcing such right of action. This view is well supported by authority in other jurisdictions. *Hutchins v. St. Paul, M. & M. E. Co.* 44 Minn. 5, 46 N. W. 79; *Findlay v. Chicago & G. T. R. Co.* 106 Mich. 700, 64 N. W. 733; *Woerner, Am. Law of Administration*, § 205. In the case of *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 289, the court was unanimous in holding that under the authority of *Missouri P. R. Co. v. Lewis*, 24 Neb. 848, 2 L. R. A. 67, 40 N. W. 401, such a cause of action is sufficient to warrant the granting of letters of administration, although the proceeds of the action are not to be distributed according to the usual course; but a majority of the court further held that the appointment should have been made in the domicile of the deceased nonresident, since by statute in Nebraska an administrator duly appointed in any other state could prosecute an action in Nebraska in his capacity as administrator, it being conceded by the majority holding this last view that, if the law did not permit a suit by a nonresident or foreign administrator, such a state of affairs would fix the situs of the claim in such manner that administration must be granted where the claim could be reached. This we understand to be the holding of the Nebraska court in the case cited, which contains an interesting discussion of both sides of the question before us. So far as we have ascertained, there are only two cases to the contrary of the view we have announced: *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420; and *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477, cited by the appellant. Since the argument we have been referred by appellant to the case of *Marvin v. Maysville Street, R. & Transfer Co.* 49 Fed. 436, as supporting his contention, but the case was reversed by the circuit court of appeals of the sixth circuit (8 C. C. A. 21, 16 U. S. App. 236, 59 Fed. 91), which court held that the Kentucky statute "giving the 'personal representative' a right of action for the wrongful death of his decedent will not be construed to confer such right upon a foreign administrator, contrary to the common-law rule and the established policy of the state." See also on this point, *Louisville & N. R. Co. v. Brantley*, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 291, and note on page 300. It must be said, however, that in Kentucky the proceeds of such action are assets for creditors, and according to appellant's view in such case the right of action is an asset warranting administration. For this reason we did not cite the case of *Brown v. Louisville & N. R. Co.* 97 Ky. 228, 30 S. W. 639, and cases from other states where the right of action is held to be a survival of the original action.

The judgment of the Circuit Court is affirmed.

McIver, Ch. J., dissenting:

While I concur fully with Mr. Justice Jones in some of the views which he presents, I cannot agree with him in the conclusion which he reaches. The fundamental inquiry is whether the probate court for Florence county had any jurisdiction to grant letters of administration upon the personal estate of James M. Mayo, deceased, to J. W. McCown. The present Constitution, in § 19 of article 5, provides (passing by the county of Charleston, for which special provisions are made) that in all other counties of the state jurisdiction in all matters testamentary and of administration shall be vested as the general assembly may provide; and the provision made by the general assembly, as may be found by reference to §§ 2023 and 2001 (Rev. Stat. 1893), is that, in case any person shall die intestate, the judge of probate of the county where the intestate resided, or, if he had no place of residence in the state, then of the county where the greater part of the estate of such intestate may be, "shall grant administration of the goods, chattels, rights, and credits of such deceased person," and the statute proceeds to indicate the persons to whom such grant shall be committed, as to which no question is raised. This is the only provision, so far as I am informed, which has been made by the general assembly vesting jurisdiction in any court or in any person to grant administration on the estate of an intestate. And under the express terms of this provision it cannot be disputed that the only person invested with jurisdiction to make such grant is the judge of probate of the county where the deceased resided, or, if he had no place of residence in this state, then the judge of probate of the county where the greater part of his (the intestate's) estate may be. The practical result would be that, unless the intestate, Mayo, resided in the county of Florence, or had an estate in that county, the judge of probate of such county would have no jurisdiction to grant letters of administration to McCown, as he undertook to do. So that the next inquiry in logical order would be whether it has been made to appear, either that Mayo was a resident of Florence county, or that he left an estate therein.

It is contended, however, by the counsel for respondent that the appellant is shut off from any general inquiry as to those two facts, and that we are confined by §§ 49 and 57 of the Code to the inquiry whether it appears on the record (meaning the record in the probate court granting the letters of administration to McCown) that there was a want of jurisdiction. So far as § 57 of the Code is concerned, it is very clear, from the decision of this court in *Witte Bros. v. Clarke*, 17 S. C. 313, that it does not shut off inquiry, and it seems to me that upon the same principle upon which that decision was rested we should hold that § 49 cannot have the effect claimed for it. The principle upon which that decision was rested is that, as no person who is not a party to a proceeding is bound by any judgment rendered

therein, such person could not appeal from such judgment, for, if he undertook to do so, the appellate tribunal could very well say to him, "You have no standing in this court, as your legal rights have not been affected by the judgment which you are seeking to reverse." For this reason it was there held that the language used in § 57 must be regarded as referring only to persons who were parties to the proceeding. I see no good reason why the same may not be said in reference to the language used in § 49, for it manifestly presupposes that there was a right of appeal. Again, it is contended by counsel for respondent that the present case is a proceeding *in rem*, and not a proceeding *in personam*, as was the case in *Witte Bros. v. Clarke*, 17 S. C. 313; and hence that decision does not apply here. I suppose that there could be no proceeding *in rem* unless there was a *res*; and the *res* in a case like this would, as I understand it, be the estate of the intestate; and, if there is no estate of the intestate within the jurisdiction of the court, as I shall hereafter undertake to show, then there would be no *res*, and consequently no proceeding *in rem*. But, even assuming, for the sake of argument, that we are confined to the inquiry whether the want of jurisdiction appears on the record, it seems to me that the record of the proceeding in the court of probate, fairly and properly construed, does show on its face a lack of jurisdiction. That record does not consist only of the letters of administration, from which certain stereotyped words, which are sometimes used merely as *descriptio personae*, have been extracted for the purpose of showing that Mayo was a resident of Florence county at the time of his death,—a statement that everyone knew was not true. Those words, I must suppose, were in the printed form used for letters of administration, and were inadvertently allowed to remain there; for I cannot suppose that such a high-minded and honorable man as the judge of probate for the county of Florence is known to be would intentionally make a misstatement of a fact. It will be noted that the judge of probate, in making his decree in this case, makes no allusion to the recital in the letters of administration that the deceased, Mayo, was "late of Florence county," but undertakes to vindicate his jurisdiction to grant such letters by the fact that upon the death of Mayo, by virtue of the statute, a right of action would accrue to his administrator under the circumstances stated in this case; and this he thought was sufficient to invest him with jurisdiction to grant administration upon the estate of the deceased. I do not mean to say that he bases his conclusion that the application to revoke the letters of administration should be refused solely upon that ground. All I mean to say is that he claims to have acquired jurisdiction only in that way. But the petition for letters of administration is just as much a part of the record as the letters granted in response to such petition. Indeed, as it seems to me, that petition is the proper source from which to obtain the facts neo-

essary to confer jurisdiction. When a suitor invokes the jurisdiction of any judicial tribunal, he must take such a case as shows that the tribunal whose jurisdiction he invokes has jurisdiction of the case thus made. Especially is this so as to the probate court, which, while not a court of inferior jurisdiction, is a court of limited jurisdiction; and hence, when the jurisdiction of that tribunal is invoked, the suitor must show, by the case which he makes, that it is a case falling within the limits of the jurisdiction prescribed by law for such tribunal. Now, in a case of this kind the petition for letters of administration is the mode by which the petitioner makes his case, of which the court of probate is asked to take jurisdiction. Looking to the petition for letters of administration, which is set out in the "case," it is quite certain that it does not state either the fact that the deceased was a resident of the county of Florence or that the greater part of his estate was in that county, one of which was necessary to invest the judge of probate of Florence county with jurisdiction of the case. On the contrary, it seems to me that the allegations of the petition, fairly and properly construed, show that the deceased was not a resident of Florence county, but was a resident of the state of Florida, and that he left no personal property in Florence county. First, as to the matter of residence, in paragraph 1 of the petition the allegation is that the deceased departed this life intestate in the city and county of Florence, leaving surviving him as his only heirs at law and distributees his widow and his children, therein named, and that all of said heirs at law and distributees were residents of the state of Florida. Now, in the absence of any allegation to the contrary (and there is none in the petition), the only inference that can properly be drawn from the allegation in the petition is that the deceased was a resident of the state of Florida, for the presumption is that a husband resides with his wife; the domicile of the wife is that of the husband. Next, as to the location of the estate of the husband, the allegation in the second paragraph of the petition is distinct "that at the time of his death the said James M. Mayo left no personal property within the jurisdiction of this court" (meaning, of course, the probate court of the county of Florence). It is true that the petition in this paragraph proceeds to allege certain facts which he claims would, if Mayo's injuries had not proved fatal, have given him a cause of action, and that under the statute a cause of action survives for the benefit of his widow and children which can only be prosecuted by the administrator of the estate of the said Mayo. It will be observed that there is no inconsistency between these additional allegations and the distinct allegation made in the outset of the paragraph that said Mayo died leaving no property in the county of Florence; for these allegations do not assert that this right of action therein referred to constituted any part of the estate of said Mayo, but rather implies the contrary. It

seems to me, therefore, that the record of the proceedings in the probate court under which the letters of administration were granted, looked at as a whole, and fairly considered, do show on their face a want of jurisdiction on the part of the judge of probate for Florence county to grant the letters of administration.

But there is another view of this matter, which, it seems to me, deserves consideration. It appears from the "case" as prepared for argument here that the North-eastern Railroad Company, the appellant herein, filed a petition in the court of probate for Florence county alleging, among other things,—which I do not set out here, as I think a copy of such petition should be included in the report of the case,—that the judge of probate for said county had, upon the *ex parte* application of McCown (of which application the appellant had no notice), unsupported by any evidence tending to show that the said Mayo was a resident of the county, or that he had any property therein, granted letters of administration upon the personal estate of the said Mayo to the said McCown; that the said Mayo at the time of his death was not a resident of this state, but was, at the time of his death, and long prior thereto, a resident of the state of Florida; and that the said Mayo died, leaving no property or estate of any description whatsoever within the limits of this state, either at the time of his death or at the time of the grant of letters of administration or since; wherefore the petitioner prays that the grant of administration to the said McCown be revoked and canceled. Upon the filing of this petition the judge of probate granted an order requiring the said McCown to show cause why the letters of administration previously granted him should not be revoked and canceled. In obedience to such order, the said McCown made his return, in which he uses the following language: "Not admitting any of the allegations of the petition upon which the said order is based which do not appear on the face of the record of the said proceedings in this court resulting in the judgment appointing him such administrator, but reserving the right to answer the same, respectfully shows to the court that the said petition should be dismissed on the following grounds;" and then proceeds to state five grounds, in which not a single fact stated in the petition was denied or in any way questioned, but these grounds raise nothing but legal questions. The return of the administrator must therefore be regarded as nothing more than a demurrer to the petition for revocation. It was so treated by the judge of probate and by the circuit judge, and there was no exception on that point. Hence the question cannot be raised here. But, even if the question could be raised, I think that the view which both of those officials took was correct. The words "not admitting any of the allegations of the petition," etc., which I have quoted from the return, may be regarded by some as an ingenious mode of avoiding the necessity of denying allegations

of fact which are known to be true, but there is no system of pleading with which I am acquainted which would recognize that mode as sufficient to raise an issue of fact. Indeed, counsel who drew this return evidently recognized the correctness of my view, as they took care to reserve the right to answer the allegations of the petition, of which reserved right, however, the administrator has never availed himself. So that, as the case comes before us, all the allegations of fact in the petition must be regarded as admitted by the demurrer, and the only questions presented by this appeal are the legal questions raised by the demurrer. There are only two of these questions which I deem it necessary to consider: (1) Whether the right of action conferred by the provisions of Lord Campbell's act can be regarded as such a part of the estate of the intestate Mayo as would invest the judge of probate of Florence county with jurisdiction to grant letters of administration upon the estate of said intestate. (2) Whether the provisions of Lord Campbell's act, as incorporated in §§ 2315-2318, Rev. Stat. 1893, can be regarded as a sufficient amendment of our statutes conferring jurisdiction on the judge of probate to grant administration upon the estates of intestates to warrant the appointment of an administrator of a deceased nonresident who dies leaving no property within the limits of this state.

In considering the first of these questions, the inquiry naturally presents itself whether the right of action conferred by this special statute in a case like this is a new right of action, or merely a continuance or revival of the right of action which the deceased would have had if his injuries had not been fatal. This inquiry is so conclusively disposed of by Mr. Justice Jones in his opinion that I do not deem it necessary to add anything (even if I could) to what he has so well said upon this point. But, even if the right of action conferred by the statute is not a mere revival or continuance of the right of action which the deceased would have had if he had not died, but is an entirely new right of action, the question still remains whether such new right of action can in any sense be regarded as a part of the assets or estate of the deceased. Now, this new right of action owes its origin exclusively to the statute. It never existed in this state until our act was passed in 1859 (12 Stat. at L. p. 825). It is therefore a creature of statute, and in determining its nature and effect we must look to the terms of the statute, read in the light of the provisions of the Constitution, which control the legislature, the courts, and the people, in order to ascertain the intention of the legislature in bringing into existence this new right which had never previously existed. Looking into the terms of this statute, we do not find a single word or phrase which even implies an intention on the part of the legislature to make this right or its fruits any part of the assets of the estate of the decedent. On the contrary, we do find there language which plainly implies that the legislature intended that

the same should not be any part of the assets of the estate of the decedent. In that portion of § 2316 (Rev. Stat. 1893), which was originally taken from the 2d section of the act of 1859, prescribing how the amount recovered should be divided among the beneficiaries, these words are used: "Shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, *and the amount recovered had been personal assets of his or her estate.*" These words which I have italicized necessarily imply that the legislature did not intend that the amount recovered should be the assets of the estate of the decedent, but should be distributed among the beneficiaries mentioned in the same shares as if they had been personal assets of his estate. It was the same thing as saying that, although the amount recovered is no part of the personal assets of the estate of the decedent, yet they shall be divided among the beneficiaries in such shares as they would have been entitled to if the same had been such personal assets. The only act which I have been able to find amending this section (act 1898 [22 Stat. at L. p. 788]), not only makes no change in this respect, but, on the contrary, uses precisely the same words which I have italicized above, and only makes certain changes in the persons mentioned as beneficiaries. Besides, to suppose that the legislature intended to make this right of action or the fruits thereof a part of the assets of the estate of a decedent, and at the same time to deny to the creditors of such decedents the right to have such assets applied to the payment of their debts, as both in law and good morals they are entitled to, would be to impute to the legislature an intention to lend its aid to the perpetration of a fraud upon such creditors; and this no court ought to do. It seems to me clear, therefore, that the right of action conferred by the statute, or the fruits thereof (as the one necessarily follows the other), can in no sense be regarded as any part of the assets of the estate of a decedent. These views have the support of high authority. See *Stewart v. Baltimore & O. R. Co.* 168 U. S. 449, 42 L. ed. 539, 18 Sup. Ct. Rep. 105; *Martin v. Baltimore & O. R. Co.* 151 U. S. 695, *sub nom. Gerling v. Baltimore & O. R. Co.* 38 L. ed. 311, 14 Sup. Ct. Rep. 533; 8 Am. & Eng. Enc. Law, p. 859.

The second question above stated will next be briefly considered. I do not see how it is possible to regard the provisions of Lord Campbell's act, as incorporated in Rev. Stat. of 1893, as an amendment to any of our statutory provisions in regard to the appointment of administrators. The two subjects are entirely foreign to each other, and there is no hint or suggestion in any of our statutory provisions that the one was intended as an amendment to the other. On the contrary, §§ 2001 and 2023 of the Revised Statutes of 1893, hereinabove referred to, are contained in the same volume which contains the sections of Lord Campbell's act, and I am unable to discover any indication whatever in these or any other sections of

an intention to extend the limits of the jurisdiction conferred upon the judge of probate by §§ 2001 and 2023, or in any way to modify or qualify the same. It is contended, however, that the result of the view which I have taken would be to deny to the beneficiaries mentioned in the statute the benefit of the statute whenever a person is killed in this state by the wrongful act of another who is not a resident of this state, and who dies leaving no estate within this state. But it seems to me that there are two conclusive answers to this contention: (1) That the heirs at law of such a person would be in the same position in which everyone was prior to the passage of the act of 1859; and if the legislature, in passing that act, and the several acts amendatory thereof, have omitted to make such provision as would enable the heirs at law of a nonresident who is killed in this state by the wrongful act of another, and dies leaving no estate within the limits of this state, to avail themselves of the benefit of such legislation, the court has no power to supply such omission. And I am not prepared

to concede that such a result would follow from the view which I have taken; for there is certainly high authority for saying that in such a case the administrator of the decedent could bring the action. (2) The reason for the rule that a foreign administrator cannot sue in this state, as usually given, is that it is necessary for the protection of the rights and interests of the creditors of the decedent within the state; and, as the rights of creditors are in no way involved in a case like this, the reason for the rule ceases, and under the maxim, *Cessante ratione legis, cessat ipse lex*, that rule would not apply in a case like this.

It seems to me, therefore, that in any view which I am able to take of this case the judgment of the circuit court should be reversed, and the case remanded to the court of probate, with instructions to sustain the demurrer to the petition for revocation of the letters of administration granted to the said McCown, and with leave to answer said petition, if he so desires, raising such issues of fact as may be deemed pertinent to the case.

RHODE ISLAND SUPREME COURT.

Harry PAULTON *et al.*

v.

B. F. KEITH.

(.....R. I.....)

1. Declarations of the manager of a theater that he is acting under instructions of the owner in preventing the service of process on an actor engaged in the theater are not admissible in a suit to hold the owner liable for such act.
2. The manager of a theater has no implied authority from the owner to prevent the service of process upon actors employed in the theater, so as to make his declarations while doing so admissible against the owner as part of the *res gestæ*.
3. The owner of a theater cannot be held liable for the unauthorized acts of his manager in obstructing the service of process upon an actor employed in the theater.
4. The failure of an officer who has entered the outer doors of a theater to serve process on an actor, to force an entry to the stage, which is necessary to effect the service, and not the act of the owner's servants in obstructing the officer, is the cause of injury resulting from the failure, so that the owner of the theater cannot be held liable for such injury.

(July 9, 1901.)

PETITION by plaintiffs for a new trial after verdict in favor of defendant in an action brought to recover damages for

wrongful obstruction of an officer in the discharge of his duty. *Denied.*

The facts are stated in the opinion.

Mr. James A. Williams, for plaintiffs:

There were two distinct offenses committed by the agent Fynes,—a criminal act against the officer, for which the agent alone was liable and for which he was arrested, and a civil wrong done to the plaintiffs by preventing the officer from making service of the writ.

Fynes by the very nature of his employment, and from the fact that his principal rarely came to Providence, had as absolute control over his principal's property as the principal himself could possibly exert.

When a principal chooses to deliver up the entire control of a public place to an agent he cannot escape liability by reason of the agent's exercise of unlawful authority over that property. The act of the agent is the act of the principal.

Mechem, Agency, p. 282; 1 Am. & Eng. Enc. Law, 2d ed. p. 1151; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 134, 21 Am. Rep. 597; *Hynes v. Jungren*, 8 Kan. 391; *Gulf, C. & S. F. R. Co. v. Moore*, 69 Tex. 157, 6 S. W. 631; *Cantrell v. Colwell*, 3 Head, 471; *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333; *Hoffman v. New York C. & H. R. R. Co.* 87 N. Y. 32, 41 Am. Rep. 337.

NOTE.—For a case in this series holding that authority from master to do an illegal act cannot be inferred, see *Staples v. Schmid* (R. I.) 19 L. R. A. 824.

As to rule that servant must have been acting within scope of his employment in order 54 L. R. A.

to render master liable for his wrongful or negligent act, see note to *Ritchie v. Waller* (Conn.) 27 L. R. A. 161.

As to liability of owner of theater for assault by employee, see *Dickson v. Waldron* (Ind.) 24 L. R. A. 483.

Mr. Nathaniel W. Smith, with Messrs. Edwards & Angell, for defendant:

For all acts done by the servant under the express orders or direction of the master, as well as for all acts done in the execution of his master's business within the scope of his employment, the master is responsible; but when the act is not within the scope of his employment or in obedience to the master's orders, it is the act of the servant, and not of the master, and the servant alone is responsible therefor.

Wood, Mast. & S. § 279; *Staples v. Schmid*, 18 R. I. 224, 19 L. R. A. 824, 26 Atl. 193.

To obstruct an officer is not within the scope of the employment of the manager of a theatre.

Staples v. Schmid, 18 R. I. 228, 19 L. R. A. 824, 26 Atl. 193; *Poulton v. London & S. W. R. Co.* L. R. 2 Q. B. 534; *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65; *Bank of New South Wales v. Owen*, L. R. 4 App. Cas. 270; *Green v. Woodbury*, 48 Vt. 5; *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479.

The declarations of a person assuming to act for another are not admissible to prove either the existence or the extent of the agency. In other words, declarations of an agent are admissible only when the agent is acting within the scope of his employment.

Brigham v. Peters, 1 Gray, 139; *Whiting v. Lake*, 91 Pa. 349; *Rouell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *Saw v. Davis*, 71 Iowa, 406, 32 N. W. 403; *Sencerbo v. McGrade*, 6 Minn. 484, Gil. 334; *Craighead v. Wells*, 21 Mo. 404; *Mechem, Agency*, § 100; 1 Am. & Eng. Enc. Law, 2d ed. p. 690.

A ministerial officer armed with due process of law and acting within it is the servant of the state, and not of the plaintiff. Resistance to him is resistance to the public authority, and is a penal offense.

Western R. Co. v. Thomas, 60 Ga. 313, 27 Am. Rep. 411.

It was the officer's right and duty to break open doors and to overcome all unlawful opposition, in the service of plaintiffs' writ.

Clark v. Wilson, 14 R. I. 11; *Kelley v. Schuyler*, 20 R. I. 432, 44 L. R. A. 435, 39 Atl. 893.

If he failed to do so, such failure, and not the refusal of admittance, was the proximate cause of injury to the plaintiffs.

Stimess, Ch. J., delivered the opinion of the court:

The plaintiffs brought this suit against the defendant, the proprietor of a theater in Providence, to recover damages upon the charge that the defendant's manager prevented an officer from serving a writ in their behalf upon an actor engaged in said theater. The evidence showed that the officer, with another officer and the plaintiffs' attorney, entered the outside door of the rear part of the theater; where they were met by the manager with two other men, who stood against the door to the stage, and refused to allow the officers to enter it. The employment of the manager by this defendant 54 L. R. A.

was admitted, but no authority from him to refuse admission to the officer was shown, other than the officer's testimony that the manager said that he was acting under the direction of the defendant. This testimony was objected to, but, after the plaintiffs' case was in, the court directed a verdict for the defendant, and the plaintiffs ask for a new trial on the ground of error in such direction.

It is a general rule that the declarations of a person assuming to act as the agent of another are not admissible to prove his agency. He may be called as a witness to state what orders he has received, and upon that point he would be subject to cross-examination, from which a limitation of his authority might appear. But to allow his statement to others upon a vital point, as to which he cannot be cross-examined, is obviously hearsay testimony, and contrary to the well-settled rules of evidence. The plaintiffs do not controvert this rule, but they claim to be within this qualification of it; that, when the agent is acting within the scope of his authority, and during the continuance of the agency, his declarations may be given, as to matters then occurring, as a part of the *res gestæ*. The question presented in this case, therefore, is whether the manager, in refusing entrance to the officer, was acting within the apparent scope and implied authority of his employment. The plaintiff's argue that the defendant is liable by analogy to cases such as these: If the manager had assaulted a patron of the theater and wrongfully ejected him; if a conductor of a street car or steam train should assault a passenger, and put him off, without right to do so; if a motorman should run his car at an unlawful speed, and injure a passenger, or a traveler upon the street,—the master would be liable. Doubtless this is so, but upon very different principles from any which are applicable to this case. In the cases supposed, a proprietor of a theater and a company running cars are held to guarantee some protection to their patrons, and to assume a liability if employees, either wilfully or negligently, injure them; and a motorman, engaged in his proper duties of running a car, carries with him, like the driver of a horse, the master's responsibility that it shall not be driven wrongfully upon another. As to a master's responsibility to others for a wilful act by his servant, there has been some conflict in decisions. In many cases it has been held that a master is responsible for the torts of his servant, done with a view to the furtherance of the master's business, whether the same be done negligently, wantonly, or even wilfully, but within the scope of his employment (14 Am. & Eng. Enc. Law, p. 817, note 3); but we need not examine those cases, because the controlling question before us is that of the agent's authority. In *Staples v. Schmid*, 18 R. I. 224, 19 L. R. A. 824, 26 Atl. 193, this subject was carefully considered, and one of the principles recognized in determining liability was that it cannot be inferred as matter

of law that a master has authorized his servant to do an act which he could not lawfully do himself in the circumstances supposed by the servant to exist. In that case the proprietor of a store was held to be liable to a customer, whose arrest the defendant's salesman and custodian had caused on a wrongful suspicion of stealing goods from the store. The court said that the master would have no right to arrest and search an innocent person, but that he had the right to detain a thief, and to recapture his property from him. Hence the act of the servant might be lawful or unlawful, according to the facts. As the master's substitute he had to make a decision of his duty, which, as to third persons, was the master's act, for which he was answerable either for excess of force or mistake in regard to the occasion for it. In the present case it could not be lawful for the defendant to obstruct an officer in the discharge of his duty, in any event, if the refusal of admission amounted to obstruction; and so it could not be lawful for his servant to do so. The cases relied on by plaintiffs, so far as they support them, are based upon lawful authority to a servant to do the act from which the injury arose, and upon an excess of force or bad judgment in doing it. This is clearly right. If one employs another to do a certain thing as his servant, retaining the right of control, oversight, and discretion in the performance of the act, the servant acting in place of the master, and not independently, the master is responsible for the way in which the thing is done. But it is a very different thing to hold a master responsible for an act which he has never authorized a servant to do, simply because the latter is his servant, and on the strength of it to allow the statements of the servant to be put in to bind the principal. The plaintiffs' claim goes to this extent, but the cases cited do not. In *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597, the action was for kicking a boy off a baggage car by a brakeman. It was conceded that the removal of the plaintiff, who was a trespasser, was within the scope of the brakeman's authority, and hence the company was held to be liable for the injury caused by exercising that authority improperly by kicking the boy off against a wood pile, from which he fell back under the cars. *Hoffman v. New York C. & H. R. R. Co.* 87 N. Y. 25, 41 Am. Rep. 337, was to the same effect, the court saying: "The authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is 54 L. R. A.

responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own." In *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333, the question was whether the statements of the fireman and engineer of a railway train were admissible in evidence in an action against a railroad company for negligence, and the court held that they were not. *Hynes v. Jungren*, 8 Kan. 391, was a suit for false imprisonment, in which the plaintiff in the original case, together with the constable serving the writ carried the defendant in the original writ to the county jail, and kept him there for a part of a day, before taking him before the justice, as required by the precept. In that case the principal was an active participant in the wrong. In *Cantrell v. Colwell*, 3 Head, 471, Mrs. Cantrell requested a relative to turn Colwell's mare out of her inclosure. In doing so he threw a rock at the mare, and broke its leg. The court held that a request to turn out the mare could not be tortured to imply a request to injure or destroy it. In the case at bar, there being no inference of authority as a matter of law from the defendant to his servant to do the act here complained of, and no evidence of express authority, the statements of the servant were inadmissible, and, there being no other evidence of authority, the direction of a verdict for the defendant was right.

The verdict was also rightly directed upon another ground. The building in which the affair took place was not a dwelling house, and the officer had entered the outer door. If he had a valid precept, he had the right to break doors, and command sufficient force to enter, having requested admittance, which had been refused. *Clark v. Wilson*, 14 R. I. 11. The cause of the plaintiffs' injury, if any, was not the refusal of the defendant's servant to allow the officer to enter, but the failure of the officer to serve his process as he might and should have done. To this may be added the fact that the plaintiffs offered no proof of the judgment set out in their declaration, nor any evidence to show that they had suffered any pecuniary loss in the case. On the contrary, the defendant put in a discharge in bankruptcy of Seabrooke, the defendant in the original writ, subsequent to the plaintiffs' judgment, to show that the plaintiffs had no right of action against him, and consequently had suffered no damage.

The petition for a new trial is denied, and case remitted, with direction to enter judgment for the defendant.

WISCONSIN SUPREME COURT.

Edward S. ANDREWS *et al.*, *Appts.*,
v.

D. H. ROBERTSON, *Respnt.*

(.....Wis.....)

1. Parol evidence is proper to explain the meaning of words used in a writing which are ambiguous when applied to the subject which gave rise to such paper, as well as when the meaning of the writing is uncertain looking only at the language thereof.
2. A person is conclusively presumed to have had notice, actual or constructive, of all the doings of his agent within the actual or apparent scope of the agency, and to be bound thereby.
3. The holder of a promissory note, taken for him of the maker by an agent

*Headnotes by MARSHALL, J.

NOTE.— *Rights of payee of note after repurchasing it from bona fide holder.*

The question which is involved in the subject of this note is founded upon the exception to the general rule that a purchaser of negotiable paper, even if he had notice that there was fraud in the inception of the paper, or that it was lost or stolen, or that the consideration has failed between some anterior parties, or the paper is overdue and dishonored, is, nevertheless, entitled to recover, provided his immediate indorser was a bona fide holder for value unaffected by any of these defenses; in other words, as soon as the paper comes into the hands of a holder unaffected by any defect, its character as a negotiable security is established. The exception mentioned is that if the note were invalid as between the maker and payee, the payee could not himself, by purchase from a bona fide holder, become a successor to his rights, it not being essential to such bona fide holder's protection to extend the principle so far.

The rule above mentioned is the same as the rule laid down in equity in regard to the purchase and sale of real property, and which, as stated by Judge Story in his work on Equity Jurisprudence, arose in a case decided in 1695, in which A purchased an estate with notice of an encumbrance, and then sold it to B, who had no notice, and B afterwards sold it to C, who had notice, and the question was whether the encumbrance bound the estate in the hands of C. The master of the rolls having held that it would, on appeal to the lord keeper it was urged that in such case an innocent purchaser without notice might be forced to keep his estate, and could not sell it. The lord keeper held this to be true, and decided that if B had not notice at the time of his purchase that the estate was redeemable, the plaintiff could not be relieved through A although A and C had notice. *Harrison v. Forth*, Prec. in Ch. 51.

This equitable principle is further illustrated in *Sweet v. Southcott*, 2 Bro. Ch. 66, Dick. 670; *Brandlyn v. Ord*, 1 Atk. 571, 1 West, 512.

That there is the same exception to this equitable rule in regard to real property is shown in *Kennedy v. Daly*, 1 Sch. & Lef. 879, where it was held that if a trustee conveys to a person with notice, and takes a reconveyance, it operates nothing. So if the person to whom he conveys has no notice, yet on the reconvey-

upon a condition not disclosed to such holder and outside the scope of the agency, cannot repudiate the condition and insist upon holding and enforcing the note. He is bound, if he does not intend to abide by such condition, to restore or offer to restore the note within a reasonable time after discovering the facts.

4. The general rule is that if a person, with knowledge of facts which will defeat a promissory note in the hands of the payee, purchases it from a bona fide holder thereof, he may recover thereon upon the strength of such bona fides; but that rule does not apply to a purchaser who is the payee of the note. If he sells such paper to an innocent third person and repurchases it for value, he does not thereby become possessed of any better right as against the maker than he possessed in the first instance.

(August 24, 1901.)

ance the trust would attach, though it did not attach on the person to whom he conveyed, and would not have attached if that person had conveyed to another without notice.

And the decision in the last case was adopted and followed in *Church v. Euland*, 64 Pa. 432, where it was held (illustrating both the rule and the exception) that undoubtedly if a person, though with notice, purchases from one without notice, he is entitled to stand in his shoes, and take shelter under his bona fides. If it were not so the bona fide purchaser without notice might be unable to dispose of the property, and thus its value in his hands would be materially deteriorated. But if the second purchaser in such case be the original trustee, who reacquires the estate, he will be fixed with the trust. To the same effect, *Ely v. Wilcox*, 26 Wis. 91.

There are a number of American cases supporting the doctrine as to the equitable rule in regard to real property as above stated, but as they are not considered within the immediate scope of this note it is not deemed necessary to cite them.

The rule in regard to the rights of purchasers from a bona fide holder of negotiable paper, and the exception thereto, which is the immediate subject considered in this note, and the reasons for both the rule and the exception, are so completely and admirably stated in the decisions which follow that it is deemed unnecessary to speak further of them here.

The general rule is, that a bona fide holder of negotiable paper is entitled to the entire world as a market, and to secure this it is necessary that all the rights and advantages possessed by him shall pass to his assignee, even though the latter may have notice of such facts as would have defeated any right of recovery had the instrument remained in the hands of the original payee. An exception to this rule is, that if the paper returns to the original payee it is not shielded, as it was in the hands of the bona fide holder without notice, or would have been in the hands of any other person holding under him, but is subject to any defense that could have been made had it never been transferred at all. *Elwell v. Tatum*, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434.

While the general rule is that a bona fide holder of negotiable paper may pass it to an assignee, even if the latter may have notice of such facts as would have defeated the right

APPEAL by plaintiffs from a judgment of the Circuit Court for Dane County in favor of defendant in an action brought to enforce payment of a promissory note. *Affirmed.*

Statement by **Marshall, J.:**

Action on a promissory note. The defense was that plaintiffs, as agents of the Equitable Life Assurance Society of the United States, acting through their sub-agent, one Forsting, delivered to defendant two insurance bonds duly issued by such society, on his application made through such agents, and that he at the same time delivered to Forsting for the agents the note in suit, the same being for the down payment for such bonds, and that the delivery was coupled with an agreement which Forsting had authority to make to the ef-

fect that defendant might, at his election to be made within thirty days, return the bonds, and in that event that the note should be delivered to defendant; that such election was made, notice thereof given to plaintiffs, a demand made upon them for the note and a tender of the bonds made to them, all within the thirty days agreed upon. The evidence was to the effect that defendant dealt with Forsting believing him to be the authorized agent of plaintiffs, received from him the bonds mentioned in the answer, and delivered to him the note in suit, receiving at the same time a writing signed by Forsting as follows: "Received of D. H. Robertson note for \$600 balance due on bonds Nos. B836,811 and 851,882. It is understood and agreed that should the above-numbered bonds be returned not accepted within thirty days duebill will be

to recover had the instrument remained in the hands of the original party, an exception to the rule is that, if the paper returns to the original party, it is not shielded, as it would have been in the hands of another person, but is subject to any defense that could have been made had it never been transferred at all. This exception rests on the principle that one cannot take advantage of his own wrong. *Hoye v. Kalaashian* (R. I.) 46 Atl. 271.

If a patent is worthless, and consequently furnishes no consideration for a note, such note in the hands of the payee is void; and if, being negotiable, he sells or transfers it to an innocent holder before maturity, for value, he, by that act, perpetrates a fraud upon the maker, for which he is liable to the full extent of the injury caused by such sale and transfer. Upon the same principle, and as a sequence from it, where the payee transfers negotiable paper, void in his hands, to an innocent holder, and repurchases from him or a subsequent holder, the paper becomes affected with the original infirmity, and the payee cannot recover. *Tod v. Wick Bros.* 36 Ohio St. 370.

Probably the best statement and illustration of the general rule in regard to the rights of a purchaser from the bona fide holder, and also of the exception to that rule, which, as has been stated, forms the subject of the note, as well as the reasons for both the rule and the exception, is that contained in a case decided by the supreme court of Michigan, in which the opinion of the court was delivered by that eminent jurist and commentator, Judge Cooley, as follows: It is perfectly true, as a general rule, that the bona fide holder of negotiable paper has a right to sell the same, with all the rights and equities attaching to it in his own hands, to whoever may see fit to buy of him, whether such purchaser was aware of the original infirmity or not. Without this right he would not have the full protection which the law merchant designs to afford him, and negotiable paper would cease to be a safe and reliable medium for the exchanges of commerce. For, if one can stop the negotiability of paper against which there is no defense, held by another, it is obvious that an important element in its value is at once taken away. But this rule has never been applied to a purchase by the original payee, and it is not essential to the protection of the innocent indorsee that it should be. It cannot be very important to him, that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community, the market value of his security is not likely to be affected

by the circumstance that a single individual cannot compete for its purchase, especially when it is considered that the nature of negotiable securities is such that their market value is very little influenced by competition. Nor is there any rule or principle of law that would be violated by permitting the maker to set up his defense against the payee, when he becomes the indorsee, with the same effect as he might have done before it had been sold at all; nor is there any valid reason against it. *Kost v. Bender*, 25 Mich. 515.

A firm of Niagara Falls, New York, were payees and holders of the note in suit. It was a negotiable promissory note, payable to their order. It was sold before maturity to a savings bank in Detroit, under circumstances which admittedly made the bank a bona fide purchaser. It was sold to this bank by the attorney of the payees, to whom it had been sent for collection. It did not appear whether or not the payees directed such sale. The attorney indorsed the note before sale in blank, as the payees had previously done. The note went to protest for nonpayment, and subsequently it was indorsed to "any bank or order" over the signature of the savings bank, and transferred to a state bank, which sent to the savings bank its check for the amount due upon the note. Plaintiff was the cashier of the state bank, and testified that he was not the owner of the note, and had brought this action for the benefit of the bank. The defendant, who was the maker of the note, sought to show that the note was obtained by fraudulent representations made by an agent of the payees. The attorney of the payees before mentioned, called as a witness for the defendant, testified that he received the note before maturity for collection, and indorsed and sold it to the savings bank, and received payment of the consideration, which he put in the bank to his own credit, and checked out, as he did other money. That he sold the note because he wanted to, and did not know that he was directed to do so by the payees. It was shown that after protest of the note this attorney had a conversation about the note with a stockholder and director of the state bank, who was also its attorney, who said that his bank would take it. The attorney of the payees before mentioned also wrote plaintiff, who was cashier of that bank, about the note, as did also the city bank after the attorney of the payees had told its officers that the state bank, of which plaintiff was cashier, would take the note. The court permitted the jury to find that the purchase of the note by the state bank, of which plaintiff was cashier, was collusive, as agent for the payees, holding

returned to D. H. Robertson." Forsting was in fact the duly authorized agent of plaintiffs to deliver to defendant the bonds mentioned and receive payment therefor. Evidence was given under objection that the word "duebill" in the receipt referred to the note in question. Evidence was excluded as to the authority of Forsting being limited to delivering the bonds and receiving payment therefor in cash. Proof was made that defendant did all that was necessary on his part to entitle him to a return of his note if the writing was binding on plaintiffs, and that plaintiffs did not know of the agreement between Forsting and defendant mentioned in the receipt until after they parted with the note as hereafter mentioned; that they received the note supposing the delivery thereof to Forsting for them was unconditional, and that upon the faith

thereof they paid full value for the same to the assurance society, keeping the paper as their own property; that they thereafter parted with the note for value, but discovering defendant's attitude in respect thereto before the maturity thereof, they repurchased the paper so as to enforce it in their own names and preserve their credit; that defendant knew when he gave the note that it was negotiable and was payable to plaintiffs as principals; also that the bond, according to the contract between him and the assurance society, required payment in cash. A verdict was rendered in favor of defendant and judgment was rendered accordingly.

Messrs. Bashford, Aylward, & Spensley, for appellants:

The payees named in a negotiable instru-

that, if it was not a purchaser in the ordinary sense, it would not be entitled to set up the bona fides of the savings bank, and refused to direct a verdict for the plaintiff. In considering this question on a writ of error from a judgment in favor of the defendant, the supreme court said: "The plaintiff's counsel say that, being indorsed in blank, the possession of the note was sufficient proof of plaintiff's right to sue, and that it was error to permit the jury to defeat the plaintiff upon this ground, which they may have done under the charge. In the case of *Kost v. Bender*, 25 Mich. 515, it was held that the payee of a note could not avoid the equities in favor of the maker by repurchasing the note from a bona fide holder, to whom he had sold it. This rule should apply in this case, if, as claimed, the transfer to the Crosswell bank [the bank of which the plaintiff was the cashier] was colorable only, to cover an actual payment or repurchase by Myers & Co. [the payees] or by their attorney on their behalf." The supreme court, however, reversed the judgment, and ordered a new trial upon another ground, *etc.*, that the court had committed an error in charging the jury to the effect that the plaintiff had no right to bring the action. *Battersbee v. Calkins* (Mich.) 8 Det. L. N. 778, 87 N. W. 760.

In *Clark v. McNeal*, 114 N. Y. 287, 21 N. E. 405, the court after deciding that the rule that if one who has purchased real estate with full notice of an equitable claim of another thereto transfers it to a bona fide purchaser, the latter not only takes a good title, but can transfer such title to one who purchases with full knowledge of the fact, is subject to the exception where the transfer is back to the original purchaser, who was guilty of constructive fraud in transferring the property; if it becomes re-vested in him, the original equity will re-attach to it in his hands, and, quoting from *Story, Eq. Jur. § 410*, and *Pom. Eq. Jur. § 754*, in support thereof, said: "The authorities are uniform upon the subject, so far, at least, as they apply to the facts of this case," and then cited in support of the statement, among others, *Kost v. Bender*, 25 Mich. 515; *Dan. Neg. Inst. § 805*.

This case does not relate to negotiable paper, but is one of the cases illustrating the correlative rule in regard to the rights of a bona fide purchaser of real estate from one who has full notice of the equitable claim of another thereto, and of the right of such purchaser to transfer a good title to one who purchases with full knowledge of the fact of such claim, and of the exception that the rule does not apply when the transfer is back to the original pur-

chaser; yet as the court of appeals cited *Kost v. Bender*, 25 Mich. 515, which was a case relating purely to negotiable paper, it is deemed proper to insert it here both as an affirmation by the New York court of appeals of the rule laid down in *Kost v. Bender*, and also in support of the assertion of the statement made in the introduction hereto, that the rule and exception in regard to negotiable instruments, and the rule and exception in regard to the purchase of real property, are identical.

Section 2296, U. S. Rev. Stat. provides: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

A patent was issued to the appellee in 1878. Previous thereto he had become indebted to the appellant, who had afterward recovered a judgment against him, and an order was made by the county court reviving the judgment. The appellee brought this action, alleging facts which he claimed rendered the land exempt from liability for the satisfaction of the judgment, and praying that it be decreed to be free from the apparent lien thereof. A decree was rendered in favor of the plaintiff, from which the defendant and appellant appealed. The patent was issued in 1878. In 1885 the appellee, the patentee, and wife conveyed the lands to another person, who in 1886 conveyed it to the wife of the appellee. She afterward died, and the county court set aside the land in question as the homestead of her husband, the appellee. It was conceded that the land was not subject to the payment of the debt of the appellant before the appellee (the patentee) conveyed it; and that it did not become liable for the debt in the hands of his grantees; but it was urged that, having again reached him, it was liable. That while it was not liable as long as he retained it, or in the hands of anyone deriving title through him, still whenever he should acquire a new title to the land, it would then become liable. The court said: "We cannot find that the precise question has ever been determined. In the absence of direct authority, the apparent analogy of the law of commercial paper at once suggests itself. It is a familiar rule that if a negotiable instrument once reaches the hands of a bona fide holder for value, it is discharged from equities, although he should transfer it to a third person with notice of such equities; but still, if the transferee should happen to be the original payee of the instrument, it would be subject to the equities in his hands. This rule and the reasons therefor are strongly stated by Judge Cooley in *Kost v. Bender*, 25 Mich. 515. By

ment are bona fide holders when they accept the same innocently for a valuable consideration, although the maker may have been fraudulently induced to sign the same, unless the fraud was such as to destroy the paper as a monetary obligation.

Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177; *Nelson v. McDonald*, 80 Wis. 605, 50 N. W. 893; *Johnson v. Weed & G. Mfg. Co.* 103 Wis. 291, 79 N. W. 236; *Mack v. Prang*, 104 Wis. 1, 45 L. R. A. 407, 79 N. W. 770; *Verbeck v. Scott*, 71 Wis. 59, 36 N. W. 600; *Kinney v. Kruse*, 28 Wis. 183; 4 Am. & Eng. Enc. Law, pp. 330, 332, 333.

The paper had a valid legal existence at the time it came into the hands of the plaintiffs and with no actual notice to them of any condition whatsoever.

Lytle v. McCormick Harvesting Mach. Co.

examining that case it will be seen that the reasons for the rule are, that, while the protection of the innocent holder requires that those taking from him should also be protected, it is not very important that there should be one person in the world incapable of succeeding to his equities. The rule protecting innocent purchasers is for the benefit of the purchaser, and not for the benefit of the culpable payee. Against him the payor, were he compelled to pay the paper, would have his remedy by action, and to avoid circuity of action if the paper comes back to his hands, the payor should be permitted to set up the defense." The court then held that the reason for changing the rule in regard to commercial paper when it returned to the original payee was not applicable to the case before it. *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213.

This case is taken because of its very positive indorsement of what was said by Judge Cooley in *Kost v. Bender*, 25 Mich. 515, in regard to the general rule, and the exception thereto which forms our subject, as applied to negotiable paper, and its statements in regard thereto are undoubtedly correct, and in a case to which they applied would be extremely appropriate; but, inasmuch as the court wound up by holding that the reason for changing the rule in regard to commercial paper when it returned to the original payee was not applicable to the case before it, it is somewhat difficult to see why the judge who delivered the opinion went into the rule in regard to negotiable paper to such length; unless it is found in his statement in the beginning that he did it in the absence of direct authority in regard to the precise question before the court.

Plaintiff conveyed to defendant an interest in patents for \$10,000, and took in payment from the defendant three notes; \$3,000 payable in three months, \$3,500 payable in nine months and \$3,500 payable in fourteen months. The note of \$3,500 payable in nine months was before its maturity indorsed by the plaintiff to another person for a valuable consideration. Thereafter an arrangement was made between plaintiff and the person to whom he had transferred the note, by which the plaintiff agreed to transfer to such person certain interests in the same patents, and to take therefor the defendant's notes for \$1,000, which such other person agreed to procure. Accordingly, by request of such other person and with the plaintiff's knowledge, the defendant gave as a substitute for said note of \$3,500, two notes, one for \$2,500 which was paid, and the note in suit, which was dated back to the day of the sale of the patents and of the three

108 Wis. 81, 51 L. R. A. 906, 84 N. W. 18; *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

Where drafts given for the future delivery of coal were discounted by a bank, with knowledge of the consideration therefor, it can enforce them against the acceptor, when discounted before maturity and before a breach of the agreement to deliver.

Tradesmen's Nat. Bank v. Curtis, 167 N. Y. 194, 52 L. R. A. 430, 60 N. E. 429; *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461.

A contemporaneous collateral agreement when in writing cannot control the operation of the note in the hands of a third party unless he has notice of its existence.

4 Am. & Eng. Enc. Law, p. 144; *Brinker v. Meyer*, 81 Wis. 33, 50 N. W. 782; *Racine County Bank v. Keep*, 13 Wis. 210; *Jilson*

original notes. The plaintiff contended that, even if the original note of \$3,500 was invalid in its inception, by reason of fraud, yet as it passed before its maturity into the hands of a bona fide holder, and as the note in suit, given in part substitution therefor, was negotiated to the plaintiff upon a new and valuable consideration, the action might be maintained; and that the last sale and transaction constituted a sufficient consideration to support the note in suit, and that the alleged frauds of the former transaction could not be used to impeach it. The trial court declined so to rule, and instructed the jury that the fact that the note had, under the circumstances of the case, passed through the hands of the third person, would not confer upon it any additional validity in the plaintiff's hands; and that if the last agreement was made in ignorance by the defendant of the fraud in the first transaction, such fraud would not be purged by the second transaction, so far as to render the note valid on its return into the hands of the original perpetrator of the fraud. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions, in overruling which the supreme judicial court said: "It is urged by the counsel for the plaintiff that the defendant would have been compelled to pay the whole amount of the note in suit to the indorsee to whom the plaintiff negotiated it for value before its maturity, and that he could not have set up the ground of defense on which he now relies if an action had been brought upon it by him. This is certainly true; but we do not see that the suggestion has any material bearing on the rights of the parties to this suit. While the notes were in the hands of the indorsee, the defendant still retained his claim for damages against the present plaintiff. The transfer of the note in no way affected or impaired the right of the plaintiff to recover those damages. It affected only the form of his remedy, limiting it to a right of action against the plaintiff. But on the redelivery of the note to the plaintiff, and the commencement of an action by him to enforce it, the remedy by recoupment revived. Nor can we see that it is at all material that the plaintiff, when he took back the note in suit, paid a valuable consideration for it to the person to whom he had previously negotiated it. The rights of the defendant could not be affected by the dealings of the plaintiff with third parties with whom he had no concern. The plaintiff could not purge the fraud with which the note was tainted so as to get rid of the claim for damages on account thereof, which the defendant had against him. This still remained to be enforced, either by a separate action, or

v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100; *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28; *Strachan v. Mualou*, 24 Wis. 21.

If there was an actual delivery of the note, which was subject to be defeated by a condition subsequent, the maker could not avail himself of the defense as against an innocent holder; and not as against the payee if he, himself, had negligently permitted the paper to be put in circulation.

McDonald v. Provident Sav. Life Assur. Soc. 108 Wis. 213, 84 N. W. 154; *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315; *Keller v. Schmidt*, 104 Wis. 596, 80 N. W. 935.

If negotiable paper, fair on its face, has been put in circulation, contrary to the intention of the maker, but by reason of his fault or negligence, payment thereof may be enforced by an innocent holder.

by recoupment, according as the rules of law might make either form of remedy appropriate and applicable, when the defendant sought to avail himself of it." *Sawyer v. Wiswell*, 9 Allen, 89.

The mere borrower of a note does not become a holder for value, and stands no better than a mere donee, and gets no superior equity to that of the payee. If in any case a partnership can take a note from one of its members free from the equities binding him, this result does not follow when the note is merely lent for the accommodation of the firm. And although, by pledging it, the pledgee might acquire the rights of a bona fide holder for value without notice, yet, upon its coming back into the firm's hands again, the equity of the maker would revive. *King v. Nichols*, 138 Mass. 18, citing *Sawyer v. Wiswell*, 9 Allen, 89.

Certain officers of a national bank, who were also officers of a real-estate corporation or company at the instance of one of them, who was the cashier of the bank, upon a pretended claim of the bank against the company of \$20,000 which the evidence in the case did not sustain, procured a note for that amount with interest, and a mortgage on all of the real estate it owned to secure it, to be executed in the name of the company to a loan and trust company. The company was not indebted in any amount to the loan and trust company, but the name of the latter was used to deceive the officers of the government, who should be directed to examine into the affairs of the national bank. The pretended proceedings in the way of a resolution to execute the note and mortgage on the part of some of the officers of the company were entirely irregular and illegal although done by a majority of the directors thereof. The note was immediately indorsed without recourse to the before-named national bank, and it negotiated the note to another national bank before maturity, for value, in the usual course of trade, on two different occasions—both occasions without notice, and in good faith. The note and mortgage were afterwards taken up, and at the time of the trial were owned by the first-mentioned national bank. The relationship between the different persons, who were officers both of the company and the bank, left no doubt that the circumstances attending the contraction of the debt of \$20,000 covered by the note and mortgage, and the manner in which it was executed, were known to all of them; and they were undoubtedly executed at the instance of the cashier and manager of the bank for its benefit. It was held that the receiver of the national bank, for whose benefit the note and mortgage were so executed, 54 L. R. A.

Tiedeman, Com. Paper, § 286; *Dan. Neg. Inst.* § 854.

Forsting never was an agent of the company, and he did not represent himself so to be. He was a special agent with limited authority, as the defendant is presumed to have known. Instead of incorporating the condition in the note, he gave a negotiable instrument, and accepted a separate paper giving him the right to rescind the transaction if he should change his mind within the time named.

An agent for collection without special authority can receive payment only in the legal currency of the country.

1 Am. & Eng. Enc. Law, p. 1027; *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Chilton v. Willford*, 2 Wis. 1; *Hall v. Storrs*, 7 Wis. 253; *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485; *State*

held the same subject to the same defenses that applied to the bank itself, and that that bank took the note and mortgage with notice of all defenses thereto. It was executed for a pretended indebtedness to a third person,—the loan and trust company,—although it was known by the parties who acted for the bank that nothing was due to the loan and trust company by the company executing the note and mortgage, and it was used to enable the bank to protect itself against loss on a debt of one of such persons. Nor was anything cured or strengthened by the negotiation of the note before maturity, as collateral security for future advances, to the other national bank, on two different occasions. It finally came back into the hands of the original payee charged with the same equities and defenses as applied to it when first issued. *Hatch v. Johnson Loan & T. Co.* 79 Fed. 828.

In an action to foreclose a chattel mortgage given to secure two promissory notes, the court found that one of the notes (both of which were tainted with usury which was a defense to them except they were held by a bona fide holder) was sold and indorsed to a national bank as collateral security for a loan made to a state bank of which the payee of the note was cashier, or to the cashier and president of the bank, they then being the sole owners of the stock in the state bank, and that such sale and indorsement were without knowledge or notice on the part of the national bank of any defense thereto, and the note was received by it as collateral security in the ordinary course of its business, and for value; that prior to the purchase of such note by the plaintiff it had been returned to another national bank, or to the president and cashier of the state bank. Upon the organization of the national bank last mentioned the president of the state bank was made president thereof and the cashier of the state bank vice president thereof. The note was purchased by the plaintiff after the maturity thereof, and he paid a valuable consideration therefor and its full market value, and purchased or obtained it from the last-mentioned national bank, or of its president and vice president, who were as aforesaid respectively president and cashier of the state bank, the latter of whom was the payee of the note. The trial court found that at the time of the purchase he was chargeable with full notice of the consideration for which the note was given, and the testimony showed that it was returned to the president of the state bank and the cashier (the payee) by the national bank, to whom it was negotiated before maturity before the plaintiff obtained it. On appeal

Bank v. Byrne, 97 Mich. 178, 21 L. R. A. 753, 56 N. W. 355; *Gibson v. Trow*, 105 Wis. 288, 81 N. W. 411.

Forsting's authority was limited by the nature of the transaction.

Hoffman v. John Hancock Mut. L. Ins. Co. 92 U. S. 161, 23 L. ed. 539.

The bonds in suit stipulated for cash payment, so defendant knew that the giving of a note to the plaintiffs was a special arrangement outside of their authority as agents of the company, and he is therefore chargeable with notice of the limited authority of Mr. Forsting.

The principal is not bound by the unauthorized acts of a special agent, or by the acts of a general agent which are beyond the scope of his authority.

Kelly v. Troy F. Ins. Co. 3 Wis. 254;

the supreme court held that the plaintiff purchased the note of the payee, and not from the national bank, who was a bona fide holder, and, having purchased the note after maturity from the payee, he was not an innocent holder, but took the paper subject to the same defenses that existed between the original parties thereto. *Koehler v. Dodge*, 31 Neb. 329, 47 N. W. 913.

In *Eckbert v. Ellis*, 26 Hun. 668, Hardin, J., in delivering the opinion of the general term of the supreme court in holding that a purchaser of a promissory note before or after its maturity may avail himself of the title of his assignor, after quoting from Field, J., in *Cromwell v. Sac County*, 96 U. S. 59, 24 L. ed. 686, "that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with like immunity," said: "There is one exception to this rule, which arises where the purchase is made by the original payee, as he is not entitled to the protection which the rule gives to the innocent indorsee or purchaser."

Plaintiff, as agent of a corporation engaged in manufacturing grain separators, sold to defendant a separator for threshing small grain, for which the notes sued on were executed. There was a general warranty that the machine properly handled would thresh and clean grain as well as any other separator of like size. The notes in suit were executed by the defendant and assigned to the plaintiff before maturity. The notes were indorsed by him to a national bank, but were afterward, and before the commencement of the action, reindorsed to the bank by appellant. (It would seem that the last is a misstatement, and that it should read, "reindorsed by the bank to appellant.") The defendant alleged a breach of the warranty, and that the plaintiff knew it at the time he purchased the notes. The defense prevailed, and judgment was entered against the plaintiff. On appeal therefrom it was contended on the part of the appellant that, even if it should be held that there was a failure of consideration by reason of the breach of the warranty, then such defense could not prevail, because appellant, when he received the notes from the bank, received them purged of all defense. Held that a party having full knowledge of the defense which a maker may have to a promissory note at the time he received it, may not purge it of an equitable defense by merely assigning the notes to a third party and receiving them back at a subsequent time. *Dollarhide v. Hopkins*, 72 Ill. App. 509.

Defendant, a corporation, made its promissory note by its president payable to the order

Schomer v. Heckla F. Ins. Co. 50 Wis. 575, 7 N. W. 544; *Rahr v. Manchester F. Assur. Co.* 93 Wis. 355, 67 N. W. 725; *Wood v. Prussian Nat. Ins. Co.* 99 Wis. 497, 75 N. W. 173; *McDermott v. Jackson*, 102 Wis. 419, 78 N. W. 598; *Godfrey v. Schneek*, 105 Wis. 568, 81 N. W. 656; *Schauer v. Queen Ins. Co.* 88 Wis. 561, 60 N. W. 994; *Wicks Bros. v. Scottish Union & Nat. Ins. Co.* 107 Wis. 606, 83 N. W. 781.

Mr. H. W. Chynoweth, for respondent:

Andrews & Smith are not bona fide holders of this note and never have been. They deposited in the bank and got it discounted, if at all, with full knowledge that the note was not theirs and could not be until Robertson had accepted the delivery of the bonds as his property. If they paid the company money, they did it knowing that

of an estate of which the president of the corporation was the executor, who thereafter indorsed it as such executor, and it was then indorsed by the plaintiff, who alleged that he was an accommodation indorser for the defendant at its request, and that the defendant did not pay the note, and the plaintiff was compelled to and did, pay to the national bank, the owner and holder of the note, the amount of it. A supplemental affidavit of defense made by the manager of the corporation stated, among other things, that the corporation was not indebted to the estate, which was the payee of the note, in any sum whatever; but, on the contrary, such estate was indebted to the defendant for more than the amount of the note, and that both the executor and the plaintiff well knew these facts; and that the note was made in pursuance of an arrangement between the executor and the plaintiff for the purpose of borrowing a large amount of money with which to pay a debt owing by the decedent whose estate was payee, to the receiver of another corporation, and that the plaintiff well knew, at and before the making of the note, that the defendant was not indebted to the estate of the decedent, and that he was not a bona fide holder of said note, but an accommodation indorser with full knowledge of all said facts before he indorsed said note and before he procured possession of the same. A rule for judgment for want of sufficient affidavit of defense was made absolute by the judge before whom the matter was argued, he holding that no facts were set out which would constitute a defense against recovery on the note at the suit of the bank. That the plaintiff, who was an accommodation indorser, could not have resisted the payment at the suit of the bank against him upon his indorsement. He was compelled to pay the bank. That the want of consideration and the fraud in the original transaction, alleged by the defendant, could not have availed him as indorser, or the defendant as maker, as against the bank. Having been compelled to pay, the plaintiff succeeded to the right of the bank, and was affected by such equities as it was affected by, and by none other. On a writ of error the judgment was reversed, the supreme court holding that, even if the bank was a bona fide holder, judgment could not be entered in favor of the plaintiff, in the face of the supplemental affidavit that he knew of and was a party to the fraudulent arrangement by which the note was made. The bona fide title of a holder protects all subsequent holders, as a general rule; but this protection does not extend to a party to the original fraud. *Erie Boot & Shoe Co. v. Elchenlaub*, 127 Pa. 164, 17 Atl. 889.

Plaintiffs were the agents of a manufacturer

the note had not yet taken effect, as they were bound by the knowledge of their agent. If the company has been paid money on these policies, appellants can recover it back. They have lost nothing by the transaction, they gave no consideration for this note, they are in the law parties to the whole transaction as it took place, just as though they made the agreement with Robertson themselves, and they cannot put themselves in an attitude under those circumstances where they can take advantage of their own wrong.

Marshall, J., delivered the opinion of the court:

The view we take of this case renders it unnecessary to consider the question of whether the instrument sued on ever became the promissory note of respondent.

of guano, and as such, by their local agent, sold to the defendant a lot of guano, and warranted the same to be a good fertilizer, taking a note for the price payable to themselves. Afterwards, before the note became due, they became the real owners of the note by arrangement between themselves and the manufacturer. It was held that the plaintiffs were not such bona fide purchasers without notice of defendant's note as that defendant could not set up as a plea that the guano was of no value, even though it was not shown that plaintiffs knew it to be of no value at the time they became the real owners of the note. *Bolt v. Whitehead*, 50 Ga. 76.

P. sold a boat to E., May 8, 1889. E. mortgaged to P. on the same day. E. sold to B. some time thereafter. B. sold to a corporation, January 17, 1890. P.'s mortgage from E. was recorded March 6, 1890. The corporation sold to W. March 7, 1890, and the bill of sale was recorded March 8, 1890. Upon the same day W. gave his note at thirty days and mortgage to B., and the mortgage was duly recorded. B. sold this note and mortgage to O. March 28, 1890, before the note had fallen due. B. had notice of the P. mortgage when he bought from E. It did not appear that the corporation had any notice of that mortgage when it bought from B., and at that time the mortgage was not recorded. The court held that it was clear that the corporation was a bona fide purchaser of the boat from B., and, as its title was recorded before the P. mortgage was recorded, it did not take subject to that mortgage. It had neither actual nor constructive notice of the existence of that lien. Whether W. had notice of the lien or not, he took all the right in the boat which the corporation could convey, and therefore he also held his title to the boat free from the P. mortgage. When W. conveyed to B. the title to the boat as a mortgagee vested in him who had been guilty of the original fraud in selling a boat, which he knew to be mortgaged, free from that mortgage. As against him, P.'s equity was revived, and B. held the mortgage on the boat subject and junior to the P. mortgage. It was held, further, that O. was bound to know that if B., with actual notice of the P. mortgage, had sold the boat to the corporation free from the mortgage, the subsequent revesting of the title in B. would revive the equity which P. held against B. when he first purchased the boat from E., and would give P.'s mortgage priority over B.'s and that it therefore followed that O.'s position in receiving a mortgage from B. was exactly the same as if neither the corporation nor W. had intervened in the chain of title, for he was 54 L. R. A.

Conceding that it did, it is not enforceable in the hands of plaintiffs if the condition on which it was delivered to their agent, Forsting, is binding upon them, upon the ground that they are not bona fide holders of the paper. What that condition was is too clear for controversy. It was competent to show that the word "duebill," found in the receipt given by Forsting, referred to the note, upon the plainest principles of evidence; so there can be no question but that the delivery of the note was made upon condition that if respondent elected to and did return the bonds as not satisfactory, within thirty days, it should be delivered back to him.

It is said appellants became the bona fide holders of the note because they paid full value therefor to their principal without notice of the condition upon which it was

bound to know that he could get from B. nothing more than a title affected by the same equity, in favor of the P. mortgage with which B.'s original title was affected. *The W. B. Cole*, 8 C. C. A. 78, 16 U. S. App. 334, 59 Fed. 183.

In 1882 the British Parliament passed an act to codify the law relating to bills of exchange, cheques, and promissory notes (45 & 46 Vict. chap. 61), in which it was provided, among other things:

Sec. 29. (1). A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

(b) That he took the bill in good faith and for value, and that, at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course, as regards the acceptor and all parties to the bill prior to that holder.

The foregoing sections all apply to bills of exchange, but by § 89 of the same act it is provided that their provisions apply to promissory notes.

In 1897 a uniform negotiable instruments act, copied substantially from the English act above mentioned, revised and amended by the conference of commissioners on uniform state laws, became a law in the states of Colorado, Connecticut, Florida, and New York. In 1900 eleven other states, and by act of Congress the District of Columbia, had adopted the same act.

It would seem from the foregoing that in Great Britain and in the fifteen states mentioned and in the District of Columbia the general rule as herein alluded to, and the exception to that rule which forms the subject of the note, have been confirmed and adopted by statute.

P. H. V.

taken for them by Forsting. True, they did not have actual notice of such condition, but by well-settled principles of law they had constructive notice, if what Forsting did was within the actual or apparent scope of his agency; and if it was not, they are chargeable just the same and are bound accordingly, because they insisted on reaping the benefit of his transaction after having knowledge of the facts. Upon receiving such knowledge, if they did not intend to ratify such transaction, they should have promptly repudiated it and offered to return the note. *McDermott v. Jackson*, 97 Wis. 64, 72 N. W. 375; *Wilson v. Groelle*, 83 Wis. 530, 53 N. W. 900; *Perkins v. Boothby*, 71 Me. 91; *First Nat. Bank v. Oberne*, 121 Ill. 25, 7 N. E. 85; *Mechem, Agency*, § 167.

The further claim is made that plaintiffs are bona fide holders of the paper because they purchased it from their indorsee, who was an innocent holder thereof, paying full value therefor, and that the trial court erred in refusing to permit proof of such repurchase for value. In that, they invoke the familiar common-law rule, which has recently been added to the statute law of the state, § 1676-23, chap. 356, Laws 1899, that the holder of commercial paper may recover on the strength of the title of a precedent innocent holder, regardless of knowledge on his part of fraud which would defeat it in the hands of the payee named therein. *Verbeck v. Scott*, 71 Wis. 59, 64, 36 N. W. 600. That rule is stated in the books, particularly in judicial opinions, generally, in such a way as to lead one

astray who is not familiar with the law on the subject, as to the extent of its application. It is not a universal rule. It does not apply to a case like this, where the payee of the paper, being so circumstanced at the start that he cannot recover thereon, transfers it to an innocent third party for value, and subsequently purchases it back for value. Under such circumstances the payee cannot lean for support on the innocence of his vendee. His position is the same when he comes into possession of the paper the second time as when he first possessed it. One would say that must be the law without reference to authority; otherwise a person might become possessed of the promissory note of another by the grossest of frauds and by selling it to an innocent third person for value and subsequently repurchasing it enforce the same against the maker. The law contains no such open door as that for the successful perpetration of fraud. *Tod v. Wick Bros.* 36 Ohio St. 370; *Sawyer v. Wiswell*, 9 Allen, 39; *Kost v. Bender*, 25 Mich. 518; *Vorce v. Rosenberg*, 12 Neb. 448, 11 N. W. 879; *Charitan Plow Co. v. Davidson*, 16 Neb. 374, 20 N. W. 256; *Camp v. Sturdevant*, 16 Neb. 693, 21 N. W. 449. We are unable to find that the rule contended for by appellants has ever been applied to a case like this. If authority to that effect could be found, we would be compelled to reject it as out of harmony with the settled law on the subject and contrary to every principle of justice upon which the law is founded.

The judgment of the Circuit Court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

FIDELITY & CASUALTY COMPANY,
Plff. in Err.,
v.

T. H. FREEMAN, Admr., etc., of C. C. H.
Burton, Deceased.

(48 C. C. A. 692, 109 Fed. 847.)

1. Suicide of the insured is not so conclusively shown as to require the taking of an action on the policy from the jury, by evidence that, having been upon a train, he was found by the side of the track mortally wounded, that for some time he had been in straitened financial circumstances, his property being heavily encumbered and about to be sold, that he had failed in an attempt to effect a loan, had been guilty of forgery and false representations for which he was threatened with prosecution, and had recently been making efforts to secure as much accident insurance as possible, where it also appears that he had four daughters dependent upon him for support, for whom he had a strong affection, was a man of sanguine temperament, accustomed to carry consider-

able insurance, and that his property sold for enough to pay all his debts.

2. The refusal to instruct the jury that the burden of proving that the insured did not come to his death through causes from liability for which the policy excepts the insurer is upon the one suing on the policy cannot be questioned for the first time on appeal.

3. A new action is not brought by the substitution of plaintiff as administrator with the will annexed after the finding and probate of the will, for himself as simple administrator, in an action on an insurance policy, so as to give the insurer the benefit of the expiration of the time limited for the bringing of the suit, which occurs before the substitution is made.

4. A statute is not void for granting special rights, privileges, immunities, or exemptions, which, by not being applicable to companies doing business on the assessment plan, thereby exempts them from a provision that false representations in applications for life or casualty insurance shall not avoid the policy unless made with actual

NOTE.—For cases in this series as to presumption and burden of proof in respect to suicide of deceased person, see *Mutual L. Ins. Co. v. Wiswell* (Kan.) 35 L. R. A. 258, and note 54 L. R. A.

on page 263; *Johns v. Northwestern Mut. Relief Assn.* (Wis.) 41 L. R. A. 587; and *Standard Life & Acci. Ins. Co. v. Thornton* (C. C. App. 6th C.) 49 L. R. A. 116.

intent to deceive, or unless they increase the risk.

5. An accident insurance company cannot insist on the invalidity of a statute for unconstitutional discrimination against fire insurance companies.

(June 4, 1901.)

ERROR to the Circuit Court of the United States for the Middle District of Tennessee to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

Statement by **Severens**, Circuit Judge:

This is an action at law, removed into the court below from the circuit court for Wilson county, Tennessee, upon the petition of the above-named plaintiff in error. The plaintiff sued as the administrator of C. C. H. Burton, deceased, to recover upon an accident policy issued to the said Burton March 26, 1896, in the sum of \$2,500, in case of death, with provision for a weekly indemnity for injuries not resulting in death; the policy to be in force for one year. Injuries self-inflicted, whether resulting fatally or not, were excluded by the terms of the policy. So, also, were all injuries received "while or in consequence of" the insured being affected by (among other things) "vertigo, fits, or any disease or bodily infirmity." One of the conditions was that "no suit should be brought upon the policy unless begun within six months from the time of death or other injury. The insured came to his death on the 8th of September, 1896, from injuries received by him from falling off, or throwing himself off, a railroad train on the 4th of the same month. Freeman was appointed administrator of his estate by the proper probate court, and qualified as such, it being then supposed that Burton died intestate. Upon a representation that the estate was insolvent, the administration thereof was removed under a provision of a state statute into the chancery court. The insurance company having denied its liability, Freeman brought this suit in January, 1897, having received his letters of administration. On April 19, 1897, a will made by Burton, which had meantime been discovered, was probated, and it was ordered that letters testamentary be issued to Freeman, as administrator with the will annexed, and on the same day he qualified as such. But on the 26th of April, 1897, in the proceeding pending in the chancery court, the heirs and distributees of Burton entered into an agreement that the will should "be set aside, and for nothing held, and that the estate of said Burton shall be settled as if no will was ever probated." Thereupon the chancery court, reciting this agreement, ordered that it be "in all things confirmed and approved, and is made the decree of this court. The estate of said C. C. H. Burton will be settled in accordance with said agreement, and without any reference to the will, which has been probated." Meantime, by leave of the court, the declaration in the present suit

was amended by making Freeman, as administrator with the will annexed, a party plaintiff in the case, and it was ordered that "this cause will hereafter proceed in the name of Freeman in his double capacity of administrator and of administrator with the will annexed." To the maintenance of the suit the insurance company interposed several defenses, as follows: (1) That the deceased came to his death by suicide; (2) that, for aught that appeared, the defendant's falling off the train was in consequence of vertigo, fits, or some disease or bodily infirmity; (3) that the suit abated upon the probating of the will of the deceased and the appointment of Freeman as administrator with the will annexed, and that upon the amendment of the declaration by bringing in Freeman as administrator with the will annexed a new suit was brought, and this more than six months after the death of the assured. Another question arose upon the pleadings, involving the effect of the representations made by the deceased upon which the policy in suit was issued. The 22d section of chapter 160 of the Acts of Tennessee, passed in 1895, entitled "An Act to Govern and Regulate the Business of Insurance, Other Than Life and Casualty Insurance upon the Assessment Plan, and to Repeal All Laws, or Parts of Laws, in Conflict with This Act," is as follows: "No written or oral misrepresentation or warranty therein, made in the negotiation of a contract or policy of insurance, or in the application therefor by the assured, or in his behalf, shall be deemed material, or defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increases the risk of loss." For the insurance company it was contended that this statute was unwarranted class legislation, and was unconstitutional. These are the four principal points here presented for review. The case was tried before a jury. At the close of the testimony the defendant prayed for an instruction from the court that a verdict should be rendered in its favor upon the ground that it was clearly established that the death of the insured was by suicide. This instruction was refused, and a verdict was rendered in favor of the plaintiff. The insurance company brings the case here on writ of error.

Argued before **Lurton**, **Day**, and **Severens**, Circuit Judges.

Mr. Albert D. Marks, for plaintiff in error:

The court should have directed a verdict in favor of plaintiff in error, the evidence showing that the decedent came to his death by suicide, and not by accident, within the meaning of the policy.

The burden of proof was on the defendant in error to show that the injuries were not received as the result of decedent's falling from the train in consequence of vertigo, fits, or any disease or bodily infirmity.

The discovery and probate of the will re-

voked the grant of the letters of administration, and the suit could not be continued by T. H. Freeman as administrator; and, there being no privity between the titles which he took in his two representative capacities, his suit as administrator cannot inure to the benefit of himself as administrator with the will annexed; and the amendment allowing him to maintain the suit in the latter capacity does not relate to the suing out of the summons, but requires the suit to be taken as having been instituted on the date of the amendment.

Brown v. Pendergast, 7 Allen, 427; *Grant v. Chamberlin*, 4 Mass. 611; *Taylor v. Savage*, 1 How. 282, 11 L. ed. 132; *Kane v. Paul*, 14 Pet. 39, 10 L. ed. 344; *Yeaton v. Lynn*, 5 Pet. 231, 8 L. ed. 107; *Woerner*, Am. Law of Administration, 274; *Tidd*, Pr. 848; *National Bank v. Stanton*, 116 Mass. 438; *Jewett v. Jewett*, 5 Mass. 275; *Bigelow v. Bigelow*, 4 Ohio, 149, 19 Am. Dec. 591; *Hughlett v. Hughlett*, 5 Humph. 466; *Wilson v. Bothwell*, 50 Ala. 378; *Morrison v. Cones*, 7 Blackf. 593; *Cuppy v. Coffman*, 82 Iowa, 214, 47 N. W. 1005; *Broach v. Walker*, 2 Ga. 428; *Hunt v. Wilkinson*, 2 Call (Va.) 49, 1 Am. Dec. 534.

The amendment permitting T. H. Freeman to sue in his new capacity as administrator with the will annexed was certainly an amendment changing the form of action, and its effect must be restricted to the time when it was allowed.

Crofford v. Cothran, 2 Sneed, 492; *Flatley v. Memphis & C. R. Co.* 9 Heisk. 230.

Section 22 of chapter 160 of the Acts of 1895 is unconstitutional and void.

Stratton Claimants v. Morris Claimants, 89 Tenn. 497, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Cooley*, Const. Lim. p. 523.

Messrs. Stokes & Stokes, for defendant in error:

This action could be maintained by Freeman in his individual name, or as administrator, or as administrator with the will annexed, or in all three capacities jointly.

Kane v. Paul, 14 Pet. 33, 10 L. ed. 311.

The finding and probating of the will did not revoke the appointment of Freeman as administrator.

Franklin v. Franklin, 91 Tenn. 126, 18 S. W. 61; *Fisher v. Bassett*, 9 Leigh, 119, 33 Am. Dec. 227.

Such an amendment as the one in this case relates to the date at which the suit was instituted.

Nance v. Thompson, 1 Sneed, 321; *Burgie v. Parks*, 11 Lea, 84; *Augusta Mfg. Co. v. Vertrees*, 4 Lea, 75.

An administrator and an administrator with the will annexed are privies.

Stacy v. Thrasher, 6 How. 45, 12 L. ed. 337; *Greenl. Ev.* § 523; *Fuller v. Mowry*, 18 R. I. 428, 28 Atl. 606.

If there is anything in the stipulations of the policy that would defeat its collection if the facts are that way, it is a matter of defense that must be pleaded.

Beach, Ins. § 260; *Piedmont & A. L. Ins. Co. v. Fwing*, 92 U. S. 377, 23 L. ed. 610. 54 L. R. A.

The facts fail to bring this case within the rule permitting the court to direct the verdict of the jury.

Chicago G. W. R. Co. v. Healy, 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245.

Severens, Circuit Judge, delivered the opinion of the court:

1. It is contended that the evidence established beyond doubt that the deceased committed suicide, and that the court should, for that reason, have instructed the jury that the plaintiff was not entitled to recover. The evidence upon which this peremptory instruction was asked tended to show that for some time prior to his death Burton had been in straitened financial circumstances; that his property was heavily encumbered; that his house, which was mortgaged, and his personal property, which had been seized on execution, were about to be sold; that he had just before been making strenuous efforts to borrow money to tide him over his distress, but had failed; that he had forged a mortgage, and the certificate of acknowledgment thereof, on which he had made an attempt to borrow money; that he had, a year before, borrowed money upon false representations in regard to the freedom of his property from encumbrances; that he was being threatened with prosecution for these offenses; that he had four daughters living at home with him, who were dependent upon him for support; and that just before his death he had been making efforts to secure as much accident insurance as possible in addition to that which he was then carrying, and had succeeded in effecting enough to make in all \$16,000. But it was also shown that he was a man of sanguine temperament, that he had been accustomed to keep considerable insurance upon his life and against accidents, and that after his death his property sold for enough to pay off all his debts. At the time of his death he was returning home from an ineffectual effort to raise money to save his home and personal property from forced sale. He was last seen before his injury upon the platform of the car on which he was riding, and not long afterwards was found by the side of the track, mortally injured. No doubt these circumstances, taken together, were well calculated to excite grave suspicion that the assured had thrown himself from the train with intent to destroy himself, but they were by no means conclusive; nor did they so clearly demonstrate that conclusion as to compel the finding by the jury that it must be so. Taking into account, in connection with all the circumstances above enumerated, the common instinct of mankind to hold on to life, and his strong affection for his daughters, and his earnest purpose to care for and protect them, we cannot say that it would be unreasonable to conclude that the death of the assured was accidental, and not purposed. It was a question upon which the minds of jurors might fairly be convinced that the fact was one way or the other. The legal presumption was against the fact of sui-

cide, and the burden of proof was upon the insurer. In these circumstances there was no error in refusing the instruction requested.

2. It is further contended here that the jury should have been instructed that the burden of proof was upon the plaintiff to prove that the deceased did not come to his death in consequence of, or while suffering from, vertigo, fits, or other disease. But we are unable to find in the record any request by the plaintiff in error to instruct the jury upon this point, or any exception to such part of the charge as might inferentially imply the contrary of what is now insisted upon as the correct theory upon the subject. This being so, the question is not before us. It is useless to cite authority upon a proposition so well settled. Moreover, the bill of exceptions indicates that, when the case came to go to the jury, it was, without objection by either party, reduced by the court, so far as the facts were involved, to the single question whether the assured came to his death by suicide or not.

3. Another supposed error assigned is that the probate of the will revoked the plaintiff's letters of administration, and that the amendment by which he was permitted to proceed with the case as administrator with the will annexed operated to the effect of enabling him to bring a new suit, and that the six months allowed for bringing the action had expired before the amendment was made. If this question had arisen upon the early common law of England, it might be attended with difficulty on account of the widely different character of an executor from that of an administrator at that time. The executor derived his authority from the will. He was not an officer of the court, but was regarded as a trustee for the purposes declared by the testator, and could, before probate, do nearly all things required for the settlement of the estate except that he could not bring suits in the courts. The probate was for the purpose of definitely determining his character, and establishing it once for all, and enabling him to make profert of his authority in the manner required by the practice of the courts. Ordinary administration was in derogation of his rights as executor, which could not be thus taken away. And it was at one time held that such an administration was void upon the subsequent production and probate of a will. But later on the rule was modified so as to apply only to those cases in which administration had actually deprived the executor of some right, and not to those cases in which only the rights of other persons interested in the estate were concerned, in which latter case the administration was voidable only. In this country the rule itself has been much further restricted, if not obliterated, by the effect of statutory regulations in all the states in regard to the settlement of estates of deceased persons. Here, for all the purposes of administering the estate, an executor is charged with the same duties as an administrator, although quite frequently

he is, in addition, a trustee for certain purposes expressed by the testator. But those purposes are always subordinated to the paramount rights of creditors. Contrary to the English doctrine, he is here an officer of the court for the purpose of administering the estate, and cannot act without the sanction of his appointment by the probate court. Subject to certain limitations imposed by public policy, the testator may direct the disposition of his estate, and then the executor distributes the property according to the will, while an administrator distributes according to the statute. For the ordinary purposes of recovering the assets of the estate, the right and the method of procedure are precisely alike, whether of an administrator or an executor, and the same defenses may be made by the debtor. An administrator differs from an administrator with the will annexed, not in respect to his right to collect debts due to the estate, but only in respect to the disposition of the assets. Each represents the estate in all controversies with its debtors. If, before the discovery of a will, administration is granted and proceeded with, that which is done before the probate is valid and effectual for the purposes of administration. Upon the probate of the will, the executor takes up the settlement of the estate where the administrator left it, and proceeds with the administration according to law; the will, by consent of the law, supplying some part of the method by which he shall dispose of the estate; the court in the meantime giving such directions as are expedient for disposing of the assets, and as the law combined with the purpose of the testator require. Though the executor thus coming in is not in privity with the administrator in the sense that he receives the title by devolution of the estate from the latter, yet he is, to use the language of Chief Justice Shaw in *Buttrick v. King*, 7 Met. 20, "his successor in the trust," and is bound by what he has done in the lawful execution of the powers of his appointment. The cause of action in the suit which Freeman brought as administrator was the identical cause of action which continued upon his appointment as administrator with the will annexed. No other modification of the suit took place, except that a peculiar characteristic was added to the status of the plaintiff. This affected him only as it touched the disposition of what he should collect. The issues remained the same. The proof in support and in defense of the claim would be the same, and the recovery would be held by him as the representative of the estate, and subject to the orders of the court. By the terms of the policy the sum insured was payable "to the legal representative of the assured." Freeman was at all times the representative of the assured, and payment to him by the insurance company, whether before or after the amendment of the declaration, would have been a clear acquittance of the liability. In the case of *Randolph v. Barrett*, 16 Pet. 138. 10 L. ed. 914, suit was brought against the defendant as ad-

ministrator. He pleaded in abatement that he was not administrator, but was the executor of the will of the deceased. Thereupon the plaintiff moved to amend by striking out of the writ and declaration the words "administrator of all and singular the goods and chattels, rights and credits, which were of Algernon S. Randolph, at the time of his death, who died intestate," and inserting "executor of the last will and testament of Algernon S. Randolph, deceased." The motion was granted, and the cause proceeded to judgment. The defendant sued out a writ of error, relying upon the ground that the amendment was improperly allowed. But the court said that, "whether he acted in one character or the other, he held the assets of the testator or intestate in trust for the creditors," and held that there was sufficient in the record to amend by, but that, independently of this, it was authorized by the 32d section of the act of 1789, which allows amendments of process and pleadings; that the granting of the amendment disposed of the plea in abatement; and that the amendment was properly allowed. It is obvious that the court regarded the cause of action as the continuing subject of the suit, and that the change in the official character of the defendant did not essentially affect it. If this be so as to a defendant, the reason is still stronger for its application to the case of a plaintiff, for in the latter case the position of the defendant is in no wise affected. The case referred to not only has the weight of authority, but is in harmony with later decisions, which have tended more and more to free the subject from the embarrassments which followed the attempt to carry the technicalities of the English doctrine into a system where, by the operation of statutes, an executor becomes an officer of the court, and as such administers the estate under the orders of the court in precisely the same way as an administrator does, except in respect to the specific trusts which the testator has designated, and which the law permits the executor to carry out. The defendant in such a case as this has no concern with those. It would be sacrificing justice to the merest form to permit the defendant to maintain this defense, where, in ignorance of the fact that there was a will, which might change the ultimate disposition of the fund, the suit had been lawfully brought within the time prescribed by the policy.

The Tennessee cases relied upon—*Croft v. Cothran*, 2 Sneed, 492, and *Flatley v. Memphis & C. R. Co.* 9 Heisk. 230—are not in point. In the former case the plaintiff had been permitted by amendment to change his suit from one in assumpsit to one in debt. Different defenses are open upon differing pleas in the one form of action from those in the other, and usually different limitations for actions are prescribed. In the other case a suit had been brought by a party who had no right at all to sue, and by the amendment a new party, who, in fact, had the right of action, was brought in. It is

easy to see that there was no continuity of the cause of action, for none had existed during the time when the suit was by the former plaintiff. Other cases in Tennessee seem to hold that, if the cause of action continues, the variation of the position of the respective parties in relation to the right to pursue it would not abate it, and that in such case the suit would be deemed to have been commenced at the time when it was originally brought. See *Nance v. Thompson*, 1 Sneed, 321; *Augusta Mfg. Co. v. Ver-trees*, 4 Lea, 75; *Burgie v. Parks*, 11 Lea, 84. In the latter case a suit was brought against one of two executors upon a covenant of the testator. Pending the suit, and after the statute of limitations had run, the plaintiff was allowed to bring in the other executor by amendment. He pleaded the statute, but it was held that, the cause of action being the same, the amendment related to the commencement of the suit, and that the plea was not maintainable. It will be noticed that in that case the form in which the suit proceeded was changed to an action against two defendants jointly, but that, as here, the essential character and purpose of the suit were preserved. In *Person v. Fidelity & C. Co.* 35 C. C. A. 117, 92 Fed. 965, an administrator appointed by the probate court, who had given bond, but had not fully qualified, commenced a suit upon a policy of the company issued to the decedent. His appointment was afterwards canceled, and Person was appointed administrator, and by the order of the court in which the suit was pending was substituted as plaintiff. The defendant moved to dismiss the suit upon the ground, among others, that the policy required the suit to be begun within six months from the time of the death, and that Person had no standing in court until he was substituted as plaintiff, which was more than six months after the death of the assured. This motion was granted, the suit was dismissed, and the plaintiff brought a writ of error to this court. The judgment was reversed. Judge Thompson delivering the opinion of the court, in answer to the objection that the suit was illegally brought by the administrator in violation of a statute of the state, and conferred no jurisdiction upon the court, after referring to § 4589 of Shannon's Code (Tenn.), which reads as follows: "No civil suit shall be dismissed for want of necessary parties, or on account of the form of action or want of proper averment in the pleadings, but the courts shall have the power to change the form of action, strike out or insert in the writ and pleadings the names of either plaintiffs or defendants, so as to have the proper parties before the court, and to allow all proper averments to be supplied, upon such terms, as to continuances, as the court, in its sound discretion, may see proper to impose,"—says: "The question is not whether the suit could have been maintained in Lee's name, nor whether Lee was guilty of a misdemeanor in bringing the suit, but whether it should abate because of Lee's want of authority to prose-

cute it. . . . The defendant was in court to answer to a cause of action in favor of the estate of Hudson, which could only be prosecuted by the administrator of the estate; and, Person having been appointed and qualified as such administrator in the place and stead of Lee, . . . the court substituted him for Lee as plaintiff in the case."

The present case is distinguishable from that class of cases of which *Sicard v. Davis*, 6 Pet. 124, 8 L. ed. 342, is a leading one. That case was an action of ejectment. The plaintiff laid his demise as one from Sicard. He was permitted to amend by substituting a demise from other parties, who had derived title from Sicard's grantor before the grant to Sicard. This was permitting the plaintiff to assert a different title, depending upon the determination of wholly new issues. It was substituting a new cause of action. A comparison of this case with that of *Randolph v. Barrett*, 16 Pet. 138, 10 L. ed. 914, develops the distinction between the cases where, by an amendment, a new cause of action is asserted, and those where the amendment rests upon the cause of action which is already the subject of the suit, and is designed to facilitate the prosecution of the suit to a determination of its merits. We think that in the present case, the cause of action remaining the same, that the modification of the representative character of the plaintiff did not destroy the continuity of his representation; that the suit in which the judgment was rendered was therefore a continuation of the one originally commenced, and not a new one begun at the time when the declaration was amended.

There is another view upon which it should seem that the defense founded on the limitation of the time contained in the policy within which suit must be brought ought not to be sustained. When the contract of insurance was made, the company knew (as it must be presumed) that the law of Tennessee provided that in the suit which it required to be brought the court would be authorized to permit new parties to be brought in by amendment. It was in the contemplation of the parties that this might happen, and it could not have been expected that such a suit would not be subject to the general regulation applicable to all suits. Now, the statute was enacted for the very purpose of mending all such defects in the constitution of the suit as would permit it to go on to judgment, and one of such defects was that of proper parties. Manifestly, it was intended that the suit should continue, and not abate. If the parties are held bound to have contemplated such a contingency as the exercise of the power of the court to permit the amendment, the defendant ought not now to be heard to say that a suit lawfully brought to recover upon this policy for the benefit of the estate should be defeated by the event which made the amendment necessary and proper. It would be difficult to conceive of a case where such an amendment would be more just and proper. The defendant imposed a short limita-

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tion. By it the suit could not be brought within three months, but must be within six months. Its object, as we must suppose, was to enable the company to gather the evidence, and prepare for its defense, while the matter was fresh, and to have a speedy determination of its liability. This object was accomplished by the commencement of the suit, and it was a suit which, when begun, suffered no delays which were not incident to other suits which might be brought in the same court. If such an amendment could not be made except with the consequences of a new suit, then brought, the defendant in such a case would escape all liability if it should happen that the will should not be found within six months after the death of the insured, unless the administrator should have brought suit and enforced collection within the three months allowed by the policy for that purpose. We see no difficulty in holding that the suit required by the policy to be brought intended a suit subject to the exercise of the power of the court to remodel it as the law permitted and justice should require.

4. A question was raised by the defendant upon the pleadings in respect to the effect of the alleged falsity of the misrepresentation of the assured in his application for insurance that he had never had fits or disorders of the brain; the contention of the defendant being that, whether or not the representation was made with an actual intent to deceive, or the existence of the fact increased the risk of loss, the falsity of the representation defeated the policy. This contention was made upon the ground that § 22 of chapter 180 of the Acts of Tennessee of 1895, declaring that such misrepresentation, if not made with intent to deceive, and the matter thereof did not increase the risk of loss, should not be deemed material, or make the policy void, was in violation of § 8 of article 11 of the Constitution of Tennessee, which reads as follows: "The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual, or individuals, rights, privileges, immunities, or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law."

The ruling of the court, as we gather from the record, upheld the validity of the statute, and this ruling is now assigned as error. It is insisted that the statute in question is "a partial law, and vicious class legislation," because, as is said, it exempts from its burdens life and casualty insurance companies conducted on the assessment plan. But the gravamen of the complaint is rather that the statute imposes a burden upon this insurance company which is not imposed upon other companies engaged in a similar business, and it is charged that the classification of life and casualty insurance companies doing business on the assessment plan

on one hand and mutual fire insurance companies, life and casualty insurance, and all other insurance companies on the other, and denying a privilege to one which it gives to the other class, is without any imaginable reason or justification. In so far as the law can be said to cast a burden upon mutual fire insurance companies which it lifts from "mutual life and casualty insurance companies," the mutual fire insurance companies themselves are the only companies who are in a position enabling them to raise the objection, if it be one. The defendant in the court below, not being a mutual fire insurance company, has no legitimate ground for complaint that another company is unjustly burdened. Only the party injuriously affected by unconstitutional legislation can be heard to allege its invalidity. The question, therefore, comes to this: whether it was competent for the legislature to change the rule of law in respect to the liability of a casualty company insuring for a fixed premium upon its policies thereafter to be issued, without at the same time imposing the same liability upon the contracts of mutual life and casualty companies. And we are of opinion that it was. Legislation is not open to the objection here made, provided it affects all persons alike who are within the description of those mentioned in the statute. The decisions of the Supreme Court upon that clause of the 14th Amendment to the Constitution of the United States which forbids the denial by any state to any person within its jurisdiction of the equal protection of the laws are strictly pertinent, there being a close similitude between that clause and the provision of the Tennessee Constitution in question. Those decisions are very numerous, and illustrate the subject by many examples. We cite at random a few of the cases, which sufficiently indicate the general doctrine. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. In the last of these, many of the recent cases are collected. The rule declared in those cases in respect to the extent to which discrimination in classifying the objects of legislation may rightfully proceed is the same as that which we think applicable to the case before us. What this declaration of the Constitution of Tennessee means is that no discrimination shall be made in respect of burdens and privileges between persons whose interests and relations to the general public are so far identical that they would be affected in the same way by legislation which should comprehend all such persons. The division of such persons into classes, and making one law respecting burdens and privileges for one class, and a different one in regard to the same subjects for another class, would be purely arbitrary, and it is such discrimination that the Constitution forbids. We

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accept the doctrine as stated and approved by the supreme court of Tennessee in *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, 534, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 80, 15 S. W. 87, 97, "that whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of the state, the basis of such classification must be natural, and not arbitrary." But the power of classification will be upheld when such classification proceeds upon a difference which has a reasonable relation to the object sought to be accomplished. The distinction between insurance for a fixed premium, where the parties have no community of interest, and mutual insurance, where the insured is also the insurer, and shares in the management of his company, participates in the making of its by-laws, whereby the terms of its contracts with its members are prescribed, where the insurance is at its actual cost, and no profits taken out by a stranger, is not arbitrary. The nature and the incidents of the business of the two methods vary greatly. The laws of Tennessee in regard to mutual insurance companies contained provisions which are common to those of many of the states, and under which the relations of the member and the company were those above described. The legislature might well think it not unreasonable that the members of such associations should be left to determine for themselves whether they would adhere to the common-law doctrine in respect to the consequences of a misrepresentation of facts though made without any fraudulent purpose, and there was no increase of the risk by the untruth of the representation, or whether they would adopt the rule which the legislature proceeded to lay down upon that subject in respect to companies insuring upon the other plan. The rule itself was undoubtedly prescribed from a sense of the harshness of the former doctrine, and was designed to prevent the less astute of the parties from falling into a pit through having mistakenly made some representation the falsity of which did not increase the risk of loss. It is of a kind not uncommon in legislation for alleviating the perils to which the insured is often exposed. In mutual insurance the insured determines for himself whether he will expose his insurance to such hazard as would ensue from an incorrect representation. It was said by the Supreme Court, in considering the obligatory effect upon a member of one of the articles of a mutual insurance company, in *Korn v. Mutual Assur. Soc.* 6 Cranch, 192, 3 L. ed. 195, that, "whether [it was] just or unjust, reasonable or unreasonable, . . . to all concerned, was certainly a mere matter of speculation, proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member in fact stands in the peculiar situation of being party of both sides,—insurer and insured."

We think there was enough of dissimilar-

ity in the character of the business of insurance for a fixed premium and that of mutual insurance to justify the legislature in laying down a rule regulating the former without also imposing it upon the latter. These views lead to an affirmance of the judgment.

Judgment affirmed.

J. H. CONNOR, *Appt.*,

v.

TENNESSEE CENTRAL RAILWAY.

(48 C. C. A. 730, 109 Fed. 931.)

1. A state may provide for bringing before the court by publication non-residents claiming liens upon a railroad located within its jurisdiction, in a suit to wind up the railroad corporation and free its property from liens.
2. A purchaser of a railroad under a decree in a creditors' suit may intervene in a suit to enforce a construction lien upon the property by sale of the section to which it applies, to enforce its right to be relieved from the threatened sale, by which the unity of the railroad will be broken.
3. A section of a railroad cannot be sold under a decree of court, separate from the franchises, for the purpose of enforcing a contractor's lien.

(June 4, 1901.)

APPEAL by defendant from a decree of the Circuit Court of the United States for the Middle District of Tennessee in favor of complainant in a proceeding to enjoin an effort to enforce a judgment establishing a lien on property of the Tennessee Central Railroad Company. *Affirmed.*

Statement by Lurton, Circuit Judge:

The Tennessee Central Railroad Company is a Tennessee corporation, authorized to construct and operate about 60 miles of railroad beginning at Monterey, in Putnam county, Tennessee, and extending to a junction with the Cincinnati Southern Railway at or near Glen Mary. In September, 1893, said railroad company entered into a contract with the appellant, J. H. Connor, for the complete construction of said railroad, including the ironing of its road and the construction of depots, water tanks, switches, etc.; Connor to furnish all materials and obtain necessary rights of way. For this he was to receive a fixed sum, partly in money and partly in first-mortgage bonds, both payable in instalments as the work progressed. After grading a section of about 10 miles, beginning at Monterey, and extending east, he threw up his contract in April, 1894, claiming that the company had made

default in payments, and was insolvent. May 25, 1894, he filed an original bill in equity in the circuit court of the United States at Nashville against the railroad company claiming a balance due him for work done and a lien therefor under the Tennessee statute giving to contractors a lien for work done in construction of any railroad. That bill averred that the said company was proceeding with the construction under contracts with other contractors, and asserted a lien for the balance due, not only upon the roadbed, bridges, trestles, culverts, etc., constructed by the complainant, but a lien upon the entire railroad, that constructed as well as that under construction, its franchises and property of every description. The bill prayed that the said railroad, including its franchises, should be sold for the payment of his debt and the enforcement of his statutory lien. It was not filed as a creditors' bill, and the only defendant was the railroad company. The railroad company answered and defended, and such proceedings were had as resulted on May 28, 1896, in a decree fixing the liability of the railroad company at \$21,421.78. The decree then proceeded as follows: "The court is further of opinion that the foregoing judgment is a lien upon portion of the defendant railroad company commencing with the town of Monterey, in the county of Putnam, and continuing in a southeasterly direction for 10 miles; said strip of land being 100 feet wide, upon which there has been constructed a roadbed for said railroad, 14 feet wide at its crest; and that there are also within and upon said property various cuts, trestles, and bridges,—upon all of which said judgment constitutes a lien, the court being of opinion that complainant is entitled to have so much of said railroad sold for the satisfaction of the aforesaid judgment. It is therefore adjudged and decreed by the court that H. M. Doak, in his character as special commissioner under appointment heretofore made, will proceed at once to sell the above-described property after advertising the same as required by law or rule of this court. He will make said sale at the custom house in the city of Nashville, and will sell said property to the highest bidder for cash, free from any equity of redemption or repurchase. Said commissioner will make his report to the next term of this court how he has executed this decree." No step in execution of this decree was taken until October 28, 1899, when the order of sale was revived. On November 11, 1899, it was again revived, and the decree amended so as to require the property to be sold at the custom-house door in the town of Cookeville, in the county of Putnam, instead of at the custom house in Nashville. Before that decree of sale had been executed, the Tennessee Central Railway Company intervened, and by leave of the court filed a petition praying that the court would perpetually stay the execution of said order of sale, and protect its rights against the cloud which would thereby be thrown upon its title as the purchaser of

NOTE.—For cases in this series as to execution or judicial sale of corporate franchises or property necessary to their enjoyment, see *Brady v. Johnson* (Md.) 20 L. R. A. 737, and *note*; *Lake Shore & M. S. R. Co. v. Grand Rapids* (Mich.) 29 L. R. A. 195; and *Stewart v. Wheeling & L. E. R. Co.* (Ohio) 29 L. R. A. 438. 54 L. R. A.

the property and franchises of the Tennessee Central Railroad Company. A temporary injunction was granted, and Connor answered said petition, denying that he was ever a party to the Walker suit, and setting out that he was a nonresident of the state when that bill was filed, had never appeared in said suit, and was still a nonresident of Tennessee. He also took issue upon every material matter set up as a ground for restraining the execution of his decree. Upon the issues thus made up and the evidence the circuit court, upon final hearing, perpetually enjoined Connor from the enforcement of his lien by a sale of the roadbed described in his decree, but otherwise permitted the decree to stand unaffected. From this decree Connor has appealed.

The essential facts established and necessary to be regarded in the judgment to be pronounced are these:

Connor's bill was filed in the circuit court May 25, 1894. The bill was not a creditors' bill, and its sole purpose was to enforce the statutory lien of a railroad constructor for his exclusive benefit. While the bill prayed for the appointment of a receiver, none was in fact ever appointed, and the property against which he asserted his lien was never attached or otherwise taken into the actual custody of the court. On April 3, 1895, and before any final decree under Connor's bill, J. C. Walker and others, claiming to be creditors of the said railroad company, filed a general creditors' bill in the state chancery court for Cumberland county. The object of that suit was to set aside certain mortgages made by the company as fraudulent, and to have the company wound up as an insolvent corporation. The bill was filed for the benefit of all creditors, and sought to have all debts ascertained, all liens and priorities declared, and the property sold free from all liens and encumbrances, and the proceeds applied to the payment of debts in the order of their rank. October 23, 1895, the chancellor ordered the bill to stand as a creditors' bill, and that the clerk and master should make publication requiring all creditors to come in and make themselves parties on or before the first Monday in April, 1896, on penalty of being deprived of all the benefits of the suit. It was further ordered that the institution of any other suits against the said company be enjoined. On the same day a receiver was appointed, who was ordered to take into his possession all the property, and effects of the said company. At the date of the filing of this creditors' bill about 23 miles of the roadway of said company had been graded, and it is inferable that some bridge and trestle work had been constructed. Aside from this incomplete roadway and some cross-ties, bridge timbers, and commissary stores, it does not appear that said company owned any other property whatever, save certain conditional subscriptions to the stock of the company, dependent upon the construction of the railroad into or through certain mountain counties. The defendants named in the caption of the

bill, other than the railroad company, included J. H. Connor & Co., described as "contractors of the defendant" railroad company "operating in Cumberland county." A final decree was rendered in the suit of Connor, May 28, 1896. Connor stood by and took no step to enforce this decree for a period of more than three years. In the meantime the creditors' suit in the state court was proceeding. General publication for four successive weeks was made in November and December, 1895, requiring all creditors to file their claims by April 1, 1896. January 12, 1897, an alias subpoena to answer issued to the sheriff of Cumberland county, requiring him to summon J. H. Connor & Co. to appear and plead to the February rules. This was returned January 15, 1897, "Search made, and the defendant not to be found in my county." On the day of this return an order was made on the rule docket by the clerk and master in these words:

J. C. Walker et al. v. Tennessee Central Railroad.

In the Chancery Court at Crossville, Tennessee.

In this cause it appearing by the sheriff's return that J. H. Connor & Co., one of the defendants, is not to be found in the county, and that search has been duly made by such sheriff, they are therefore hereby required to appear on or before the first Monday of March next before the clerk and master of said court at his office in Crossville, Tennessee, and make defense to the bill filed against them in said court by J. C. Walker et al., or otherwise the bill will be taken for confessed. It is further ordered that this notice be published for four consecutive weeks in the Crossville Chronicle.

H. G. Dunbar, C. & M.

This January 15, 1897.

Publication was duly made as required by this order, and in the mode and manner required by the statute of the state. It is further shown by the clear weight of evidence that the firm of J. H. Connor & Co. consisted of J. H. Connor and B. L. Jett. Whether Connor and Jett were partners at the date of the construction contract between the railroad company and J. H. Connor is not very clear. But it does appear that very shortly after that contract was signed Jett became jointly interested with Connor as a partner, and that the work was thereafter carried on by them as partners under the name of J. H. Connor & Co. The written contract stood in the name of J. H. Connor, and the suit in the circuit court was conducted in Connor's name alone, and the decree is in the name of J. H. Connor, but the decree is for and upon a partnership claim. The railroad company, in its answer, stated that B. L. Jett was associated with J. H. Connor, and should be a party. But no plea in abatement or bar was filed, and the issue seems to have been abandoned. April 17, 1897, an amended bill was filed by Walker and others, making more specific the

objects and purposes of the suit, and specifically praying that all liens and priorities be ascertained, and the railroad sold free from liens or encumbrances, and the proceeds of sale applied to the payment of claims in their proper order and rank. In this amended bill J. H. Connor and B. L. Jett were named as defendants, composing the firm of J. H. Connor & Co. Jett was served with process. It does not appear that any further process issued for J. H. Connor, but a decree *pro confesso* was taken against him and Jett in these words: "In this cause it appearing to the court that publication has been made as provided by statute, requiring J. H. Connor to appear and make defense to the original bill filed in the cause of *J. C. Walker et al.* against *The Tennessee Central Railroad et al.*, and has failed to plead, answer, or demur thereto within the time required by law, it is accordingly ordered and decreed that said original bill be taken for confessed as to said J. H. Connor, and set for hearing *ex parte*. It further appearing to the court that B. L. Jett has been duly served with process to answer under the amended bill in this cause, and has failed to plead, answer, or demur thereto, it is accordingly ordered and decreed that said amended bill be taken for confessed as to said B. L. Jett, and set for hearing *ex parte*." The answer of the railroad company to this amended bill included a schedule of the indebtedness of the company to J. H. Connor, and disclosed for the first time the liability of the company to J. H. Connor & Co., by stating that they had recovered a decree against the company in the circuit court of the United States for \$21,421.78 for construction work, and that said court had declared said sum "to be lien upon 10 miles of the railroad of the said defendant, . . . extending from Monterey to Johnson's stand." Under a reference to a special master, a report was filed as to the indebtedness of said company of every class. Among other lien debts, that to J. H. Connor & Co. was reported, though same does not appear to have ever been filed. A final decree was rendered May 10, 1897, which found the railroad company insolvent, and ordered the sale of its entire property free from all liens and mortgages. The decree settled the order of liens, and directed that, after paying costs and receiver's debts, the proceeds should be applied equally in payment of claims which were liens under the Tennessee statute. Among the claims thus preferred was included the decree in favor of J. H. Connor & Co. in the circuit court of the United States, which was referred to in these words: "The judgment obtained by J. H. Connor & Co. in the circuit court of the United States for the middle district of Tennessee, for \$21,042.78, with interest from May 28, 1896, shall be entitled to the benefit of the foregoing provisions of this decree, and share ratably with the other judgments and decrees of the same character, and the special commissioner shall make distribution to said J. H. Connor & Co., or their assigns, upon said judgment, as fully as if

they had intervened herein for the payment thereof." Next after these labor and material claims the mortgage bonds were preferred, for this embryo railroad had not only the dignity of receiver's certificates, but the added honor of a first-class mortgage. At the sale thus ordered the petitioner, the Tennessee Central Railway Company, became the purchaser of the entire property and franchises of the Tennessee Central Railroad Company. It has paid the entire amount of its bid of \$125,000, and has received a fee-simple conveyance. Since said sale it has proceeded with the construction of said road, and for this purpose has made a mortgage to secure a large issue of bonds to be used in finishing and equipping its railroad. The proceeds of sale were nearly exhausted in paying costs and receiver's debts. The construction liens aggregated more than \$100,000, and the *pro rata* applicable to the Connor claim was only a few hundred dollars.

Upon this state of facts the court below rendered a decree in these words: "That in the proceedings in the chancery court of Cumberland county, Tennessee, that court acquired jurisdiction over the entire properties of the defendant, Tennessee Central Railroad, including that portion or section thereof upon which the original bill in this cause was filed to enforce the contractor's lien, and that the said complainant in the original bill in this cause, after the jurisdiction of said Cumberland chancery court attached, and Connor was brought into that cause by publication, was required by law to present his claim for a final disposition to the chancery court of Cumberland county, Tennessee, and had not the right to enforce the decree by the process of this court, regardless of that suit. It is therefore ordered, adjudged, and decreed by the court that the order of sale heretofore issued by the clerk of this court in the original cause above stated be vacated and annulled, and the said J. H. Connor and his agents, solicitors, attorneys, and counsel, and every person claiming by or under or through said Connor, and each of them, are hereby restrained and perpetually enjoined from suing out of this court any process for the purpose of enforcing the lien of said decree against the section or portion of said railroad therein described, or any part thereof, and the costs of this proceeding to be taxed by the clerk are hereby adjudged and decreed against the said complainant, J. H. Connor, for which let execution issue as in actions at law; but the decree of this court is not otherwise affected than to prevent enforcement of the lien." From this decree Connor has appealed.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

Messrs. Stokes & Stokes, for appellant: Connor was not a party to the proceedings in the state court.

In the original bill filed, the residence of Connor is not given, nor is it stated that he was a nonresident. So the publication was

not made for him under the allegations of the bill.

On January 12, 1897, a subpoena issued for "J. H. Connor & Co.," directed to the sheriff of Cumberland county. He returned it on the 15th of January indorsed, "Search made and the defendant not to be found in my county." On the same day the clerk made the order directing publication to be made for "J. H. Connor & Co." The order of the clerk directing publication to be made was a nullity. By the very terms of the statute, § 6164, the clerk was precluded from making such an order until the necessary affidavit was filed with him, and there is no pretense that this was done.

The residence or nonresidence must be stated in the bill.

Walker v. Cottrell, 6 Baxt. 271.

It was certainly not the intention of the legislature to allow a complainant to name a party as defendant without giving his residence, and then issue process to any county he desires, and on the return "not to be found" make publication, and thus acquire jurisdiction of the party.

Carlisle v. Cowan, 85 Tenn. 165, 2 S. W. 26.

The statute permitting publication to be made on the return of the summons that the defendant is not to be found not only requires that the summons shall issue to the county of the defendant's residence, but also that the sheriff shall exercise diligence in serving the same, and shall not return it until the time allowed in the summons has been consumed in trying to find the defendant, and that publication shall not be resorted to as a means of acquiring jurisdiction unless such facts appear.

Soule v. Hough, 45 Mich. 418, 8 N. W. 50, 159; *Clayton v. Clayton*, 4 Colo. 410.

J. H. Connor was not made a party to the proceedings in the state court in his individual capacity, but the firm styled "J. H. Connor & Co." was made a defendant.

If the court by publication acquired any jurisdiction, it was of J. H. Connor & Co., and it had no right to render a decree under such acquired jurisdiction, destructive of the individual rights of J. H. Connor.

17 Enc. Pl. & Pr. p. 90.

The original bill in this cause, in legal effect, recognized the lien of Connor's judgment, and did not seek in any way to disturb it. The publication that was made for Connor & Co. directed them to appear and answer that bill. Afterwards the amended and supplemental bill was filed, seeking to destroy or vacate the lien. It would be a great injustice for any court to hold that Connor was bound by the decree predicated upon allegations of the amended and supplemental bill, when he was only technically, if at all, before the court by publication made under the original bill.

Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366.

Connor was a nonresident of the state of Tennessee. By proceedings in the United States court at Nashville he recovered a large judgment. It was declared a lien up-
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on certain property, and this property the court ordered sold to satisfy that lien. The state court vacated that lien, and ordered the property sold free from any encumbrance.

The action of the state court is a nullity, and presents no bar to Connor's right to enforce the order of the United States court.

Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 505; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586.

The decree of the United States circuit court, giving judgment in Connor's favor, declaring it a lien on certain property, and ordering the property sold to satisfy the lien, was beyond the control of the state court.

Randall v. Howard, 2 Black, 585, 17 L. ed. 269; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Florentine v. Barton*, 2 Wall. 210, 17 L. ed. 783; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214.

A suit to enforce a mechanic's lien is a proceeding *in rem*, and on the institution of the suit the court acquires jurisdiction and custody of the property upon which it is claimed the lien exists.

Porter v. Miles, 67 Ala. 133; *Crawfordsville v. Barr*, 65 Ind. 367; *O'Halloran v. Leachey*, 39 Ind. 150; *Carson v. White*, 6 Gill, 25; *Guerrant v. Dawson*, 34 Miss. 149; *Gray v. Pope*, 35 Miss. 116, 72 Am. Dec. 117; *Sly v. Pattee*, 58 N. H. 102; *Gordon v. Torrey*, 15 N. J. Eq. 112, 82 Am. Dec. 273; *Shryock v. Buckman*, 121 Pa. 258, 1 L. R. A. 533, 15 Atl. 480; *Rogers & B. Hardware Co. v. Cleveland Bldg. Co. (Mo.)* 32 S. W. 1; *Weller v. McNabb*, 4 Sneed, 424; *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135.

The United States circuit court acquired jurisdiction of this property when the bill of Connor was filed, and the proceedings in the state court instituted nearly a year afterwards could not take from that court the jurisdiction it had previously acquired over the property in question.

Hassall v. Wilcox, 130 U. S. 493, 32 L. ed. 1001, 9 Sup. Ct. Rep. 590.

The United States court, having acquired jurisdiction of the parties and of the property in the bill filed by Connor, will, irrespective of any subsequent proceedings in a state court, proceed to adjudicate the rights of the parties before it, will enforce its own decree, and will not send a party litigant in its court to a state court for that court to enforce a decree rendered by it.

Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Central Nat. Bank v. Stevens*, 169 U. S. 464, 42 L. ed. 818, 18 Sup. Ct. Rep. 403; *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, *sub nom.* *Rio Grande R. Co. v. Vinet*, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; *Leadville Coal Co. v. McCrerry*, 141 U. S. 475, 35 L. ed. 824, 12 Sup. Ct. Rep. 28.

Messrs. Robert L. Morris, George W. Easley, and Boyle, Priest, & Lehmann, for appellee:

The judgment and decree in Connor's favor are voidable, if not void.

The lien given by the Tennessee statute is upon the railroad, and not upon the section or detached portion constructed by a contractor.

Shannon's Code, § 3570.

It is against public policy to sell a detached portion of the roadbed to enforce a statutory lien.

Brooks v. Burlington & S. W. R. Co. 101 U. S. 443, 25 L. ed. 1057; *Muller v. Dows*, 94 U. S. 449, 24 L. ed. 209; *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506; 2 Jones, Liens, §§ 1619, 1620; *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453, 11 L. R. A. 580, 14 S. W. 1087; *Knapp v. St. Louis, K. C. & N. R. Co.* 74 Mo. 374; 3 Elliott, Railroads, §§ 1069, 1074.

A court of equity has no power to order the sale of the property of a railroad necessary to the exercise of its franchise, in any other manner than by a proceeding that will transfer both the property and the franchise.

Louisville, N. A. & O. R. Co. v. Boney, 117 Ind. 510, 3 L. R. A. 435, 20 N. E. 432; *East Alabama R. Co. v. Doe ex dem. Visscher*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; *Gue v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635; *Baxter v. Nashville & H. Turnpk. Co.* 10 Lea, 488.

The lien sought to be enforced by Connor was wholly statutory.

Shannon's Code, § 3570.

The law creating the lien provided that it should be enforced "in the circuit court of the county or district" where the work was done or the materials furnished, or some part thereof was done or delivered.

Shannon's Code, § 3572.

The lien was a new right not existing at common law, and the remedy given to establish the lien was exclusive.

Sedgw. Stat. & Const. Law, 2d ed. Pom. notes, p. 343; *Sutherland, Stat. Constr.* § 399; *Cranston v. Union Trust Co.* 75 Mo. 29; 3 Elliott, Railroads, § 1074.

To take jurisdiction on the equity side of the Federal court would be to legislate, which the courts are not authorized to do.

Phillips, Mechanics' Liens, § 2a; *Boisot, Mechanics' Liens*, § 633; *Brooks v. Blackwell*, 76 Mo. 309.

The property in dispute was in no sense placed in *custodia legis* by the filing of Connor's bill in the middle district of Tennessee.

Shields v. Coleman, 157 U. S. 178, 39 L. ed. 663, 15 Sup. Ct. Rep. 570.

The assets of an insolvent corporation become from the date of its assured insolvency a fixed trust fund for equal *pro rata* distribution among its creditors, unless otherwise provided by law or fixed by valid contract.

Pom. Eq. Jur. § 410; *Sauser v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 644, 31 L. R. A. 593, 32 S. W. 54 L. R. A.

1097; *Moseby v. Williamson*, 5 Heisk. 286; *Marr v. Bank of West Tennessee*, 4 Coldw. 471; *Comfort v. Patterson*, 2 Lea, 672; *Bank of Rome v. Haselton*, 15 Lea, 230; *First Nat. Bank v. North Alabama Lumber & Mfg. Co.* 91 Tenn. 15, 18 S. W. 400.

The court which first assumes jurisdiction of a suit to administer the affairs of an insolvent corporation and to distribute its assets among creditors is entitled to maintain that jurisdiction.

Pom. Eq. Jur. § 410; *Smith v. St. Louis Mut. L. Ins. Co.* 6 Lea, 569; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 644, 31 L. R. A. 593, 32 S. W. 1097; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015; *Shannon's Code*, §§ 5187, 6103, 6104; *Gibson, Ch. Pr.* §§ 965 *et seq.*

Laws of the several states relating to insolvency of individuals and corporations will be regarded and enforced by the United States courts.

Davidson v. Smith, 1 Biss. 346, Fed. Cas. No. 3,608; *Flash v. Wilkerson*, 22 Fed. 689, 20 Fed. 257.

A creditors' bill filed by a particular creditor for the purpose of collecting his own judgment, and not on behalf of creditors generally, gives the court jurisdiction of the equitable assets for that particular purpose, and does not necessarily involve a complete and final distribution of said assets among all the creditors.

Russell v. Chicago Trust & Sav. Bank, 139 Ill. 549, 17 L. R. A. 345, 29 N. E. 37.

When the creditors' bill is filed on behalf of all creditors, a subsequent bill cannot be filed by other creditors.

Roseboom v. Whitaker, 132 Ill. 81, 23 N. E. 339; *Smith, Equitable Remedies of Creditors*, § 46.

Every other contractor and materialman had an equal lien upon the whole line of railway with Connor, and as between them there was no priority.

15 Am. & Eng. Enc. Law, title *Mechanics' Liens*, p. 95.

Connor could not acquire any priority or preference over other lienors by judgment even, after insolvency.

Memphis Barrel & Heading Co. v. Ward, 99 Tenn. 172, 42 S. W. 13; *Levins v. W. O. Peoples Grocery Co.* (Tenn. Ch. App.) 38 S. W. 733.

This rule is not changed because the road was constructed in sections.

Brooks v. Burlington & S. W. R. Co. 101 U. S. 443, 25 L. ed. 1057; *Meyer v. Hornby*, 101 U. S. 728, *sub nom. Meyer v. Egbert*, 25 L. ed. 1078.

The decree in favor of Connor in the Federal court was rendered May 28, 1896. It has not yet been enforced by execution or sale.

The Federal statute provides that judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state, in the same manner and to the same extent and under the same conditions only as if such judgments and decrees

had been rendered by a court of general jurisdiction of such state.

25 U. S. Stat. at L. 357, § 1, chap. 729; 2 Deaty, Fed. Proc. 9th ed. § 492, p. 1197.

Shannon's Code, §§ 4708, 4709, 4710, provides: The lien thus given will be lost unless an execution is taken out and the land sold within twelve months after the rendition of the judgment or decree.

Connor having permitted the lien of his judgment to expire before any sale thereunder, the purchaser under the state court proceeding obtained the title, and Connor will not be permitted to disturb, cloud, or encumber the same.

Chouteau v. Nuckolls, 20 Mo. 442; Shannon's Code, p. 1185, note 3; 2 Deaty, Fed. Proc. 9th ed. p. 1199, notes to § 495.

It does not matter whether Connor was personally served with process from the state court or not, or that the special publication made as to him did not have the effect to bring him into court.

The proceedings to administer the assets of an insolvent corporation for the benefit of all creditors is strictly a proceeding *in rem*. The decree sustaining the bill as a general creditors' bill, the appointment of a receiver, and the publication made for all creditors to appear and present their claims and demands, operated as a warning and notice to all parties interested in the property sought to be administered, whether resident or nonresident of the state, and they would be bound by the action and dealings of the court in respect to such property.

Smith v. St. Louis Mut. L. Ins. Co. 6 Lea, 564; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L. R. A. 593, 32 S. W. 1097; *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Smith, Equitable Remedies of Creditors*, § 46; *White v. Ewing*, 159 U. S. 38, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; *Peck v. Elliott*, 38 L. R. A. 616, 24 C. C. A. 425, 47 U. S. App. 605, 79 Fed. 10; *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657.

The decision of the state court that the liens of the contractors who constructed the railroad rested upon the entire line, and not upon a part, and included a right to sell the franchise of the company, was strictly in accordance with law, even though the road was constructed in alternate or widely separated sections, and not consecutively.

Brooks v. Burlington & S. W. R. Co. 101 U. S. 143, 25 L. ed. 1057; *Meyer v. Hornby*, 101 U. S. 728, *sub nom.* *Meyer v. Egbert*, 25 L. ed. 1078.

"Equality is equity" as between the holders of mechanics' or contractors' liens.

15 Am. & Eng. Enc. Law, title *Mechanics' Liens*, p. 95; *Memphis Barrel & Heading Co. v. Ward*, 99 Tenn. 172, 42 S. W. 13; *Levins v. W. O. Peoples Grocery Co.* (Tenn. Ch. App.) 38 S. W. 733.

The property of the company, and the franchise, should be sold as a unit.

Brooks v. Burlington & S. W. R. Co. 101 U. S. 143, 25 L. ed. 1057; *East Alabama R. Co. v. Doe ex dem. Viischer*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869.

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Connor, knowing of the pending proceedings in the state court, and not objecting to the issue of receiver's certificates, is now estopped to question their validity and priority over his debt, or the wisdom of the court in issuing them.

Humphreys v. Allen, 101 Ill. 490.

Lurton, Circuit Judge, delivered the opinion of the court:

1. This court is not sitting as a court of error to review either the original decree of the circuit court in favor of J. H. Connor against the Tennessee Central Railroad Company, nor the decree of the state chancery court in the creditors' suit of J. C. Walker and others against the Tennessee Central Railroad Company, under which the present appellee the Tennessee Central Railway Company obtained its title. Those decrees are final. They are here only collaterally brought into question, and all the principles which relate to a collateral attack have application when we come to consider their force and effect. If they are not void, they must be given full effect and force, regardless of errors or irregularities which might have been remedied by a seasonable proceeding in error. The Tennessee Central Railroad Company was a corporation created by the state of Tennessee, and its entire projected line and all of its property was within the state of Tennessee. As an insolvent company, it was entirely competent that it should be wound up under a creditors' bill in a Tennessee court of equity as an insolvent corporation. Shannon's Code, §§ 5187, 6103, 6104; *Marr v. Bank of West Tennessee*, 4 Coldw. 471; *Gleaves v. Davidson & W. Turnp. Co.* 4 Baxt. 83; *Smith v. St. Louis Mut. L. Ins. Co.* 6 Lea, 564; *Baxter v. Nashville & H. Turnp. Co.* 10 Lea, 488, 491; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L. R. A. 593, 32 S. W. 1097. The bill of J. C. Walker and others was filed and conducted according to the usual course of a general creditors' bill. The only non-resident creditor claiming to have any interest in the property of the company under the control of the court was the appellant, J. H. Connor, who, as a member of the firm of J. H. Connor & Co., composed of J. H. Connor and B. L. Jett, had at the time a bill pending in the circuit court of the United States for the middle district of Tennessee, in which he was asserting a contractor's lien against the railroad under the Tennessee statute giving a lien upon any railroad in behalf of contractors engaged in construction work.

Aside from any questions arising out of a possible conflict of jurisdiction by reason of the prior pendency of Connor's bill for the enforcement of his contractor's statutory lien in the circuit court, it was entirely competent for the Tennessee chancery court to bring J. H. Connor & Co. or J. H. Connor before the court, as persons claiming a lien upon an interest in the railroad property in the possession of the court, by publication as a nonresident, or as a resi-

dent who evaded service of process. Shannon's Code, § 6162. The power of the state to provide by statute for bringing into court nonresidents having interests in real property situated within the state, for the purpose of enforcing a lien, or clearing a title, or subjecting the property to the satisfaction of debts, can no longer be doubted. The whole subject has been thoroughly considered, and the limits of the jurisdiction defined, in *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. ed. 565, 569; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, and *Roller v. Holly*, 176 U. S. 393, 44 L. ed. 520, 20 Sup. Ct. Rep. 410. In *Arndt v. Griggs*, Justice Brewer, in delivering the opinion of the court, said: "The question is not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is in subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits, —its process goes not out beyond its borders, —but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable methods of imparting notice. . . . Mortgage liens, mechanics' liens, materialmen's liens, and other liens are foreclosed against nonresident defendants upon service by publication only. Lands of nonresident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against nonresidents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication."

The appellant has strenuously insisted that he was not made a party to the creditors' bill in the state court, and that he did not appear, and is therefore in no way concluded by the decree of that court setting the Tennessee Central Railroad free from all liens and encumbrances, and that the lien declared by the circuit court to exist in his favor against a portion of that railroad has

not been cut off or foreclosed by the proceedings in the state court. The question of the conclusiveness of the decree of the state court in respect to Connor's lien involves a number of questions. Among them are these: (1) The effect of the pendency of Connor's suit in the circuit court upon the jurisdiction of the state court over the property of the railroad company against which Connor was in that bill asserting a lien at the date of the institution of the creditors' bill in the state court. (2) The sufficiency of the publication made for "J. H. Connor & Co." as constructive service upon J. H. Connor. (3) The sufficiency of the publication made upon a return of an alias subpoena, "Not to be found in my county," under Shannon's Code, § 6162, subsec. 3, authorizing publication upon a return of "leading process" of "not to be found." Each of these questions bristles with difficulties, which we find it unnecessary to solve; for, if they should all be solved according to the contention of the appellant, there would still remain an insurmountable objection to the enforcement of the decree of sale awarded him by the circuit court. If we assume that J. H. Connor was not a party to the creditors' suit of J. C. Walker and others against the Tennessee Central Railroad Company, and that he is therefore unaffected by the decree which directed the property and franchises of the railroad company to be sold free from all liens and encumbrances, it would follow that the purchaser at the sale made in pursuance of the decree in that case has acquired the property and franchises of that company subject to the rights of J. H. Connor under the decree of the circuit court, whatever they may be. If we also assume that the circuit court had the constructive possession of the entire property and franchises of that corporation from the date of the filing of Connor's bill, and that it could not be properly deprived of that possession by a proceeding subsequently begun in the state court, it would at most follow that the possession by the receiver appointed under the order of the state court would be ineffectual to confer any rights upon a purchaser under the decree of that court, and equally ineffectual in its effect upon the jurisdiction of the circuit court over that property. The actual seizure of the property was wholly unimportant to the jurisdiction of the state court. An insolvent corporation may be proceeded against under a creditors' bill, and wound up, without appointing a receiver, and we may treat the fact that the state court appointed a receiver pending Connor's bill as a nullity. It is due, however, to the state court, to say that there was no intimation in the bill of Walker and others that there was any proceeding pending in the circuit court of any kind, and at no time was there ever made to that court any suggestion of a possible conflict of jurisdiction. The railroad consisted of a mere graded roadbed some 23 miles in length, so that there was at no time any such actual possession by the receiver

as to oust the purely constructive possession of the circuit court. However extensive we may regard the constructive possession of the circuit court by reason of the relief prayed under Connor's bill, the hand of that court was withdrawn as a result of its final decree, which declared Connor's lien to extend only to a specific part of the property of said company, which the decree described as "that portion of the defendant railroad company commencing with the town of Monterey, in the county of Putnam, and continuing in a southeasterly direction for 10 miles;" "said strip of land being 100 feet wide, upon which there has been constructed a roadbed for said railroad 14 feet wide at its crest; and that there is also within and upon said property various cuts, trestles, and bridges,—upon all of which said judgment constitutes a lien, the court being of opinion that complainant is entitled to have so much of said railroad sold for the satisfaction of the aforesaid judgment." The necessary effect of this decree was to discharge the franchises and property of said railroad company from the possession and control of the circuit court, except in so far as Connor's lien was declared to extend. It was not until after this decree had been pronounced, and nearly a year had elapsed, that the state court ordered a sale of the property of said railroad company. The decree then made ordered the sale of the franchises and entire property of the railroad company. Twenty-three miles of railroad had then been graded. The railroad being ordered sold as an entirety included, of course, the 10 miles of roadbed upon which Connor's lien rested.

Having assumed that Connor was not a party to or concluded by this decree, we must also assume that neither the decree nor the sale were effectual to defeat any right, lien, or remedy he may have by virtue of the decree of the circuit court. After lying silent for more than three years after date of his order of sale, Connor obtained a revivor, and was about to have his decree of sale executed. In the meantime the purchaser under the decree in the creditors' suit has completed and put in operation about 40 miles of railroad. Acting upon the assumption of the validity of its title, it has made a first mortgage, and its bonds to a large amount have been negotiated. Under these circumstances it has intervened in the case of Connor against the Tennessee Central Railroad Company, and has set up the title so acquired under the chancery court sale as a bar to any proceeding to enforce the order of sale awarded to Connor for the enforcement of his lien. These assumptions put the Tennessee Central Railway Company in the attitude of a purchaser which has acquired, subject only to the unforesclosed lien of Connor, every right, title, and interest of the Tennessee Central Railroad Company and of its mortgagees and lienors foreclosed in the creditors' suit. *Columbus, S. & H. R. Co.'s Appeal*, 48 C. C. A. 275, 109 Fed. 177. In this attitude, and under these circumstances, it has intervened in the case of Con-

nor against the Tennessee Central Railroad for the purpose of asserting the right and title thus acquired pending Connor's suit, and to prevent the dismemberment of its railroad by a sale which it claims will but cast a cloud upon its own title. We entertain no doubt that, if the appellee is entitled to be relieved from the threatened sale by which the unity of its railroad would be broken, the mode in which it has appealed to the circuit court to prevent the use of its power to its needless injury is appropriate. *Krippendorf v. Hyde*, 110 U. S. 276, 283, 28 L. ed. 145, 148, 4 Sup. Ct. Rep. 27; *Buck v. Colbath*, 3 Wall. 343, 18 L. ed. 280; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379. If the execution of the decree of sale awarded to Connor will not confer a valid title to a purchaser, and will only result in casting a cloud upon the title of the intervener, Connor should be restrained from such an abuse of the process of the court, and remitted to such other remedy as may be open to him for the collection of his claim and the enforcement of his lien. The statute under which Connor asserted a lien is one which gives a lien to every contractor, subcontractor, and materialman who aids in the construction of a railroad. Shannon's Code, §§ 3570 *et seq.* That the statute, by prescribing a remedy at law and in the circuit court of the state, cannot defeat the jurisdiction of the Federal circuit court, sitting as a court of equity, of its jurisdiction to enforce a statutory lien upon property, such as the lien of a mechanic or railroad contractor, is well settled. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 37 L. ed. 853, 13 Sup. Ct. Rep. 936. The lien given by this statute is given equally to all who contribute to such construction, and the lien of each extends to the whole railroad, and is not limited to the particular section, bridge, or other part of the work. The lien extends to the entire railroad. The language of the statute is, "there shall be a lien upon such railroad." Statutes giving liens to builders of houses or furnishers of materials are construed as giving the lien upon the entire house or distinct structure. *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453. 11 L. R. A. 580, 14 S. W. 1087. Under like statutes in respect to railroad contractors the lien is held for even stronger reasons to extend to the entire railroad. *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Knapp v. St. Louis, K. C. & N. R. Co.* 74 Mo. 374; *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506; 2 Jones, Liens, §§ 1619, 1620; Elliott, Railroads, §§ 520, 1074. Connor's bill described the property as an unfinished railroad still in course of construction, and averred that the work was being carried on by other contractors. He properly prayed that he might be declared to have a lien upon the road finished and that in course of construction, and upon the franchises of the company. This the court denied by limiting his lien to "that portion of the defendant railroad company [sic] commencing with the town of Monterey, in the

county of Putnam, and continuing in a southeasterly direction for 10 miles;" "said strip of land being 100 feet wide, upon which there has been constructed a roadbed for said railroad 14 feet wide at its crest; and that there are also within and upon said property various cuts, trestles, and bridges, upon all of which said judgment constitutes a lien, the court being of opinion that complainant is entitled to have so much of said railroad sold for the satisfaction of the aforesaid judgment." The decree then proceeds by directing that the commissioner will, after advertising, etc., "sell said property to the highest bidder for cash free from the equity of redemption or repurchase." It is plain from this decree that the contractor's lien declared by the court extends only to a specific strip of property constituting the right of way and roadbed thereon, and that for the purpose of enforcing this lien the circuit court ordered a sale of this specific property. What would a purchaser acquire under this decree? The franchise to construct and operate a railroad for tolls was a franchise to construct the line as an entirety. The franchise is a unit. A part cannot remain with the company and a part pass to a purchaser of a section of its railroad. It is not a case of where the work was abandoned after a part of the line had been constructed. Connor's bill averred that the work of construction was being carried on by the company when he filed his bill, and the decree itself recognizes that the sale ordered is only of "a portion" of the railroad. Neither does the decree of sale direct or authorize the sale of the franchise of the company, and it is clear that a franchise will not pass as appurtenant to a part of a roadbed. *Wood v. Truckee Turnp. Co.* 24 Cal. 474. It follows that the commissioner could not convey or deliver to the purchaser at his sale anything more than the right and interest of the railroad company in that portion of its right of way and roadbed described in the decree. That title and right is a mere easement acquired for the purpose of maintaining and operating a railroad thereon.

But if it be assumed, for the purposes of this case, that the fee to the described strip of land was in the company, the situation of a purchaser not owning the franchises would be no better. The general rule is that the physical property of a private corporation is as subject to be sold at judicial sale for the enforcement of a lien, or for the satisfaction of a judgment or decree for debt, as the property of an individual. But an exception exists, upon principles of public policy, in respect to the property of a quasi public corporation which is essential to the enjoyment of its franchises for the discharge of those public duties for which it was created. Property acquired and held as essential to the operation of quasi public franchises cannot be seized and sold separate and apart from the franchises, without which the latter would be inoperative. Thus, in Tennessee, without regard to the character of the title, the toll houses and roadway

of a turnpike company are not the subject of execution, levy, and sale. "The weight of authority is," said Justice Cooper, speaking for the supreme court of Tennessee, "that the exemption of the franchise from levy will protect all property essentially necessary to its exercise, for the obvious reason that the franchise was conferred for a public purpose; and that there ought not to be any disposition of the property except in a mode which would secure a continuance of the use of the franchise for the benefit of the public. The rights of creditors are sufficiently secured by the right to attach or impound the tolls, and, if necessary, to sell the property and franchises together." *Baxter v. Nashville & N. Turnp. Co.* 10 Lea, 488, 493. This doctrine has received very general sanction. *Elliott, Railroads*, §§ 520, 1074; *Morawetz, Priv. Corp.* § 1125; *Gue v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635; *East Alabama R. Co. v. Doe ex dem. Visscher*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; *Ammant v. New Alexandria & P. Turnp. Road Co.* 13 Serg. & R. 210, 15 Am. Dec. 593; *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432; *Wood v. Truckee Turnp. Co.* 24 Cal. 474; *Dayton, X. & B. R. Co. v. Lewton*, 20 Ohio St. 401; *Overton Bridge Co. v. Means*, 33 Neb. 857, 51 N. W. 240; *Goock v. McGee*, 83 N. C. 59, 35 Am. Rep. 558; *Gardner v. Mobile & N. W. R. Co.* 102 Ala. 635, 645, 15 So. 271. The case of *Gue v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635, is closely in point. An execution had been levied upon "a homestead lot, sundry canal locks, a wharf, and sundry other lots," all of which property, the court in its opinion said, was admitted to belong "to the canal company in fee." The canal company enjoined the sale under the fieri facias, and on final hearing the injunction was made perpetual. It was admitted that the property so levied upon was essential to the proper and useful operation and working of the canal, and that without same the franchise would be valueless. Upon appeal the decree was affirmed, the court, speaking by Mr. Chief Justice Taney, saying: "The property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it is connected in the hands of the company, and, if sold under this fieri facias, without the franchise, would bring scarcely anything, but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless. Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties shows

it was not seized; and, consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks, and lots adjoining them. The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by disavowing from the franchise property which was essential to its useful existence."

In *East Alabama R. Co. v. Doe ex dem. Viischer*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 809, the facts were that a judgment creditor levied an execution on the right of way of a railroad company, and it was sold and conveyed to the execution creditor, by the sheriff. The court held that a right of way could not be sold under execution or otherwise to a purchaser who did not own the franchise. It is true that the court found that the right of way was a mere easement, and that the franchise had not been and could not be levied upon, being a mere incorporeal hereditament. But the court, among other things, said: "The sheriff's deed purported to convey, in words, 'the said tract of land or railroad bed, to wit, the right of way of the Opelika & Oxford Railroad, so far as the right of way has been obtained, from Lafayette to the edge of Lee county. . . . If the deed undertook to convey any land, or soil, or roadbed, it conveyed with it the right of way. The deed, in reciting the levy, states that it was made 'on the following tract or lot of land, as the property of the said railroad company, to wit, the right of way; . . . and, if they obtained a deed of anything, the right of way was included, or else they received nothing beyond, perhaps, a right to carry away from the land what the company had put upon it. . . . This court decided in *Gue v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635, that a corporate franchise to take tolls on a canal could not be seized and sold under a fieri facias, unless authorized by a statute of the state which granted the act of incorporation; and that neither the lands nor the works essential to the enjoyment of the franchise could be separated from it and sold under such a writ, so as to destroy or impair the value of the franchise. This decision was put on the ground that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under the execution on a judgment at law against the corporation, because it was an incorporeal hereditament, and upon the settled principles of the common law could not be seized on a fieri facias, and was made in a case where the corporation owned in fee the real estate, toll houses, **\$4 L. R. A.**

canal locks, and wharf seized, all of which were necessary for the uses and working of the canal."

The principle running all through these cases is that the property of a public corporation, such as a railroad, cannot be sold separately and apart from its franchise if the property is so indissolubly linked to the franchise and to its public functions as that without it the franchise will be rendered inoperative. The remedy of a creditor who has exhausted property not necessary to the exercise of the franchises is to obtain a receiver, and sequester the tolls or income, or a decree subjecting the property and its franchises to sale as an entirety. *Morawetz, Priv. Corp.* § 1126; *Baxter v. Nashville & H. Turnp. Co.* 10 Lea, 488; *Gleaves v. Davidson & W. Turnp. Co.* 4 Baxt. 83; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112, 16 L. ed. 38; *Gue v. Tide Water Canal Co.* 24 How. 258, 16 L. ed. 635.

The decree directing a sale of a portion of the roadbed of the Tennessee Central Railroad Company separate and apart from the franchises of the company is ineffective. The purchaser will acquire no right or title. To execute the decree will but cast a cloud upon the title of the Tennessee Central Railway Company, and operate only as an abuse of the process of the circuit court.

The decree perpetually enjoining the commissioner from proceeding is therefore affirmed, with costs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plff. in Err.*,

William STUBER.

(48 C. C. A. 149, 108 Fed. 934.)

1. The question of fellow service, in an action by an employee in a Federal court to recover from his employer for personal injuries inflicted through negligence, is not one of local law to be settled by the decisions of the highest courts of the state in which the cause of action arose.
2. A foreman of water supply of a railroad, whose duty requires him to be carried from place to place along the road to supervise water tanks and pumping machinery, is, when riding on a detached engine to a place where machinery needs repairs, a fellow servant of the engineer in charge of the engine carrying him, within the rule exempting the employer from liability for injuries negligently inflicted upon an employee by his fellow servant.

(May 7, 1901.)

ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment in favor of plaintiff in an action brought to recover

NOTE.—As to what servants are deemed to be in the same common employment, apart from suits where no questions as to vice principal arise, see also *Sofield v. Guggenheim Smelting Co.* (N. J. L.) 50 L. R. A. 417, and *note*; and *Spees v. Boggs* (Pa.) 52 L. R. A. 983.

damages for personal injuries for which defendant was alleged to be responsible. *Reversed.*

The facts are stated in the opinion.

Argued before *Lurton* and *Severens*, Circuit Judges, and *Clark*, District Judge.

Messrs. Charles N. Burch and John W. Judd, for plaintiff in error:

Plaintiff was not a passenger, nor entitled to the rights of a passenger, but he was a fellow servant of those in control of the engine. The negligence of these fellow servants was one of the ordinary risks of his employment; and for the negligence of a fellow servant there can be no recovery against the common master, the defendant railroad company.

Cases where servants of the company were traveling free of charge on its trains, and were injured through the negligence of those in control of the trains, will divide themselves into three classes: (1) Those in which plaintiff, at the time of the injury, was traveling in the prosecution of the defendant's business, and in the discharge of his contract of employment; (2) those in which plaintiff was traveling on his own pleasure or business; (3) those in which the plaintiff, though apparently traveling free, yet in his contract of employment received transportation as a portion of the consideration for his labor,—in other words, where the transportation was not, in fact, free, but paid for by labor.

The case at bar belongs to the first class, and the overwhelming weight of authority, state and Federal, is to the effect that in such case there can be no recovery.

Hale, Bailments & Carriers, pp. 440, 447; *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228; *Ryan v. Cumberland Valley R. Co.* 23 Pa. 384; *Russell v. Hudson River R. Co.* 17 N. Y. 134; *Vick v. New York C. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36; *Seaver v. Boston & M. R. Co.* 14 Gray, 466; *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 336; *Kansas P. R. Co. v. Salmon*, 11 Kan. 83; *Ross v. New York C. & H. R. R. Co.* 5 Hun, 488, Affirmed in 74 N. Y. 617; *Capper v. Louisville, E. & St. L. R. Co.* 103 Ind. 305, 2 N. E. 749; *Hando v. London & O. R. Co.* (Q. B. 1867) 2 Wood, Railway Law, p. 1044; *Hutchinson v. York, N. & B. R. Co.* 5 Exch. 343; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 203, 53 Am. Rep. 616; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Kumler v. Junction R. Co.* 33 Ohio St. 150; *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108; *McQueen v. Central Branch U. P. R. Co.* 30 Kan. 689, 1 Pac. 139; *Howland v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 226, 11 N. W. 529; *Tomlinson v. Chicago, B. & Q. R. Co.* 38 C. C. A. 148, 97 Fed. 253; *Texas & P. R. Co. v. Smith*, 31 L. R. A. 321, 14 C. C. A. 509, 30 U. S. App. 176, 67 Fed. 524; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Hamblly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co. v. 54 L. R. A.*

Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 102 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Oakes v. Mass.*, 165 U. S. 363, 41 L. ed. 740, 17 Sup. Ct. Rep. 345; *Northern P. R. Co. v. Poirier*, 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184.

Mr. J. N. Thomason for defendant in error.

Lurton, Circuit Judge, delivered the opinion of the court:

The defendant in error, William Stuber, sustained a severe injury through the negligence of an engineer in charge of a detached engine upon which he was riding. Both the engineer and Stuber were at the time in the service of the railroad company. There was a judgment upon a verdict for defendant in error. 102 Fed. 421.

This case turns upon the single question as to whether the negligent engineer and Stuber were fellow servants. The facts were undisputed, and were as follows: Stuber for many years had been the "foreman of water supply" upon an extensive division of the railroad of the plaintiff in error, receiving \$80 per month. His business was to supervise the water tanks and pumping machinery at the many water stations within his division, keeping same in good repair, and in condition to furnish water for the proper movement of trains. In the discharge of his duties he was obliged to pass frequently from one water station to another, and was authorized by a superintendent's order or pass to travel free upon any and all trains, and to stop them, when necessary, at any tank. To answer a call to repair the pumping machinery at Humboldt, Tennessee, Stuber boarded a detached locomotive at Guthrie, Kentucky, bound down the road. Through the negligence of the engineer in sole control of this engine, a collision occurred at Clarksville, Tennessee, with a train, whereby Stuber sustained a severe personal injury. The learned circuit judge was of opinion that the relation of fellow servant did not exist between defendant in error and the engineer, through whose negligence he had been injured, and instructed the jury to return a verdict against the plaintiff in error. A request to instruct the jury to find for the railroad company upon the ground that the engineer and Stuber were fellow servants was denied. The charge given and the request denied have been assigned as error. There is no statute in Tennessee defining fellow servants. The question is, therefore, one to be determined upon common-law principles. Under the decisions of the Tennessee supreme court, the liability of a railroad company to one servant who has sustained injury through the negligence of another has been made to depend upon the subordination of the one to the other, as well as upon refinements in respect to different departments of service.

Nashville & C. R. Co. v. Carroll, 6 Heisk. 347, 364; *Louisville & N. R. Co. v. Bowler*, 9 Heisk. 866; *Louisville & N. R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. 663; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 719, 18 S. W. 387; *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600; *Louisville & N. R. Co. v. Martin*, 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772. The question is, however, not one of local law to be settled by the decisions of the highest courts of the state in which the cause of action arose, but one of general law. So far as the Supreme Court of the United States has authoritatively determined the law applicable to such a case, it is the duty of this court to follow the law thus determined. But, so far as the question has not been thus authoritatively settled by that court, the common law applicable is to be determined by a consideration of all the authorities bearing upon the relation of master and servant. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. There is no authority for regarding Stuber, while being carried to his work by his employer, as a passenger. To discharge the duties of his peculiar employment, it was necessary that he should be carried from one place of work to another, as occasion should require. His transportation to and from his work was part of his contract of service, and while being thus transported he was as much in the service of the company as when engaged in the repair or construction of a water tank or pump. He was traveling at the time under a single contract of service, and his right to be carried free to and from his work is inseparable from the contract to do the work, and no valid ground exists for saying that he paid his own fare, or was in any sense a passenger.

The rule is now well settled that railway employees, while being carried, as part of their contract of service, to and from their place of work, are fellow servants, and not passengers. Thus, in *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228, laborers being carried to and from their work upon a gravel train were held not to be passengers, but fellow servants of those operating the train. In *Seaver v. Boston & M. R. Co.* 14 Gray, 466, a carpenter, whose business it was to repair bridges and fences along the line of railroad, injured while being carried free to a place of work, was held to be a fellow servant, and not a passenger. In *Ryan v. Cumberland Valley R. Co.* 23 Pa. 384, a laborer on a gravel train was injured through the negligence of the conductor or engineer while being carried from his residence to his place of work. Held, that there could be no recovery. In *McQueen v. Central Branch U. P. R. Co.* 30 Kan. 689, 1 Pac. 139, a bridge painter, while being transported over the road to discharge the duties of his place, was held not to be a passenger. In *Texas & P. R. Co. v. Smith*, 31 L. R. A. 321, 14 C. C. A. 509, 30 U. S. App. 176, 67 Fed. 524, it was held that a civil engineer, charged with the duty of looking after the maintenance of bridges, trestles, and water tanks, was not

a passenger when traveling over the road in discharge of his duties. In *Tomlinson v. Chicago, B. & Q. R. Co.* 38 C. C. A. 148, 97 Fed. 252,—an opinion by the circuit court of appeals for the eighth circuit,—it was held that a bridge builder and repairer, whose duties called him to various places on the line of the railroad company employing him, was not a passenger when being carried over the road to place of work, but a fellow servant with those operating the train to which his car was attached. To the same effect are the cases of *Tunney v. Midland R. Co.* L. R. 1 C. P. 291; *Ross v. New York C. & H. R. R. Co.* 5 Hun, 488, Affirmed in 74 N. Y. 617, and cited in 95 N. Y. 272; *Russell v. Hudson River R. Co.* 17 N. Y. 134; *Vick v. New York C. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 203, 53 Am. Rep. 616; *Kumler v. Junction R. Co.* 33 Ohio St. 150. On this record there can be no question as to the right of the defendant in error if he had been injured while traveling for a purpose disconnected with his employment. He was not so traveling. The cases of *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 25 L. R. A. 157, 37 N. E. 770, 166 Mass. 492, 33 L. R. A. 844, 44 N. E. 611; *McNulty v. Pennsylvania R. Co.* 182 Pa. 479, 38 L. R. A. 376, 38 Atl. 524; and *State use of Abell v. Western Maryland R. Co.* 63 Md. 433,—are cases in which it appeared that at the time of the injury the employee was not in the service of the company, but was traveling for his own purposes, and therefore a passenger. The learned trial judge and the counsel for the defendant in error seem to place the liability of the railroad company upon the theory that only those servants engaged in the same department of the service of a common master are to be regarded as fellow servants.

Stuber, it is said, had nothing to do with the actual movement of trains or engines, and was, therefore, in a different department of service. The ground upon which those courts proceed which hold an employer liable to his servants for the negligent acts of other servants in a separate and distinct department is that the servant only accepts the risk of the negligence of those so closely associated with him as that he may be supposed to have contracted with reference to the possibility of their negligence, they coming through such association to some extent under his influence. *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 348, 362 et seq.; *Shearm. & Redf. Neg.* 5th ed. §§ 237, 238. But under this rule it is difficult to see its application here. If Stuber had been hurt by those engaged in operating a train or locomotive while he was repairing a tank or pump on the side of the track, he might with more plausibility have urged that he could not foresee, when accepting employment, that he would be exposed to the negligence of servants operating trains. But in the case of *Morgan v. Vale of Neath R. Co.* L. R. 1 Q. B. 149, the plaintiff was employed by the railway company to do work as a carpenter. He was injured while standing on scaffold-

ing at work on a shed close to the line of railway, and was injured by the carelessness of some train hands in shifting a locomotive on a turntable so that it struck a ladder supporting the scaffolding, by which means the plaintiff was hurt. It was held that the plaintiff could not recover, having been injured by a fellow servant. Pollock, C. B., said: "It appears to me that we should be letting in a flood of litigation were we to decide the present case in favor of the plaintiff. For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service. Although the common object of their employment, however different, is but the furtherance of the business of the master, yet it might be said . . . that no two had a common immediate object. This shows that we must not over-refine, but look at the common object, and not at the common immediate object."

In the case at bar Stuber's employment required him to pass over the line of railway continuously upon all kinds of trains. Thus he was brought continuously in contact with those operating the trains, and must, upon the association rule, be regarded as having foreseen that he would be exposed, at least while being carried to and from his place of work, to the negligence of those operating trains. The general rule is that the master is not liable in the absence of negligence in respect to those duties which he is universally regarded as having undertaken; such as the obligation to exercise care in the selection of those to be associated with him, or of a place to carry on his work, and proper tools or materials with which to do it. In the decisions of the Supreme Court we find no sanction for taking a case out of this general rule of nonliability for the negligent acts of a fellow servant by refined distinctions as to who are fellow servants, based upon the subordination of one servant to another, or upon the circumstance that two servants are engaged in different departments of a common service. Thus, in *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 650, 10 Sup. Ct. Rep. 397, the department theory was repudiated in respect to those in service upon the same steamship, and the ship's carpenter held to be the fellow servant of the stewardess, though in distinct departments. In *Northern P. R. Co. v. Hamby*, 154 U. S. 349, 360, 38 L. ed. 1009, 1013, 14 Sup. Ct. Rep. 983, 986, a section hand was held to be the fellow servant of those engaged in operating trains. Mr. Justice Brown, in delivering the opinion of the court, said: "To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service—as, for instance, between brakemen of the same
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train or two seamen . . . in the same ship—are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent,—as, for example, the superintendent of a factory or railway; and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals."

In *New England R. Co. v. Conroy*, 175 U. S. 323, 328, 44 L. ed. 181, 184, 20 Sup. Ct. Rep. 85, *Ross's Case*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, was expressly overruled, and the last vestige of authority for supposing that the master's liability depended upon the nonsubordination of the injured servant to the one negligently inflicting the injury disappeared. Distinctions based upon gradations of rank and service in separate departments stand upon the same misconceptions as to the ground upon which a master's responsibility to his servant at common law rests. Thus Shaw, Ch. J., in *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, replying to the argument which had been advanced in favor of limiting the exemption of the master to his servants to injuries resulting from the negligence of those directly associated with the injured servant, said that the argument in favor of the distinction rested "upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." In *New England R. Co. v. Conroy*, cited above, this reasoning was approved, and the rule touching the master's responsibility to his servants was thus stated for the court by Justice Shiras: "Unless we are constrained to accept and follow the decision of this court in the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, we have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master,

engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and that, accordingly, in the present case, upon the facts stated, the conductor and the injured brakeman are to be considered fellow servants within the rule."

Applying this principle, it is clear that Stuber and the engineer, through whose negligence he was hurt, were servants of a common master, and, though not engaged "in the same operation or particular work," they were both employed to perform duties "tending to accomplish the same general purposes." The services of Stuber in supplying trains with water were just as important to the proper movement of trains as those of the engineer upon a locomotive. The services of each in his particular sphere were directed to the accomplishment of the same general end. They were, therefore, fellow servants, without regard to the intimacy of their association, though, as we have already seen, the duties of Stuber were such as to require that he should be constantly carried to and from his work by those engaged in the operation of trains and engines.

The failure to instruct for the plaintiff in error was an error, for which the judgment must be reversed.

Lucius P. MASON *et al.*, *Appts.*,
v.

MARINE INSURANCE COMPANY *et al.*

(110 Fed. 452.)

1. An appeal by the owner of a vessel from a decree awarding the sum recovered for probable loss of earnings because of a collision, to the insurer, will not give the appellate court jurisdiction to review the portion of the decree which awarded appellant the amounts recovered for loss of freight under existing contracts and for loss of coal on board.
2. An insurer is not precluded from intervening to claim the amount decreed against the owners of vessels which damaged by collision the vessel on which his contract was written by waiting until after the liability has been fixed by the appellate court, if no issue was made in the case as to the distribution of the funds recovered, and the appellate court did not pass upon that question.
3. The recovery for loss of prospective earnings awarded because of injury to a vessel by collision is within the rule entitling an insurer who has received an abandonment of the vessel to the fund recovered on account of the collision from the vessel in fault, and the fact that the insurance did not cover the full value of the in-

jured vessel will not require the insurer to share such recovery with the vessel owner.

(July 2, 1901.)

APPPEAL by the owners of the steamship Ohio from a decree of the District Court of the United States for the Eastern District of Michigan awarding a portion of a sum recovered as damages for its loss, to the insurers, to whom the vessel had been abandoned. *Affirmed.*

Statement by *Severens*, Circuit Judge:

This case came here on a former appeal from a decree of the district court finding the steamers the Ohio, the Siberia, and the Samuel Mather all at fault for a collision which resulted in the sinking of the Ohio. 33 C. C. A. 667, 62 U. S. App. 88, 91 Fed. 547. The decree of the district court was reversed by this court as to the alleged fault of the Ohio upon the ground that no negligence on her part was shown, and directions were given in the mandate to enter a decree against the Siberia and the Samuel Mather for the damages sustained by the Ohio. Upon the reception of the mandate, a decree was entered in favor of the libellants and against the claimants and sureties for the Siberia and the Samuel Mather for the sum of \$71,409.74, with interest and costs. The amount of this decree was duly paid into the registry of the court, and on a subsequent date, upon stipulation of the parties concerned, a considerable portion of the sum was distributed. At the time of the loss the Ohio was insured in the following insurance companies, *viz.*: The Marine Insurance Company, the Reliance Marine Insurance Company, the Mannheim Insurance Company, the Commercial Mutual Insurance Company, and the Commercial Union Assurance Company, Limited, to the amount, in all, of \$51,175 upon a valuation, stated in the policies, of \$58,500. Promptly after the collision and damage occurred, which was on the 19th day of May, 1890, the owners of the Ohio gave due notice to the insurance companies of their abandonment of the vessel as for a total loss. The formal abandonment, with proofs of loss, were delivered to the insurers on May 30, 1890. On October 8, 1890, the full amount of insurance was paid, and a conveyance of the Ohio was delivered to the insurance companies. The insurance companies having these policies on the Ohio at the time of her loss, and which insurance they had severally paid to the owners, filed their petition in the district court, praying that there be ordered paid to the petitioners the sum of \$7,879.20, the amount alleged to have been recovered in the decree against the Siberia and the Samuel Mather, and claimed in the original libel as damages in the nature of demurrage, or the probable value of the use of the vessel for a time subsequent to the

NOTE.—As to right of subrogation in favor of the insurer against person causing the loss, see a few cases in note to Insurance Co. of N. A. v. Easton (Tex.) 3 L. R. A. on page 426; also Phenix Ins. Co. v. Pennsylvania Co. (Ind.) 20 L. R. A. 405; St. Louis, A. & T. R. Co. v. 64 L. R. A.

Fire Asso. of Philadelphia (Ark.) 28 L. R. A. 83; Leavitt v. Canadian P. R. Co. (Me.) 38 L. R. A. 152; Packham v. German F. Ins. Co. (Md.) 50 L. R. A. 828; and Svea Assur. Co. v. Packham (Md.) 52 L. R. A. 95.

collision, and while she was detained for repairs; also for the sum of \$1,719.55, being the probable net earnings of the Ohio on her voyage in which the collision occurred; also the sum of \$233.75 for the loss of fuel then on board the Ohio. The owners of the Ohio contested this petition, and upon the hearing the court decreed that the petitioners were entitled to the first of the above-mentioned sums, namely, \$7,879.20, which had been recovered as the probable net earnings of the Ohio after the collision, but denied the claim for loss of freight and for loss of fuel, which latter were considered to belong to the owner of the vessel. A decree was entered in conformity with these views, and thereupon the owners of the Ohio appealed to this court. The petitioners have not appealed.

Argued before *Lurton* and *Severens*, Circuit Judges, and *Thompson*, District Judge.
Messrs. John C. Shaw, Byron S. Waite, William B. Cady, and Herbert K. Oakes, for appellants:

Petitioners are not entitled to any money under these proceedings because they neglected their opportunity to intervene, and slept upon their rights in that regard, the final decree having been entered pursuant to mandate from the appellate court.

Re Sandford Fork & Tool Co. 160 U. S. 255, 40 L. ed. 416, 16 Sup. Ct. Rep. 291; *Ex parte Union S. B. Co.* 178 U. S. 317, 44 L. ed. 1094, 20 Sup. Ct. Rep. 904; *Sibbald v. United States*, 12 Pet. 488, 9 L. ed. 1107; *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843.

The probable net earnings of the Ohio with the Sheldon in tow were awarded to the owners as the measure of their damages by reason of their having been deprived of the use of their boat from June 3, the time when the voyage in progress would have been ended, to the 10th of October, covering more than the unexpired portion of the charter.

By what right can anyone beside the owners claim this money?

The insurer stands in no relation of privacy to the contract with the wrongdoer.

Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 321, 29 L. ed. 878, 6 Sup. Ct. Rep. 750, 1176.

The underwriters are not entitled to this money unless they have been subrogated to the rights of the owners, and the right of subrogation rests upon no such basis as the facts revealed in this case.

McCormick v. Irwin, 35 Pa. 117; 24 Am. & Eng. Enc. Law, p. 187.

The insurers are entitled only to damages to be recovered for an injury for which they have paid, and to such proportion only of those damages as the amount insured bears to the valuation in the policies.

The Potomac, 105 U. S. 635, *sub nom. The Potomac v. Cannon*, 26 L. ed. 1196; 2 Arnould, *Marine Ins.* pp. 729, 730; *Sun Oil Co. v. Ohio Farmers' Ins. Co.* 15 Ohio C. C. 355; *Mutual F. Ins. Co. v. Shovalter*, 3 Pa. Super. Ct. 452; *Sea Ins. Co. v. Hadden*, 5 Asp. Mar. L. Cas. 230.

54 L. R. A.

The owners are entitled to the recovery for loss of freight on the pending voyage.

Freight earned previous to abandonment goes to the assured, and that earned afterwards to the abandonee.

1 Am. & Eng. Enc. Law, p. 41; *United Ins. Co. v. Lenox*, 1 Johns. Cas. 379; 3 Kent, Com. 331, note; *Hammond v. Essex F. & M. Ins. Co.* 4 Mason, 196, Fed. Cas. No. 6,001; *Cass v. Davidson*, 5 Maule & S. 89.

The amount recovered for the fuel on board goes to the assured because it was not covered by the policy at the time of the disaster,—\$233.75, which petitioners now claim should be paid to them, because, they say, it was covered by their contract of insurance.

The Dundee, 1 Hagg. Adm. Rep. 109; *Swift v. Brounell*, Holmes, 467, Fed. Cas. No. 13,095.

Owners are entitled to one eighth of the damages recovered for loss of the hull.

The owners took the risk, or, more properly speaking, carried their own insurance, on one eighth of the value of the property insured, and as they took one eighth of the risk they are entitled to one eighth of the amount recovered for damages to the property.

The St. Johns, 101 Fed. 475; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 235, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; *Providence & S. S. S. Co. v. Phœnix Ins. Co.* 89 N. Y. 559.

The abandonment, under the contract in this case, transferred to the underwriters only an interest in the wreck proportionate to the amount of their insurance.

2 Arnould, *Marine Ins.* p. 1159; *Havelock v. Rockwood*, 8 T. R. 268; *Rice v. Cobb*, 9 Cush. 305; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. ed. 243; *Merchants' & Mfrs. Ins. Co. v. Duffield*, 2 Handy (Ohio) 122; *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200, 67 Am. Dec. 339; *Insurance Co. of N. A. v. Johnson*, 17 C. C. A. 416, 37 U. S. App. 413, 70 Fed. 794; *Emérigon*, *Ins.* p. 722.

The authorities everywhere recognize and speak of the owner as having an uninsured interest, and as to that interest he stands his own insurer.

The Potomac, 105 U. S. 635, *sub nom. The Potomac v. Cannon*, 26 L. ed. 1195.

To the extent that the vessel is covered by each policy the insured abandons her to each underwriter; he abandons no greater interest.

Harvey v. Detroit F. & M. Ins. Co. 120 Mich. 601, 79 N. W. 898; *Phœnix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 321, 29 L. ed. 878, 6 Sup. Ct. Rep. 750, 1176.

Mr. George W. Wendock for appellant Mason.

Messrs. Harvey D. Goulder and O. E. Kremer for appellees.

Severens, Circuit Judge, delivered the opinion of the court:

The supposed errors of which the appellants complain may properly be considered under the following heads: First. That the petitioners are not entitled to any recovery

by these proceedings, because they lost their opportunity to intervene, and slept upon their rights in that regard until after the entry of the final decree entered upon presentment of the mandate from this court; and, if they are entitled to recover any of these moneys from the owners of the Ohio, it must be done in another court and case. Second. They claim that all moneys recovered against the Siberia and the Samuel Mather for loss of probable earnings after the collision belonged to the owners of the Ohio. Third. They claim that, if the insurers are entitled to the prospective probable earnings of the Ohio, they, the owners, are entitled to share with the underwriters by reason of the fact that the vessel was only insured by all the several policies to an amount considerably less than her valuation in the policies, and that as to this difference the owners carried the risk. The right to the damages recovered for loss of freight on the voyage, and also the sum recovered for loss of fuel, were allowed to the appellants by decree of the district court, and, of course, they have no ground for complaint here, so far as those matters are concerned. But counsel for the appellees contend that the court below erred in refusing to allow these last-mentioned claims to the petitioners, and in answer to a doubt expressed by the court here whether, not having appealed, they were entitled to now make this contention, they say that those items were a part of the things disposed of by the decree, and that the appeal of the owners of the Ohio brought up the whole matter of the decree, and that, therefore, the whole subject was before the court. But we are quite clearly of the opinion that this contention cannot be maintained. It is doubtless true that, where the decree awards a balance which is the result of an adjustment of mutual accounts between the parties, an appeal from such decree might open the case for the consideration of an objection to the particular items which make up the general balance, provided the proper steps had been taken to bring those matters under the cognizance and power of the court. But this is not such case. The claims pursued are several and distinct grounds of recovery, and there is nothing in the nature of a mutual account.

Recurring, therefore, to the questions which are before us, we observe, first, that, in our opinion, the objection that the petition of the insurance companies was not seasonably presented is not well founded. It was not necessary that they should have intervened in the case prior to the entry of the decree of the district court under the order of this court, when the cause was remanded. There was nothing in the order of the mandate directing what decree should be entered, which prevented a subsequent application for a distribution of the fund recovered. There had been no issue in the case upon any such matter when it came here upon appeal, and, of course, there was nothing decided here which had any relation whatever to that subject. What we deter-

mined was the liability of the Siberia and the Samuel Mather for the damages suffered by the Ohio, and the fixing of the amount for which the respondents were liable. There was no question before the court relating to the ultimate destination of the funds, though it did undoubtedly establish the right of recovery between the then parties to the suit; but it determined nothing more. When the money was paid into court, all the purposes of the decree, so far as the parties to the suit were concerned, were accomplished. The insurance companies had not been parties to the suit, and it was entirely competent for them, at any time before the final distribution of the fund was made, to intervene for the purpose of presenting their claim to an interest in the fund, and for its establishment by the decree of the court. *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 45 C. C. A. 60, 105 Fed. 803-808; *Re Howard*, 9 Wall. 175, 19 L. ed. 634; *Williams v. Gibbs*, 17 How. 239, 15 L. ed. 135; *The Elmbank*, 72 Fed. 610. The question which we are required to determine upon the merits is whether that part of the damages recovered for the prospective earnings of the Ohio, and resulting from the collision, belong to the owners of the ship or to the underwriters. When the case was here on the former appeal, this court, in considering a question of pleading, referred briefly to this question, but as, in the then state of the case, it was not necessary to determine it, it was expressly passed over without expressing any definite opinion upon it. The question turns upon the effect under the maritime law of an abandonment of the ship by the owner to the underwriters as for a constructive total loss. The rule upon this subject is, as we think, correctly stated in 1 Am. & Eng. Enc. Law, 2d ed. p. 36, as follows: "An abandonment divests the property of the thing abandoned out of the insured, and vests it in the insurer, together with all the rights of property and rights of action incident thereto, and all the burdens and liabilities in respect thereof, from the moment of the casualty to which the abandonment refers."

This rule was accepted by the Supreme Court of the United States at an early day, and has been steadily adhered to. In the case of *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268, 3 L. ed. 220, there was an insurance of goods on board ship and in charge of the supercargo, Parker. The ship and goods were captured by a privateer, one of the perils insured against. Notice of abandonment was given to the insurance company. Parker, the supercargo, afterwards effected an arrangement with the owner of the privateer by which the vessel was released. The ship and goods were taken to the port of destination, where the latter was sold. Suit was brought upon the policy. It was held that no deed of cession was necessary, the notice of abandonment being sufficient, and that thereupon the title to the goods vested immediately in the underwriters. With respect to the effect of the abandonment, Chief Justice Marshall said: "If

the abandonment was legal, it put the underwriters completely in the place of the assured, and Parker became their agent. When he contracts on behalf of the owners of the goods, he contracts on behalf of the underwriters, who have become owners, not on behalf of Stark, who has ceased to be one."

There was a question whether the notice of abandonment was seasonably given, and the judgment in favor of the plaintiff was reversed, and a new trial ordered, but upon that ground only. That was a case of insurance upon the cargo, but the rule is essentially the same as in the case of insurance upon the ship, so far as concerns the consequences of an abandonment. In the case of *Comegys v. Vasse*, 1 Pet. 193, 7 L. ed. 108, which has always been considered a leading one, this subject was fully considered and elaborately discussed in an opinion by Mr. Justice Story. The object of the suit was to determine the ownership of a certain fund which had been distributed by the commissioners appointed by the United States in fulfillment of its stipulation in the treaty with Spain in 1819 to make satisfaction of the claims of our citizens upon the latter country for captures and losses enumerated in the treaty. Vasse had underwritten policies on several vessels and cargoes, which had been captured and taken into Spanish ports. The vessels had been abandoned to him, and he had paid the losses to owners, long before the date of the treaty. A material question in the case was whether the money distributed by the commissioners to satisfy the claim for these losses belonged to the owners of the captured vessels or to Vasse, the underwriter. This depended on the effect of the abandonment. And it was held that by that act the right to every sort of indemnity which might thereafter be awarded on account of the loss by reason of which the abandonment was made passed from the insured to the underwriter; and the doctrine of text writers was cited and approved, to the effect that the rights which pass are not limited to the specific property abandoned, or its proceeds, but include also "whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss." Almost contemporaneously with that decision the same rule, in substance, was laid down by Chancellor Kent in the third volume of his Commentaries, at page 319, where he says, in speaking of abandonment: "In such cases the insurer stands in the place of the insured, and takes the subject to himself with all the chances of recovery and indemnity. A valid abandonment has a retrospective effect, and does of itself, and without any deed of cession, and prior to the actual payment of the loss, transfer the right of property to the insurer to the extent of the insurance; and if, after an abandonment, duly made and accepted, the ship should be recovered, and proceed and make a prosperous voyage, the insurer, as owner, would reap the profits." And in the note to this passage: "The benefit of the *specie re-*

cuperandi passes, and all that may be collateral or incidental to the ownership."

It will be noticed that the chancellor uses the comprehensive expression "chances of recovery and indemnity" in describing the things which pass. Obviously, from that and the context, he intended to include every species of indemnity, and among these would be the obligation of the wrongdoer to make atonement to the owner of the vessel to the full extent of his loss. There have been many decisions in the Federal courts since that time involving collateral points, and sometimes the rule itself, but that has always been considered as having been settled by the early authorities. It would not be profitable at this day to undertake particular discussion of them in detail. Some of the cases are these: *The Monticello v. Molaison*, 17 How. 152, 15 L. ed. 68; *The Potomac*, 105 U. S. 635, *sub nom. The Potomac v. Cannon*, 26 L. ed. 1194; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566; *Phœnix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 760, 1176; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 235, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; *The Ann C. Pratt*, 1 Curt. C. C. 343, Fed. Cas. No. 409; *Gilchrist v. Chicago Ins. Co.* 44 C. C. A. 43, 104 Fed. 566.

In the English courts there is an unbroken line of authority in support of the general rule above stated in regard to the effect of an abandonment for a constructive total loss. From among their modern decisions we cite, as illustrating the English doctrine: *Yates v. Whyte*, 4 Bing. N. C. 272; *Cammell v. Sewell*, 3 Hurlst. & N. 617; *Miller v. Woodfall*, 8 El. & Bl. 498; *North of England Iron S. S. Ins. Asso. v. Armstrong*, L. R. 5 Q. B. 244; *Simpson v. Thomson*, L. R. 3 App. Cas. 279; *Scottish Marine Ins. Co. v. Turner*, 1 Macq. H. L. Cas. 334, reprinted in 9 Scots Rev. Rep. 312; *Sea Ins. Co. v. Hadden*, L. R. 13 Q. B. Div. 706. The rule is thus laid down by Cockburn, Ch. J., in *North of England Iron S. S. Ins. Asso. v. Armstrong*, L. R. 5 Q. B. 244, 248: "In the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and does satisfy it."

In *Simpson v. Thomson*, L. R. 3 App. Cas. 279, the lord chancellor, Lord Cairns, delivering the judgment of the House of Lords, says that the insurer becomes "entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship *in specie* if they can find and recover it, and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrongdoer for damage for the act which has caused the loss."

And Lowndes, in his work on Marine Insurance, at page 153, thus states the right

acquired on abandonment: "This cession or abandonment which accompanies a settlement gives to the insurers a right to all the advantages, direct and indirect, or ownership of the thing insured. Not only may they take possession of, sell, or otherwise dispose of the wreck or remains, but, if the assured is entitled, in virtue of the ownership had before, to any rights of action or recovery from third parties as for a contribution to general average, to recovery of damages against the wrongdoer in a collision suit, or the like, these rights pass by the abandonment to the underwriter."

Germane to the question we are considering, it should be noted that, having regard to the effect of an abandonment upon the right to recover freight, the doctrine is firmly established, both in this country and in England, that freight already earned at the time of the disaster on account of which the abandonment is made goes to the owner of the ship, or to the insurers of the freight if it be insured. This harmonizes with the rule, because in such case the right has matured, and is no longer an incident of the vessel. Where the freight is still pending, the English rule is (or has been) that, upon abandonment, the whole freight goes to the abandoner. This doctrine goes upon the ground that the right is immature at the time the voyage is interrupted, and therefore not detachable from the ship. On the other hand, many American authorities, basing their ruling upon what seemed to them a more equitable basis, have established a variation from the English practice by awarding the pending freight, where it has been finally matured by the underwriter, to him and to the owner of the vessel *pro rata itineris* which each has accomplished. This American rule recognizes the fundamental doctrine by dividing the earnings of the vessel at the date of the disaster, the division itself being a device of equity in favor of the owner and the insurer of freight against a strictly legal and technical consequence. So far as we know, there has been no decision in either country that upon abandonment the owner may still assert against his abandoner the right to the prospective earnings of the vessel. A case very nearly in point is *Miller v. Woodfall*, 8 El. & Bl. 498, where the insured, after an abandonment, had gotten the ship off, and had carried part of his goods on board to their destination. It was held that the abandoners of the ship were entitled to be allowed at the current rate of freight for the carriage of that part of the cargo taken by the ship into port. A case much relied on by the appellants, and thought to be decisive of this, is that of *Sea Ins. Co. v. Hadden*, L. R. 13 Q. B. Div. 706, also reported in 5 Asp. Mar. L. Cas. 230. But the case is distinguishable. The question there was whether the insurers were entitled to recover from the owner of the ship money decreed to him by reason of his having been deprived of profits under a contract of affreightment, upon which there was another insurance by other underwriters. Now, the contract of affreightment is not an

incident of the ship. Freight is of itself, and independently of the ship, the subject of a contract of insurance. They are two entirely separate things, and there are many cases in the books where the courts have been employed in protecting the interests of the owner in respect of the contract of affreightment, and, through him, of insurers of freight, in cases of this sort; as in the case of *Hickie v. Rodocanachi*, 4 Hurlst. & N. 455, where Lord Bramwell observed, having reference to the fact that the captain had fulfilled for the owner the contract of affreightment, that the captain in such a case as the present acts for the owners of the ship, and not for the underwriters, and they are not entitled to any benefit from the freight acquired. The underwriters may, indeed, be entitled to advantages attached to the ship, but not to those arising from contracts, the fulfillment of which can be and is detached from the ship, which, as often happens, the shipowners may fulfil by another ship. Considerations of this kind lie at the bottom of the rule in this country that the owner of the ship cannot recover as damages arising from collision the freight arising on a charter party. This was the ground on which the judgment in *Sea Ins. Co. v. Hadden* was rested. Brett, M. R., in giving his opinion, after quoting what was said by Lord Bramwell in *Hickie v. Rodocanachi*, said: "If the vessel is insured by one set of underwriters, and the freight is insured by another set, then whatever is salvage from the loss of the ship goes to the underwriters of the ship, and whatever is salvage from the loss of the freight goes to the underwriters of the freight. How, then, are the damages which have been recovered in this case from the owners of the colliding vessel made up? They are made up of damages given in respect both of the loss of the ship and of the loss of freight. Therefore one set of damages ought to go to one set of underwriters, and the other set to the other. It seems to me to be conclusive that the underwriters on the ship cannot recover what they here claim, because it seems clear that this recovery of damages in respect of the loss of freight is not a salvage which is a salvage out of the loss of the ship."

The difference in the facts, and consequently in the principle of law applicable thereto, between that case and this, is obvious. The claim there in question was founded upon a subject which was held to be not an incident of the ownership of the vessel, and which had in fact been separated therefrom by the owner. The right of the underwriter on the ship was derived from the owner, and was affected by his status. If he could recover against the wrongdoer upon it, the damage would, as the master of the rolls said, go to the underwriters of the freight. Here the damages in question were not for the loss arising upon a charter party, but for the loss of the prospective earnings of the ship, the charter party being used as evidence merely upon the question as to how much they would probably have been worth. The earning power of the vessel was

an incident inhering in her ownership. That earning power passed with the ship, and, as we have already seen, the abandonees were entitled to the use of it from the moment of the disaster. If the ship had not been completely disabled, but had remained in such plight that she could have completed her voyage, there could be no question but that her earnings subsequent to the collision would have belonged to the underwriters. If that had happened, it would *pro tanto* have diminished the amount recovered by the owners from the insurers. In point of fact, the injury was so grave as to completely disable the ship from earning anything during the time of her detention, and it is for precisely that period of time that the owners have recovered for her prospective earnings, and it is that sum which the underwriters claim was recovered in trust for them. We do not see how that claim can be denied without overturning the settled doctrines which apply to an abandonment. And there is really no hardship to the owners of the ship. The right to abandon as for a constructive total loss is a privilege given by the maritime law to enable the owner of the ship to forthwith realize the substance of the value of the lost vessel, so that he may reinvest it in another ship by purchase or charter, and continue in his enterprises. The exercise of that privilege casts upon the underwriter an extraordinary burden. Both parties have all these consequences in view when the contract of insurance is made. The vessel owner can never be compelled to abandon. When he does so, he acts upon an estimate of the whole situation, and all the consequences; and, of course, he will not exercise his privilege unless it is for his advantage. In such a case the right of the insurer does not depend upon the doctrine of subrogation, as that term is understood in courts of equity, and which is employed in working out the right of the insurer in cases of partial loss only. In such cases there is no change in the ownership of the vessel, and the right to its earnings continues with the owner as an incident of his ownership. On the other hand, when the ship is abandoned to the insurer, the title to the ship passes by assignment immediately to the insurer, as from the moment of the disaster, with every right which is incident to it. The distinction is an important one, though it is sometimes confused in the language of judicial opinions. Inasmuch as it is a consequence of the abandonment that the underwriter becomes substituted to all claims and remedies for the loss, in addition to the title to the ship itself, it is impossible to say that the owner may still recover to his own use damages which depend upon his right to continued ownership. We have not been referred to any case where this precise question has been determined, nor have we been able to find any, and this has been the reason for our discussion of the subject upon the reasons and analogies suggested by the authorities.

It is further contended that, notwithstanding

the abandonment, the owners of the ship retained an interest proportionate to the difference between the amount of the insurance and her valuation, and that, consequently, they are entitled to share in the sum in controversy as in the nature of salvage. This contention rests upon the ground that this difference represents an uninsured interest in the vessel, or, to put it in the way which is suggested by counsel, an interest in respect to which the owners were their own insurers. But it is a mere figure of speech to say that the owner is the insurer of his own property. In reality the only insurance is that which is contracted for. Nor is it true that, because the insurance is for less than the value, the insurance rests upon some fractional part of the ownership. The whole vessel, the body and tackle, apparel, and other furniture," to use the language of the policies, is the subject of the insurance. When an abandonment takes place, the entire ownership passes; and it is usually stipulated, as it was here, that the notice thereof, if accepted, must be efficient to convey to and to vest in the insurers "an unencumbered and perfect title to the subject abandoned." There is no suggestion that some aliquot part of an ownership is to be assigned. The owner does not continue to be an owner as a tenant in common. In the present case, before the acceptance of the abandonment and settlement as for a total loss, the underwriters required the whole title to be conveyed to them, which was done. We think, however, that that would have been the result if no deed of cession had ever been executed.

This question has never been expressly decided by the supreme court though there are several cases which employ language which, we think, implies that the understanding of the court has been in accordance with the rule which we suppose to be the correct one. For instance, in view of the fact that insurance is not ordinarily for the full value, we should have anticipated a qualification in the statement of the rule as to what would pass by an abandonment, if the owner were recognized as remaining a tenant in common as to part of the ownership by reason of the insurance being for less than the value of the ship. The rule applied by the district court has on several occasions been held to be the true one by the Federal courts, of first instance, and has been recently affirmed by the circuit court of appeals for the seventh circuit, Mr. Justice Harlan delivering the opinion. *Mutual Safety Ins. Co. v. The George, Olcott*, 89, Fed. Cas. No. 9,981; *The Mary E. Perewé*, 15 Blatchf. 59, Fed. Cas. No. 9,207; *The Manitoba*, 2 Flipp. 241, 30 Fed. 129; *The Burlington*, 73 Fed. 258; *Gilchrist v. Chicago Ins. Co.* 44 C. C. A. 43, 104 Fed. 566. The rule is also recognized in *The St. Johns*, 101 Fed. 469. There is some disagreement in state decisions upon this point, but, so far as we know, there has never been any difference of opinion in the Federal courts. It seems to us that the maintenance of this claim of the owners would be to introduce a new doctrine into

the law of abandonment, and one wholly inconsistent with its long-established principles.

Counsel for the underwriters refer, in support of their claim, to a clause in the policy which requires the insured, upon accepting payment for any damage or loss, to treat as assigned to them all rights to indemnity which the insured may have. But we think

this language in the policy was employed to denote what should happen or result in cases of partial loss only, for in the preceding paragraph the subject of liability in case of abandonment for constructive total loss was fully provided for.

We think the decree of the court below, so far as it is appealed from, is correct, and it is accordingly affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

Simeon E. LEONARD, *Pf. in Err.*,
v.

ORIENT INSURANCE COMPANY.

(48 C. C. A. 369, 109 Fed. 286.)

Liability for loss resulting from destruction by fire of a building insured by a policy exempting the insurer from liability for loss caused by explosions of any kind (unless fire ensues, and in that event for the damage by fire only), and providing that if the building or any part thereof falls, except as the result of fire, the insurance shall immediately cease, will attach under the former clause, and not be defeated by the latter, where one corner of the building is knocked down by an explosion in a neighboring building, and fire immediately appears in the exposed part, caused either by the flame of the explosion or by fires liberated thereby in the building insured.

(June 26, 1901.)

ERROR to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

Statement by Woods, Circuit Judge:

This is an action of assumpsit upon a policy of fire insurance issued by the Orient Insurance Company to Simeon E. Leonard, the plaintiff in error, upon a stock of seeds kept for sale in a six-story brick building, 40 feet wide, fronting on Lake street, between Des Plaines and Union streets, and extending back about 170 feet to Pearl street on the east, in Chicago. The total insurance was \$76,500; the total loss, \$127,833.88. Suits are pending upon the other policies. The goods were destroyed mainly by fire, but partly by the falling of the northwest corner of the building in which they were kept. Next to that building on the west was a blacksmith shop, a frame building 20 feet wide, and next to that on the west was the New England Mill, consisting of a three-story frame in front, next to Lake street, and a brick structure some

stories higher in the rear. The evidence showed, or tended to show, that at 4:45 o'clock P. M. of November 1, 1899, an explosion occurred in the mill, caused probably by ignition of mill dust, or dust powder, and resulting in the instant demolition of the mill and blacksmith shop, and the tumbling down, a few moments later, of the northwest corner of the seed store. The fire, which followed the explosion, spread at once to the ruins of the mill and shop, and within two or three minutes—probably within a few seconds—fire appeared in the exposed part of the store, to which in all probability it communicated from the outside, though it might have originated from a stove or from burning gas jets in the office room on the ground floor. No witness testified to seeing unrestrained fire in the seed store before the falling of the corner of the building, and all the testimony touching the point tended to show that from the fall to the appearance of flame in that building there was a lapse of a few seconds, or minutes, as the witnesses more frequently but probably mistakenly expressed it. Following the explosion the air was full of dust and flame, which the strong wind blowing from the northwest, once the wall was down, doubtless carried into contact with the inflammable material in the store. The policy sued on insured "against all direct loss or damage by fire, except as [t]hereinafter provided." The exceptions pertinent here are as follows: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon. If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." At the conclusion of the evidence offered by the

NOTE.—For other cases in this series as to what losses are covered by insurance against fire, see also *note* to *Heuer v. Northwestern Nat. Ins. Co.* (Ill.) 19 L. R. A. 594; *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.* (Mass.) 20 54 L. R. A.

L. R. A. 297; *Ermentrout v. Girard F. & M. Ins. Co.* (Minn.) 30 L. R. A. 346; and *Way v. Abington Mut. F. Ins. Co.* (Mass.) 32 L. R. A. 608.

plaintiff the court sustained the motion of the defendant for a peremptory instruction directing a verdict in its favor, and error is assigned upon that action. In explanation of the ruling the court said: "The case is one of very great importance. It is a question of interpretation that is not entirely covered by any authority I have found, and I have looked them over with some diligence, as called to my attention by your briefs. . . . I am well convinced that, unless you reject absolutely the condition contained in the 36th and 37th lines, there is no escape from the condition of the policy which declared it at an end,—the insurance at an end when the walls fall, except by fire. That the walls fell by the force of the explosion in the mill is the uncontradicted testimony. That being so, I can see no escape from the condition of the policy that there was no insurance upon the building at the instant the fire occurred which destroyed the property. I think there is no escape from the view that a verdict should be directed accordingly."

Argued before *Woods, Jenkins, and Grosscup*, Circuit Judges.

Messrs. Henry W. Magee and Myron H. Beach for plaintiff in error.

Messrs. D. J. Schuyler, Thomas Bates, and Monroe Tulkerson for defendant in error.

Woods, Circuit Judge, delivered the opinion of the court:

In *Dows v. Faneuil Hall Ins. Co.* 127 Mass. 346, 34 Am. Rep. 384, where the action was upon fire policies containing a clause concerning explosions like that in the policy before us, it was said, on the authority of *Scripture v. Lowell Mut. F. Ins. Co.* 10 Cush. 356, 57 Am. Dec. 111, that, "the explosion in the upper story having been caused by fire, the insurers, if no clause had been inserted restricting their liability for losses by explosion, would have been liable for the losses, whether by the explosion or by the subsequent fire, to the amount of the insurance." One of the policies also contained the provision, "If a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine," in respect to which it was said: "The question is whether this last provision is applicable to the facts of the case, and, in the opinion of a majority of the judges, it is not. The provision, being introduced by the insurers and for their benefit, is, by a familiar rule, to be construed, in case of ambiguity, most strongly against them. It appears to us to have had in view the case of a building falling by reason of inherent defects, or by the withdrawal of the necessary support, as by digging away the underlying or adjacent soil. It might, perhaps, include the case of a building thrown down by a storm or flood or earthquake. But it would be construing this provision too liberally in favor of the insurers to hold it to include the case of the destruction of a

building by an explosion within the building itself, and of a fire immediately ensuing upon and connected with such an explosion, the measure of the liability for which has been carefully and precisely defined in the previous provision of the policy."

The fact that in the present case the explosion occurred outside of the building in which the insured goods were kept cannot affect the liability of the insurer, if otherwise liable, for the loss by fire which immediately ensued. If there had been no fall of the building or of any part of it, and the flame attending or ensuing upon the explosion had reached the insured goods through an open door or window, liability under the policy for the loss would be beyond dispute. Is it to be said that there is no liability simply because the first effect of the explosion was to break a passageway into the building for the fire which in a few moments followed? Confessedly, there would be liability if the flame had entered through any opening, caused or not caused by the explosion, if no part of the building had fallen; but should there be no liability if a piece of glass falling from a window shattered by the explosion had given admission to the flame? The language of the contract is clear that if any part of the building shall fall, except as the result of fire, all insurance on building or contents "shall immediately cease." The words are surely, as they have been declared to be, "terse and expressive." They are unqualified and universal, admitting of neither interpretation nor construction, and, if applicable, it would seem, should be allowed their literal significance. It is not to be said that they are applicable, and yet not to be applied literally. It may not be said that "any part" of a building must be deemed to mean an important part, or such a part as might cause, or be supposed likely to cause, or at least to enhance the danger of, loss by fire. "It was competent for these parties to fix the terms of their agreement." Where they wrote and subscribed "any part," they must be presumed to have meant any part, great or small, if observable or readily discoverable. Even if it could be said that the part must be large enough to cause, or to be likely to enter into, the risk of loss by fire, the qualification could mean little, because conditions are readily supposable, and are not improbable, in which the fall of material of small weight or bulk would be enough to start a fire. Not much is necessary to overturn a stove or to scatter the fire of an open grate or hearth, and still less to ignite a match. If there had been a window on the west side of the building in question, the falling of a shutter or of a pane of glass would probably have been followed by the same loss to the plaintiff in error which ensued upon the falling of the corner of the building. On the theory of strict adherence to the meaning of plain words, these propositions cannot well be denied; and upon that theory the case of *Fred J. Kiesel & Co. v. Sun Ins. Office*, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 243, is urged upon

our attention in support of the ruling below. The case, however, is not in point. The policy there in suit contained the clauses now under consideration; but, there having been no explosion, the building fell, and the goods insured were burned, and the question was whether the fall was caused by the fire or by a gale of wind. It is perhaps worth while, however, to observe that the literal significance of the contract seems to have been departed from when it was said in the opinion that if the building "was on fire, and if it would have fallen by force of the wind if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable." Any question of *non sequitur* in the statement aside, it is certainly not inconsistent with the express terms of the contract that in such a case the insurer should be liable for the damage done before the fall occurs, though not caused by the fire. The insurance ceases only at the instant of the fall, and it follows, on a strict construction, that "the cause of the fall" can be the test of liability only from that instant. The case before us is one of destruction by fire, which immediately followed, and with propriety may be said to have been caused, by an explosion. Whether that explosion was caused by fire, it is

not necessary for the present purpose to consider. See *Briggs v. North American & M. Ins. Co.* 53 N. Y. 446. The liability of the insurance company for fire immediately ensuing upon an "explosion of any kind or lightning" was "carefully and precisely defined" in a clause devoted to the subject; and we agree with the opinion in *Dows v. Fancuil Hall Ins. Co.* 127 Mass. 346, 34 Am. Rep. 384, that the succeeding clause, whatever its construction when applicable, should not be deemed "to include cases of destruction by explosion and by fire ensuing upon and immediately connected therewith." In this way the two clauses may well stand together, neither interfering with the legitimate office of the other; while if the latter is to be applied and enforced according to its literal meaning in every case where by reason of the explosion or otherwise the building, or a part of it, falls just before or during a fire, which otherwise would be within the contract, it will lead to results which the parties to policies may not both be supposed to anticipate, and which the courts need not and should not approve.

The judgment below is reversed, and the cause remanded, with direction to grant a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

C. A. KING, Admr., etc., of J. W. Smith, Deceased, *Plff. in Err.*,

v.

Charles H. SMITH *et al.*

(110 Fed. 95.)

1. The circuit court of appeals may review the question whether or not a finding of facts in an action at law in the circuit court has any evidence to support it.
2. A gift of personalty placed in possession of a third person for delivery to the donee is not defeated by the fact that the delivery is not effected until the donor has become finally unconscious in his last illness.

(August 19, 1901.)

ERROR to the Circuit Court of the United States for the Northern District of California to review a judgment in favor of plaintiff in an action brought to recover possession of certain railroad bonds. *Affirmed.*

The facts are stated in the opinion.

Argued before Gilbert, Circuit Judge, and Hawley and De Haven, District Judges.

Messrs. W. M. Cannon and Whitworth & Shurtleff, for plaintiff in error: The evidence falls far short of establish-

ing a legal gift, even without considering the relation of trust and confidence existing between the parties.

White v. Warren, 120 Cal. 327, 49 Pac. 129, 52 Pac. 723; *Gisselman v. Starr*, 106 Cal. 651, 40 Pac. 8; *Re Rathgeb*, 125 Cal. 302, 57 Pac. 1010.

The law raises no presumptions in favor of gifts, and where a claim of gift is asserted after the donor's death it must be proved by clear and satisfactory evidence.

Denigan v. Hibernia Sav. & L. Soc. 127 Cal. 137, 59 Pac. 389; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 59 Pac. 390.

But it takes other evidence than mere words to establish a gift. There must be a delivery or its equivalent.

Daniel v. Smith, 64 Cal. 346, 30 Pac. 575, 75 Cal. 547, 17 Pac. 683; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415; *Dow v. Gould & C. Silver Min. Co.* 31 Cal. 629; *Zeller v. Jordan*, 105 Cal. 143, 38 Pac. 640.

Death before completion of a gift by delivery will operate as a revocation.

14 Am. & Eng. Enc. Law, 2d ed. p. 1016; *Trustees of Permanent Fund v. Hall*, 48 Ill. App. 536; *Twenty-Third Street Baptist Church v. Cornell*, 117 N. Y. 601, 6 L. R. A. 807, 23 N. E. 177.

So long as anything remains to be done to complete a gift it may be revoked by the donor.

14 Am. & Eng. Enc. Law, 2d ed. p. 1016; *Ruis v. Dow*, 113 Cal. 490, 45 Pac. 867.

NOTE.—For a case in this series as to validity of gift where deed is delivered to agent, who delivers to grantee after grantor's death, see *Peck v. Rees* (Utah) 13 L. R. A. 714.

As to delivery of personalty to third person to constitute sufficient delivery to complete gift, see *Walker v. Walker* (N. H.) 27 L. R. A. 799, 54 L. R. A.

When J. W. Smith last closed his eyes upon this world, the alleged gift was not complete.

Can it be possible, therefore, that a delivery afterwards, but before death succeeded the stupor, is of any legal effect or value to complete the gift or give it vitality?

Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931; *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267.

A mere intention to give is a nullity.

14 Am. & Eng. Enc. Law, 2d ed. p. 1017.

Such a gift is presumptively illegal, and the burden is upon the donee to overcome it by clear and positive testimony.

14 Am. & Eng. Enc. Law, 2d ed. p. 1036; *Stewart's Estate*, 137 Pa. 175, 20 Atl. 554; *Collins v. Collins* (N. J. Eq.) 15 Atl. 849; *Shirley v. Shirley*, 92 Cal. 44, 27 Pac. 1087; *White v. Warren*, 120 Cal. 327, 49 Pac. 129, 52 Pac. 723; *Denigun v. Hibernia Sav. & L. Soc.* 127 Cal. 137, 59 Pac. 389.

An admission by the donor, although evidence to be weighed by the jury as tending to establish a gift, is not in itself sufficient proof of the gift.

Rooney v. Minor, 56 Vt. 527.

Messrs. Galpin & Bolton and L. S. B. Sawyer for defendants in error.

De Haven, District Judge, delivered the opinion of the court:

This was an action at law, in the form of replevin, to recover 190 bonds of the California & Nevada Railroad, of the alleged value of \$50,000. A jury trial was expressly waived by the parties, and the cause was tried by the circuit court without a jury, and upon such trial the court found:

"(2) The plaintiff on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to possession of the property described in the complaint; and said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars (\$47,500). The defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of the plaintiff."

As a conclusion of law from this and other findings not necessary to refer to, the court found that the plaintiff was entitled to recover from defendants the possession of the bonds described in the complaint, and judgment was thereupon entered in his favor and against the defendants in accordance with such conclusion of law. The case is brought here on writ of error by the defendant C. K. King, as administrator of the estate of J. W. Smith, deceased. There are fifteen formal assignments of error, all directed against the findings of fact, and the judgment based upon such findings. With the exception of the first, relating to the citizenship of the parties, and which is not insisted upon by the plaintiff in error, the assignments of error really present but two questions, stated in different form; one challenging the legal sufficiency of the evidence to justify the finding above set out, and the other the suffi-

ciency of the findings to sustain the judgment. There is in the record a bill of exceptions containing the evidence given upon the trial, and which also shows that an exception to the above finding was taken by the plaintiff in error, upon the ground of the insufficiency of the evidence to support it. One of the assignments of error, and the only one which need be noticed, is as follows: "That the court erred in finding that the evidence was sufficient to show that plaintiff was at any of the times mentioned in the complaint the owner or entitled to the possession of the property described in the complaint, or any part thereof."

1. It is urged by the defendant in error that this assignment of error presents a question of fact, which this court has no power to review, and, as we understand the argument, that the evidence contained in the bill of exceptions cannot be examined for the purpose of determining whether the finding excepted to is sustained by any legal evidence. We do not understand that the rule is as broad as this contention. The finding that the plaintiff in the action is the owner and entitled to the possession of the property described in the complaint is clearly a general finding of the ultimate facts of ownership and right of possession, and is conclusive here, unless there was an entire want of evidence upon which to base it. The 7th Amendment to the Constitution declares that "in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Section 649, Rev. Stat., provides: "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

The findings of the court when a jury has been waived having, under the statute, the same effect as the verdict of a jury, it follows that such findings cannot be otherwise re-examined "than according to the rules of the common law;" that is to say, either by the "granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings." *Parsons v. Bedford*, 3 Pet. 433, 7 L. ed. 732; *Miller v. Brooklyn L. Ins. Co.* 12 Wall. 285, 20 L. ed. 398; *Hathaway v. First Nat. Bank*, 134 U. S. 494, 33 L. ed. 1004, 10 Sup. Ct. Rep. 608, was an action at law tried by a United States circuit court without a jury, and brought to the Supreme Court on writ of error. Some of the assignments of error assailed certain findings of the court as not sustained by the evidence, and in passing

upon the question so presented the Supreme Court said: "The first three assignments of error allege errors merely in the findings of fact by the court. Those errors are not subject to revision by this court if there was any evidence upon which such findings could be made."

In *Stanley v. Albany County*, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234,—a case in which the same question was involved,—the rule, without its qualification, was thus stated by the Supreme Court: "Where a case is tried by the court without a jury its findings upon questions of fact are conclusive here, it matters not how convincing the argument that upon the evidence the findings should have been different." See also *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807; *Hepburn v. Dubois*, 12 Pet. 345, 9 L. ed. 1111; *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979.

The law as declared in the foregoing cases is the rule by which this court must be governed in the matter now before it. The judgment of a circuit court of the United States in an action at law can only be reviewed in the circuit court of appeals by writ of error. Section 6 of the act of March 3, 1891, establishing circuit courts of appeals (26 Stat. at L. 826). This writ brings up for review only errors of law apparent on the face of the record; and for this reason, and also because of the 7th Amendment to the Constitution, and § 649 of the Revised Statutes, the circuit court of appeals, in the decision of a case on writ of error, is necessarily confined to the consideration of questions of law arising upon the record. *Hill v. Woodberry*, 1 C. C. A. 206, 4 U. S. App. 68, 49 Fed. 138; *Graham v. Earl*, 34 C. C. A. 267, 48 U. S. App. 691, 92 Fed. 155; *Syracuse Twp. v. Rollins*, 44 C. C. A. 277, 104 Fed. 958. This rule, however, when properly understood, does not deny to that court the right to inquire whether there is any evidence to support a finding; for when a fact is found upon no evidence whatever, and the record shows that the finding was excepted to upon that ground, an error of law is presented. *The Francis Wright*, 105 U. S. 381, *sub nom. Duncan v. The Francis Wright*, 26 L. ed. 1100; *The City of New York*, 147 U. S. 72, *sub nom. Alexandre v. Machan*, 37 L. ed. 84, 13 Sup. Ct. Rep. 211; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; *Mason v. Lord*, 40 N. Y. 476. In the case last cited it was said by Grover, J.: "An appeal to this court can only be taken upon the law. The question, then, is whether finding a fact without any evidence to sustain it is an error of law. The statement of the question would seem to suggest the answer: A finding of facts must always be based upon evidence, and, where none is given tending to show an affirmative fact, it is contrary to law to find such fact against a party traversing it."

The Francis Wright, 105 U. S. 387, *sub nom. Duncan v. The Francis Wright*, 26 L. ed. 1101, was a cause in admiralty, and it was held in that case that the act of February 16, 1875 (18 Stat. at L. 315), limited 54 L. R. A.

the appellate jurisdiction of the Supreme Court in admiralty causes to a review of "questions of law arising on the record." The court, however, added: "It is undoubtedly true that if the circuit court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time, and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found, when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court."

The Supreme Court, in *Hepburn v. Dubois*, 12 Pet. 345, 9 L. ed. 1111, in discussing the effect of a verdict, and to what extent the evidence upon which it was based may be considered upon a writ of error, said "that where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact. A jury may infer any fact from such evidence which the law authorizes a court to infer on a demurrer to the evidence. After a verdict in favor of either party on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party on a part or the whole of his case."

And in *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366, the judgment of the supreme court of New York was reversed on error because a material fact upon which the judgment was based was without any evidence to sustain it. We think, therefore, that, upon the exceptions to the findings and the assignment of error above set out, we can look into the bill of exceptions for the purpose of ascertaining whether there was any evidence before the circuit court having a legal tendency to prove the facts found by that court. The matter in issue related to the ownership of the bonds described in the complaint. The defendant in error claims title by gift from his deceased father, J. W. Smith. The plaintiff in error contends that no such gift was ever made, and claims the bonds as the administrator of the estate of the said J. W. Smith. The evidence contained in the bill of exceptions shows that at the time the gift is alleged to have been made on August 15, 1895, the bonds were held by Abner Doble in escrow, under an agreement by which they were to be delivered to one F. M. Smith upon payment of a stipulated sum of money. The rights of F. M. Smith under this agreement expired October 25, 1895. Of course, during

the time they were in escrow there could be no manual delivery of the bonds to the defendant in error, and the evidence shows they were not in fact delivered to him by Doble until November 14, 1895. J. W. Smith, the alleged donor, died on November 15, 1895, and for a day or two previous to his death was unconscious. In support of his title the defendant in error offered in evidence a bill of sale to himself of the bonds in question, dated August 15, 1895, with proof tending to show that the same was signed and delivered to him by J. W. Smith. This instrument recited that the bonds were sold to the defendant in error "subject to the option given to F. M. Smith, which I also assign to C. H. Smith." Upon the question of the delivery of the bonds, Doble testified, in substance, that it was his impression that J. W. Smith, a short time before his death, told him that they belonged to the defendant in error, and to deliver the same to him, and the witness added, "I think that conversation was the groundwork of my delivering the bonds to his son." In addition to this, other witnesses testified to declarations made by J. W. Smith during his last sickness, and after August 15, 1895, to the effect that he had given the bonds to the defendant in error. It cannot be said that this evidence has no legal tendency to prove a gift of the bonds to the defendant in error. The fact that they were actually delivered to him while the donor was in a state of unconsciousness does not affect the question, if in fact the direction to deliver them to the defendant in error was given by the donor while he was capable of transacting business, and for the purpose of consummating the gift. Our conclusion upon this point is that there was evidence tending to show that defendant in error is the owner of the bonds in controversy, and that he acquired title thereto by gift from his father.

2. The findings are sufficient in law to support the judgment. This is so clear that no discussion of the question is necessary.

The judgment of the Circuit Court is affirmed; the mandate to issue forthwith.

**PACIFIC POSTAL TELEGRAPH CABLE COMPANY, *Plff. in Err.*,
v.**

BANK OF PALO ALTO.

(48 C. C. A. 413, 109 Fed. 369.)

1. A telegraph company is liable for losses caused by a false telegram wilfully transmitted by an operator employed in its office, directing a bank to pay money on account of a correspondent bank.

2. Counsel fees expended in good faith in an effort to recover the money are not properly part of the damages to be re-

NOTE.—As to liability of telegraph company for wilful act of its agent in sending false message, see, in this series, *McCord v. Western U. Tele. Co.* (Minn.) 1 L. R. A. 143.
54 L. R. A.

covered from a telegraph company by a bank which has been induced to pay out money by a false telegram forwarded by an employee of the company, either at common law or under a statute allowing as damages for the conversion of property a fair compensation for the money properly expended in pursuit of it.

(May 6, 1901.)

ERROR to the Circuit Court of the United States for the Northern District of California to review a judgment in favor of plaintiff in an action brought to recover damages from defendant because of money erroneously paid out by plaintiff in response to a forged telegram sent by one of defendant's agents. *Affirmed.*

Statement by Hawley, District Judge:

Upon the trial of this case the court found, among other things: That on December 27, 1898, and for some time prior thereto, one Lee B. Minkler was in the employ of the defendant, as an operator, at its office in the city and county of San Francisco, and as such it was the duty and within the scope of his employment to send messages from the office of the company at San Francisco. That said company was known to the public and to the plaintiff to be operating a line of telegraph wires for the general transmission of messages between the city of Los Angeles, state of California, and the city and county of San Francisco, and between the last-named place and the town of Palo Alto. That prior to said date, and while the said Minkler was as aforesaid in the employ of defendant, the said Minkler made and entered into a criminal conspiracy with one Byron Hall Barclay for the purpose of cheating and defrauding the plaintiff by causing the transmission of the false telegraphic order hereinafter mentioned, and for that purpose, and in pursuance thereof, and to that end, the said Minkler did on said date make criminal use of the instruments and wires of the defendant, and caused to be transmitted over the same, and to be delivered to plaintiff, the telegraphic message hereinafter referred to; that in transmitting the said false message the said Minkler acted in criminal violation of his duties as such operator, and the defendant had no notice, knowledge, or information of the conspiracy aforesaid, or of the carrying out of the same, or of the intention of said Minkler to perpetrate said, or any, fraud upon the plaintiff, except as the same was known to said Minkler. That all of said Minkler's conduct, acts, and doings aforesaid were wholly wilful, criminal, and in absolute violation of his duties as an operator or employee of the defendant, except that, if the said telegram had been genuine, it would have been within the scope of said Minkler's employment to transmit the same in the manner in which he did. That on said day said Minkler transmitted from San Francisco to plaintiff, at Palo Al-

to, a false telegraphic message in the words and figures, to wit:

Sent by M. Received by Ma. 15, paid. Dated, Los Angeles, 27. Received at Palo Alto Dec. 27, 1898.

To Bank of Palo Alto:

Please pay Harry L. Cator eight hundred and forty dollars. Waive identification. We remit to-day.

Farmers' and Merchants' Bank.

That said message was sent by said Minkler, while he was on duty as an operator of defendant, upon an instrument belonging to and in the office of defendant in San Francisco, over one of defendant's wires, connecting its office in San Francisco with its office in Palo Alto, was received by an operator of defendant in defendant's office in the last-named town upon one of defendant's instruments in the last-named office, and was transcribed and delivered to plaintiff by defendants' operator at Palo Alto. That, for the purpose of inducing plaintiff to part with its money, Minkler caused one Byron Hall Barclay to present himself to plaintiff at its place of business at Palo Alto, and represent to plaintiff that he was the party named as Harry L. Cator, and was entitled to receive the payment of said sum of money, and the said Barclay so represented to the plaintiff. That said representations were false, and were known by Minkler and Barclay to be false. That, believing said message to be true and genuine, and acting upon the same, the plaintiff paid to Barclay on the 27th day of December, 1898, the sum of \$840 thereon. That plaintiff thereafter, on the 28th day of December, 1898, first learned that said representations were false, "and thereupon was compelled to and did immediately employ counsel to advise and direct plaintiff in the pursuit and recovery of, and to pursue and recover, on behalf of plaintiff, the said property fraudulently converted as aforesaid by defendant. That plaintiff properly expended in the pursuit of said property as aforesaid, and has paid for counsel fees, the sum of \$250, \$7.59 for telegraph and telephone messages, \$18.05 for traveling expenses, and \$2.70 for copying. That all of said sums are reasonable, and were necessarily and properly expended by plaintiff in pursuit of said property. . . . That, by reason of the premises, plaintiff has been and is damaged in the sum of \$840, United States gold coin, with legal interest thereon from December 27, 1898, and also, by way of special damages, in said sum of \$278.34, properly expended in pursuit of said property as aforesaid,"—and rendered judgment for said amount. 103 Fed. 841.

Argued before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

Messrs. Lloyd & Wood, for plaintiff in error:

A corporation is not responsible for the crimes of its servants.

Stephenson v. Southern P. Co. 93 Cal. 54 L. R. A.

558, 15 L. R. A. 475, 29 Pac. 234; *Mott v. Consumers' Ice Co.* 73 N. Y. 543; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; *Ayorigg v. New York & E. R. Co.* 30 N. J. L. 460; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Cosgrove v. Ogden*, 49 N. Y. 257, 10 Am. Rep. 361; *Howe v. Neimarch*, 12 Allen, 49; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 273; *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479, 51 Am. Dec. 315; *Isaacs v. Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Moore v. Sanborne*, 2 Mich. 520, 50 Am. Dec. 209; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 134, 21 Am. Rep. 597.

The managing officers, or those to whom the direction of the corporate affairs is intrusted, may bind the corporation and incur liabilities on its behalf, in numerous ways, which cannot be allowed to subordinate and inferior employees.

Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439; *Maynard v. Fireman's Fund Ins. Co.* 34 Cal. 49, 91 Am. Dec. 672; *McCord v. Western U. Teleg. Co.* 39 Minn. 181, 1 L. R. A. 143, 39 N. W. 315.

Mr. Joseph Hutchinson, for defendant in error:

A principal is liable to third parties for torts committed by his agent in the course of his employment.

Williams v. Pullman Palace Car Co. 40 La. Ann. 87, 3 So. 631; *Bank of California v. Western U. Teleg. Co.* 52 Cal. 280; *McCord v. Western U. Teleg. Co.* 39 Minn. 181, 1 L. R. A. 143, 39 N. W. 315; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Warren Scharf Asphalt Paving Co. v. Commercial Nat. Bank*, 38 C. C. A. 108, 97 Fed. 181; *Trabing v. California Nav. & Improv. Co.* 121 Cal. 137, 53 Pac. 644; *Croswell, Electricity*, art. 424; *Thompson, Electricity*, art. 146; *Western U. Teleg. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Huffcutt, Cases in Agency*, p. 306.

The telegraph business is in many respects different from any other business.

Crosswell, Electricity, art. 10.

One who receives a telegram which, owing to the negligence of the telegraph company, is false, is invariably permitted to maintain an action against the telegraph company for the loss which he sustains through acting upon that telegram.

Gray, Communication by Telegraph, art. 72; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Armour v. Michigan C. R. Co.* 65 N. Y. 111, 22 Am. Rep. 603; *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433; *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 23 L. R. A. 584, 35 N. E. 892; *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 529, 56 Am. Rep. 235, 1 Atl. 206; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.* 20 Kan. 519; *Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb. 556, 35 Am. Rep. 488, 7 N. W. 311; *Philadelphia & R. R.*

Co. v. Derby, 14 How. 468, 14 L. ed. 502; *Texas & P. R. Co. v. Scoville*, 27 L. R. A. 179, 10 C. C. A. 479, 23 U. S. App. 506, 62 Fed. 735.

Money properly expended in pursuit of the property is allowable as damages.

Clinton v. Townsend, 46 How. Pr. 42; *Lothrop v. Golden* (Cal.) 57 Pac. 394; *Fairbanks v. Williams*, 58 Cal. 241; *Sherman v. Finch*, 71 Cal. 69, 11 Pac. 847; *Stanton v. French*, 91 Cal. 274, 27 Pac. 657; *Arzaga v. Villalba*, 85 Cal. 191, 24 Pac. 656; *Kelly v. McKibben*, 54 Cal. 193; *Redington v. Nunan*, 60 Cal. 632; *Laughlin v. Barnes*, 70 Mo. App. 258; *Ah Thais v. Quan Wan*, 3 Cal. 216; *Elder v. Kutner*, 97 Cal. 494, 32 Pac. 563; *Trapnall v. McAfee*, 3 Met. (Ky.) 34, 77 Am. Dec. 152.

Attorneys' fees incurred because of the suing out of an attachment, and to get rid of the lien, are a necessary expense, and form part of the actual damages suffered.

Swift v. Plessner, 39 Mich. 180; *Seay v. Greenwood*, 21 Ala. 496; *Burton v. Smith*, 49 Ala. 293; *Flournoy v. Lyon*, 70 Ala. 308.

The same principle applies to injunctions. *Wilson v. McEvoy*, 25 Cal. 170; *Prader v. Purkett*, 13 Cal. 588; *Porter v. Hopkins*, 63 Cal. 54; *Lambert v. Haskell*, 80 Cal. 612, 22 Pac. 327; *San Diego Water Co. v. Pacific Coast S. S. Co.* 101 Cal. 216, 35 Pac. 651; *Curiss v. Bachman*, 110 Cal. 440, 42 Pac. 910.

Attorneys' fees incurred in defending a malicious prosecution may be recovered as part of the damages.

Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106.

Hawley, District Judge, delivered the opinion of the court:

1. The vital question involved in this case is whether or not a telegraph company can be held responsible in damages for the criminal use of its wires and instruments by a subordinate employee, to wit, a telegraph operator, as distinguished from the manager, agent, or superintendent of the business, acting in pursuance of a criminal conspiracy with an outside party, and in criminal violation of the duties of his position and employment. This question and the legal principles relating thereto are to some extent unusual, and are exceedingly interesting and important. The general rule as to the liability of a corporation for the acts of its agents, servants, or employees acting within the scope of their authority, and in the performance of duties regularly intrusted to them, is not called in question. In a certain sense it may be said that we are called upon to deal solely with the exceptions to the general rule. In another sense it may be said that the facts present the question whether telegraph corporations and companies stand upon a different plane from that of other corporations and companies engaged in other kinds of business. In any view which may be taken, grave responsibilities are involved. The decision in this case must be rendered with

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reference to the general principles of the law relating, by analogy or otherwise, to the particular facts and circumstances of this case, in order to reach the ends of justice and right between the parties. If there are no decided cases which march up to the standard of authority, binding upon this court, then sound reason, which is the soul of the law, must assert the rule which should govern and control cases of this character. The business of telegraph companies is in some respects different in its relations with the public from that of other corporations. It is important because of its instantaneous means of communication, and because it is intended to influence the action of the party to whom the telegram is directed. Such party is, in most cases, compelled to act upon the telegram which he receives, and has a right to trust to its correctness, and rely upon the representation made upon its face that the sender, whose name is signed to the message, has sent that particular telegram to the party named in the message. In these particulars, at least, it may be said that a telegraph company, in the eye of the law, stands in a position of its own.

Our attention has been called to numerous authorities where certain principles of law have been announced which, if not controlling upon the facts of this case, have more or less bearing upon the real issue herein, and are worthy of careful consideration. They have all been examined with care. Many of them will not be cited, and but few need be reviewed. There are but three telegraph cases which are specially relied upon, namely, *Bank of California v. Western U. Teleg. Co.* 52 Cal. 280; *McCord v. Western U. Teleg. Co.* 39 Minn. 181, 1 L. R. A. 143, 39 N. W. 315; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140. It is proper to state that each of these cases is identical with the case in hand, in this: that the telegram was sent without authority, was false and forged; that the party sending it committed a criminal act; that the telegram upon its face appeared to be genuine and true, and was sent and received in the usual manner, and was calculated and intended to deceive and defraud the bank or party to whom it was directed. In the case of *Bank of California v. Western U. Teleg. Co.* 52 Cal. 280, the only distinguishable feature in the facts from this case is that the telegram was not sent by an employee of the telegraph company. In that case one Washburn was the sole agent of the telegraph company at Colusa, California, for the receipt and transmission of despatches over its telegraph wires. It also appears that he was at that time the agent for Wells, Fargo & Co.'s Express, and acted as the agent of various insurance companies. In conducting his business he had in his employ a young man who went by the name of Crowell, who was a telegraph operator, and, in the line of his duties as an employee of Washburn, had free access to the office of the telegraph company, and to the apparatus therein for

sending despatches, and was authorized by Washburn to send and receive despatches when he (Washburn) was absent. Availing himself of this authority, Crowell, during Washburn's absence, wrote out and sent over the wires the following false and forged telegram:

Colusa, Jan. 19, 1875.

To the Bank of California, San Francisco:

Pay Chas. H. Crowley twelve hundred dollars, gold.

[Signed] W. P. Harrington, Cashier.

Harrington was at that time the cashier of the Colusa County Bank, and well known to be such by the Bank of California. Crowell sent a telegram to himself at San Francisco, and then went to San Francisco, and procured the services of a friend who identified him, and drew the money from the bank and disappeared. The court held the telegraph company liable. It is true, as claimed by plaintiff in error, that the case virtually turned upon the ground that Washburn, the agent, was negligent in permitting Crowell, who had no authority from the telegraph company, to have access to the wires. In the course of the opinion the court, among other things, said: "If the fraudulent acts committed by Crowell had been done by Washburn, the defendant would have been liable to an action on the case. . . . If an agent of a telegraph company, whose duty it is to send genuine messages, shall wilfully and fraudulently send a despatch in the name of another, this wrong act is as much done 'in the course of his employment' as if he had negligently sent a forged message. To this extent the person receiving the despatch may depend on the guaranty of the company that their agent is faithful and honest; and he is equally damnified, whether the fraud is committed by the agent directly, or is successfully consummated by another by reason of the negligence of the agent. The agent is authorized to transmit messages, and the transmission of a false message, whether contrived by himself or contrived by another, and negligently sent by him, is within the course of his employment. . . . Washburn was engaged in his master's business, not his own. It was part of his duty to keep Crowell from using the wires. He failed to discharge this duty, and the principal is equally responsible whether the placing of Crowell in charge was a 'wrongful act committed as a part of the transaction of the business,' or was mere negligence."

In *McCord v. Western U. Tele. Co.* 39 Minn. 181, 1 L. R. A. 143, 39 N. W. 315, the only fact which distinguishes the case from this is that the false telegram was sent by the local agent of the telegraph company, instead of a mere employee of the company. The court held that a telegraph company is liable for the fraud and misfeasance of an agent intrusted with the duty of transmitting messages over its line, in sending a false and fraudulent message prepared by

himself to a party who received the same in the usual course of business, and in good faith acts thereon to his damage; that where the local agent of a telegraph company, who was also agent of an express company at the same place, sent a forged despatch to a merchant in a neighboring city, requesting him to forward money to his correspondent at the former place, to use in buying grain, and the same was duly received, and the money in good faith forwarded by express in response to the telegram, but was intercepted and converted to his own use by the agent, the transmission of the forged despatch was the proximate cause of the loss; and that the corporation was liable, though an action might also have been maintained against the express company. In the course of the opinion the court said: "The principal contention of defendant is, however, that the corporation is not liable for the fraudulent and tortious act of the agent in sending the message, and that the maxim *respondet superior* does not apply in such a case, because the agent, in sending the despatch, was not acting for his master, but for himself and about his own business, and was in fact the sender, and to be treated as having transcended his authority, and as acting outside of and not in the course of his employment, nor in furtherance of his master's business. But the rule which fastens a liability upon the master to third persons for the wrongful and unauthorized act of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest. . . . The defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving despatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message; and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a despatch to investigate the question of the integrity and fidelity of the defendant's agents in the performance of their duties before acting. Whether the agent is unfaithful to his trust, or violates his duty to or disobeys the instructions of the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send despatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation. *Bank of California v.*

Western U. Telegr. Co. 52 Cal. 280; *Booth v. Farmers' & M. Nat. Bank*, 50 N. Y. 400."

In *Elwood v. Western U. Telegr. Co.* 45 N. Y. 549, 6 Am. Rep. 140, the only distinguishable facts from the present case were that the message was delivered to the telegraph operator by a third party, and that the question as to whether the act by which the plaintiff was injured was a wilful wrong of the defendant's operator was not properly before the court for decision. The court held that it was gross negligence in the operator at a telegraph station to send over the wires a message in the name of, and purporting to come from a cashier of, a bank, and to be dated at another station, at the request of a party known to the operator not to be such cashier, and presenting no evidence of authority to use his name, which message, addressed to a banking house, held out such party as entitled to credit for a large amount; and this negligence occurs so within the scope of the employment of such operator as to make the telegraph company liable to the person to whom such telegram was addressed for the damages occasioned by such negligence. The court, in the course of its opinion, said: "That the sending of such a message in the name of the cashier of a bank, at the request of the party who was thereby held out as entitled to credit for a large amount, without any evidence of his authority to use the name of the cashier,—it being dated at Erie, though known to have originated at Titusville,—was an act of gross negligence, is too clear to admit of argument. The act was done in the direct course of the employment of the agent. The agent was placed in the office, and in the control of the instruments, to use them in transmitting messages for a compensation. If the agent performed that duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable. Transactions of the most important character are daily carried on by means of telegraphic communication, and the confidence which the public is invited to and does repose in the care with which the proprietors of these lines conduct the business is a source of large remuneration to such proprietors. They incur a corresponding degree of responsibility, and must be held to the exercise of such care and caution as it is in their power to employ, in order to avoid being made the instrument of deception and fraud."

Notwithstanding the slight difference in the facts in those cases from the one in hand, it is difficult, under the rules announced therein as to the liability of a telegraph company, to distinguish them from the present case in principle. In the action brought by the Bank of California, the telegram was not sent by the agent of the telegraph company, nor by an operator employed by that company. It is not as strong a case against the company as is presented by the facts in this case. Can it consistently be claimed that if the telegraph company in that case had employed Crowell as an operator, or authorized its agent, Wash-

burn, to employ him, that it would thereby have been released from all liability because Crowell was a mere employee,—a telegraph operator,—not an agent? We think not. There are certain lines of business transacted by the telegraph company,—as, for instance, the purchase of goods and materials for use in its office,—where the company would be bound by acts of its agent; but the seller of the goods could not hold the company liable if the supplies were bought by a mere employee, without showing that he was authorized to make such purchases. But the principle which applies to such transactions has no relation to the business of the company in sending despatches over its wires. What is an operator employed for? What are his duties? But one answer can be given, viz., to send and receive messages in the regular order and manner of the business. Of course, it is his duty to send true messages, not false ones or forged ones. The same duty rests upon the agent. If either the agent or the operator should manufacture telegrams and send them over the company's lines, of the character of the telegram sent in the present case, they would be acting outside of the scope of their authority. But both would be acting in the direct course of their employment, viz., transmitting messages over the company's lines. The company is held liable because it has placed its agent and operator in charge of its appliances and instruments for the transmission of despatches over its lines, and authorized them to use the same. In the case of *Elwood v. Western U. Telegr. Co.*, it was a mere operator, not the regular agent of the company, that sent the fraudulent despatch, for which the company was held liable. The court treated the operator as an agent of the company for the purpose of sending telegrams.

It is contended by counsel for the plaintiff in error that when Minkler, the operator in its employ for the purpose of transmitting messages, criminally used its appliances, he was not acting as its servant; "that the relation of master and servant, as to that particular act, had ceased to exist, and it is immaterial that he used the instrument and wires of plaintiff in error in order to accomplish his criminal purpose." In support of this contention counsel confidently rely upon the principles announced in *Stephenson v. Southern P. Co.* 93 Cal. 558, 561, 15 L. R. A. 475, 29 Pac. 234, which it is claimed are directly in point, and conclusive of the question involved herein, in favor of the telegraph company. That action was brought and prosecuted against the railroad corporation to recover damages for an injury alleged to have been caused by the unnecessary and wanton act of the engineer of a yard engine, who was an employee of the railroad corporation, in blowing the whistle and moving his engine in such a manner as to frighten the passengers in a horse street car, and to cause one of them (the plaintiff) to jump out, whereby she received an injury. The court held, upon the particular facts disclosed by the record in that case, that the

plaintiff could not recover damages against the railroad company for the wrongful and wanton acts of its engineer, because he "was not acting within the scope of his employment." If an agent or employee, not in the line of his duty, or within the scope of his agency or employment, does an act wholly outside of the general business of the corporation, and in no manner having any connection therewith, the corporation cannot be held liable for his acts. But that case does not decide that a corporation cannot in any case, upon any state of facts, be held liable for the wanton and malicious acts of agents or employees while engaged in the line of duty they were employed to perform. "A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business." 2 Deering, Anno. Code, § 2338; Story, Agency, § 452; *Reynolds v. Witte*, 13 S. C. 5, 16, 36 Am. Rep. 678; *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 530, 545, 546, 56 Am. Rep. 235, 1 Atl. 200.

In *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 109, 37 L. ed. 97, 13 Sup. Ct. Rep. 261, the court said: "A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502; *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1030; *Howe v. Neimarch*, 12 Allen, 49; *Romaden v. Boston & A. R. Co.* 104 Mass. 117, 6 Am. Rep. 200."

See also *Trabing v. California Nav. & Improv. Co.* 121 Cal. 137, 140, 53 Pac. 644, and authorities there cited.

Numerous other cases might be cited where corporations transacting different kinds of business have been held liable for the wrongful, tortious, malicious, and illegal acts of their agents, servants, and employees, without reference to their grade or position. Especially is this true in all cases like the present, where the business with which the agent, servant, or employee is intrusted involves a duty owed by the corporation to the public or third persons. If the agent or servant, while so employed by the corporation, by his wrongful and malicious act occasions a violation of that duty, or an injury or loss to the person interested in its faithful performance by or on behalf of the corporation, the principal is held liable for the breach of it. This general principle is announced in all the telegraph cases heretofore cited. It seems to be deeply rooted in the groundwork of the law, and ought not to be frittered away by ingenious argument or splitting of hairs upon nicely drawn distinctions of facts which do not create any substantial distinction in the principle of law involved. The contention that in the line of duty in the transmission of messages there is a distinction that ought

to be drawn between the agent of the corporation and a mere operator is, when the duties of each in this respect are considered, to say the least, very subtle and refined. It stands substantially on the same plane as the argument that at the time an agent or operator conceives the idea to commit a wrongful act, and starts to carry out his purpose, he thereby immediately separates himself from the company's service. This is to refine the distinction sought to be made beyond the line of safety and of sound law. But it is argued by the plaintiff in error that this principle does not apply in cases of crimes committed by the agent or employee. Why not? It is broad, clear, and comprehensive, and, as before stated, it applies to all cases. As was said by Cooley in his work on Torts, 2d ed. 629: "The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name." A crime was committed by the agent of the telegraph company in *McClord v. Western U. Tele. Co.* 30 Minn. 181, 1 L. R. A. 143, 39 N. W. 315. A crime was committed by the operator employed by the agent of the telegraph company in *Bank of California v. Western U. Tele. Co.* A crime was committed by a third person in the case of *Elwood v. Western U. Tele. Co.* In each of these cases the telegraph company was held responsible. In *Dougherty v. Wells, F. & Co.* 7 Nev. 368, 373, a crime was committed by an agent, for which the company was held responsible. In that case the agent of the express company had received from the plaintiff an old certificate of deposit for \$1,000, with the request that it should be forwarded to San Francisco, and there exchanged for a new certificate of deposit from the office of the company in San Francisco. Instead of complying with these instructions, the agent collected the money on the old certificate and appropriated it to his own use. He embezzled it without the knowledge, consent, or authority of the express company. It was an act wholly without the scope of his agency. The contention of counsel for the express company was that it could not be held responsible for the crime committed by its agent; that the agent's acts were not within the scope of his agency. Of course, he was not authorized by the company to steal or embezzle the money or property of third persons doing business with the company. The court, however, held the company liable, "not upon the rule that the agent acted for the principal in that particular transaction, but because he is employed by the principal in that character of business, and is so held out as a person authorized and fully to be trusted therein. When the agent in such case does an act which is apparently within the general scope of his authority, although not so in fact, if the principal were not held liable for the act, a third person, who had reason to believe that the agent was reliable,

and possessed authority in the particular matter from the general character of his employment, might suffer loss; hence the law holds the principal liable, upon the ground that he, rather than a third person equally innocent, should suffer."

In holding the telegraph company liable for the wrongful, tortious, and criminal acts of Minkler, we are not called upon to make any departure from the established principles of the law. No additional or independent reasoning is required to show that the rule as announced in the telegraph cases is sound and just. Its foundation is based on the principle, often applied by the courts in a great variety of cases, that, if one of two innocent persons must suffer loss by the act of a third, he who put it in the power of the third person to do such act should be compelled to sustain the loss occasioned by its commission.

2. The other question presented by the assignments of error relates to the measure of damages: Did the court err in allowing the bank \$250, special damages for counsel fees which were expended by it in the pursuit of the property before the commencement of this action? The record shows that the fees expended by the bank resulted in securing from Barclay nearly the whole amount of money he had wrongfully received from the bank by means of the false and fraudulent telegram sent by Minkler, and was a benefit, instead of a loss, to the telegraph company. Notwithstanding this fact, it is clear to our minds that the bank is not entitled to recover it, as special damages, unless it is authorized to do so by the provisions of § 3336 of the Civil Code of California, which reads as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion . . . (2) a fair compensation for the time and money properly expended in pursuit of the property."

It is admitted that the question whether the damages may include counsel fees in an action of this character has never been definitely decided by the state court in its interpretation of § 3336. In so far as they have any bearing upon the question, the intimations are all adverse to the contention of the defendant in error. *Kelly v. McKibben*, 54 Cal. 192, 195; *McDonald v. McConkey*, 57 Cal. 325; *Redington v. Numan*, 60 Cal. 632, 639; *Greenbaum v. Martinez*, 86 Cal. 459, 463, 25 Pac. 12; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857; *Spooner v. Cady* (Cal.) 44 Pac. 1018; *Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395. What is the character of this action? Should it be treated as an action to recover damages against the telegraph company for the wanton, wilful, malicious, and criminal act and injury committed by its servant, or should it be treated as an ordinary action for the wrongful conversion of property? We are of opinion that the character of the action

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must be determined by the facts set forth in the complaint, not by the name that counsel may call it. The defendant in error was never in the possession of the money obtained by Barclay, to which the plaintiff in error was entitled. It did not take the money from the possession of the bank. It did not request the bank to employ counsel in the pursuit of the property. In the light of the facts set forth in the complaint, we are of opinion that this is an action to recover damages for the wrongful and illegal act committed by Minkler, the telegraph operator, in the employ of the telegraph company. The bank was injured to the extent of \$840, and legal interest thereon up to the time of recovery, for which the telegraph company is held liable. The bank was not compelled to employ counsel or expend any money in the pursuit of Barclay to obtain the money illegally procured by him by means of the false telegram sent by Minkler, in order to enable it to recover the amount from the bank. The telegraph company's liability was complete when Barclay, alias Cator, obtained the money from the bank on the telegram. Whatever the bank thereafter expended in pursuing the man that obtained the money, and in getting from him the greater amount thereof, was the voluntary action of the bank, for which it is not entitled to recover from the telegraph company. The telegraph company did not convert the money to its own use. It was not claiming this property as its own. In our opinion, § 3336 is intended to apply to ordinary common-law or Code actions for the wrongful conversion of property, pure and simple, and was never intended to apply to an action like the present, by whatever general name it may be called. It does not apply to an action of replevin. In *Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395, which was an action to recover the possession of grain of which plaintiff alleged ownership and right of possession, the court, among other things, said: "We do not think the prevailing party in a replevin action can recover attorney's fees as damages for the detention, or as damages for taking and withholding the property (Code Civ. Proc. § 667); nor are such fees to be included as part of the damages to be measured by § 3336 of the Civil Code."

The action taken by the bank in employing counsel to secure the arrest of the real criminals, and, if possible, to obtain the money from them, was evidently taken in good faith, and exhibited a commendable spirit in the interest of public justice. But our attention has not been directed to any principle of law that would hold the telegraph company liable therefor.

The Circuit Court is therefore directed to modify its judgment herein by striking out therefrom the amount of \$250 allowed for counsel fees in the pursuit of the property, and with this modification the judgment is affirmed.

MISSOURI SUPREME COURT.

REDLANDS ORANGE GROWERS' ASSOCIATION, *Appt.*,

v.

John GORMAN, *Respnt.*

(161 Mo. 203.)

When time is made of the essence of a contract for the shipment of oranges under a contract of sale, acceptance of them when shipped after the stipulated time will not waive a right to damages caused by the delay.

(March 26, 1901.)

CERTIFICATION by the St. Louis Court of Appeals for the opinion of the Supreme Court of a case in which it had affirmed a judgment of the Circuit Court for the City of St. Louis allowing a counter-

claim for breach of contract in an action brought to recover the contract price of oranges sold and delivered. *Affirmed.*

The facts are stated in the opinion.

Mr. L. R. Wilkey for appellant.

Mr. D. P. Dyer for respondent.

Gantt, J., delivered the opinion of the court:

This cause has been certified to this court by the St. Louis court of appeals because Judge Bond, one of the judges of said court, considered the opinion of the majority of the judges of that court to be in conflict with a decision of this court. The facts appear in the opinion of Judge Biggs. His opinion is as follows:

"The plaintiff sues for \$486.50. The de-

NOTE.—Effect of acceptance of goods as a waiver of damages for delay in delivery.

The claim has frequently been made that a vendee, by accepting goods, waives his right to recover from his vendor the damages sustained by reason of a delay in the delivery of such goods. But it has been said that the mere acceptance of the goods after the expiration of the time fixed in the contract of sale for their delivery does not preclude the vendee from subsequently suing to recover the damages resulting to them by reason of the non-delivery from the time of the default up to the date of acceptance, nor from recouping, when sued by the vendors, those damages against the latter's claim for the purchase money. *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033.

And it has been held that a vendee does not, by accepting the goods at a later date than that fixed for delivery by the agreement between the parties, waive his right to recover damages arising out of such delay. *Dignan v. Spurr*, 3 Wash. 315, 28 Pac. 529.

And that the acceptance by a vendee of logs which were not delivered until the next season after they should have been delivered does not cut off the right of the vendee to counterclaim the damages suffered by reason of such delay. *Whalon v. Aldrich*, 8 Minn. 349, Gil. 305.

And that the acceptance of a ferry boat after the time fixed for its delivery is not an absolute waiver of the damages sustained by the delay. *Hansen v. Kirtley*, 11 Iowa, 565.

And though a vendee, by accepting and using the goods after the time fixed for their delivery, waives the stipulation as to time so far as the right of the vendor to recover the agreed price is concerned, he is entitled to recoup the damages incurred by reason of the delay in delivery. *Jeffrey Mfg. Co. v. Central Coal & I. Co.* 93 Fed. 408; *Phillips & C. Const. R. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341.

Some of the cases qualify the rule by stating that the mere acceptance of a purchased article after the agreed time for delivery has elapsed does not constitute a waiver of damages for the delay unless such acceptance is attended with such circumstances as manifest an intention on the part of the buyer to waive such damages. *Ramsey v. Tully*, 12 Ill. App. 463; *Belcher v. Sellards*, 19 Ky. L. Rep. 1571, 43 S. W. 676.

Under this rule contractors, engaged in the construction of a public sewer for the completion of which they have given bonds, do not, by accepting sewer brick after the time for delivery has passed from their vendor, from whom

alone they could obtain brick of the requisite quality, waive the right to recoup damages for the delay in a suit by the vendor to recover the purchase price. *Ramsey v. Tully*, 12 Ill. App. 463.

And no intention on the part of a vendee of rafts of logs to waive his right to counterclaim the damages suffered by reason of delay in delivery in a suit to recover the purchase price can be inferred from his acceptance of the logs after the time specified for delivery, where he had been compelled to advance a sum of money to the creditors of the vendor, who was insolvent, in order to have the logs put into the water and rafted, as under such circumstances the vendee had no other means of saving himself and preventing the loss of the money he had already advanced, except to take the logs when they were finally delivered. *Belcher v. Sellards*, 19 Ky. L. Rep. 1571, 43 S. W. 676.

In *Rockwell Mfg. Co. v. Cambridge Springs Co.* 191 Pa. 386, 43 Atl. 327, the court held that an affidavit of defense in an action to recover the purchase price of goods sold was sufficient where it stated that the defendant had suffered great loss and inconvenience in its business by reason of the vendor's failure to deliver the goods within the time agreed upon, and alleged the impossibility of obtaining goods sufficient of the kind and quality to fill the order and thus avoid delay, notwithstanding that the rule was settled in Pennsylvania that the vendee cannot, after having accepted goods contracted for after the time agreed upon for delivery, set up a delay as a defense to a recovery for the price thereof. The court said: "To say that a vendor can never become responsible for damages by reason of his delays would be radical, and if he might ever be so held we think it is under just such circumstances as are recited in this affidavit."

But only peculiar circumstances will justify the claim of vendees of goods who have accepted them after default by the vendor as to time of delivery to set off the damages caused by such delay, and such circumstances are neither alleged nor suggested by an affidavit of defense to an action to recover the purchase price of a pump which does not allege that the pump was to be manufactured specially, or was of any new or peculiar pattern, and does not intimate that one similar or as fully fit for the purpose intended could not have been obtained at once elsewhere and loss have been thus avoided, as the duty of the vendees under such circumstances was to supply themselves with another pump from some other source when the

fendant set up in his answer a counterclaim for \$450 as damages growing out of the failure of the plaintiff to ship the goods within the time stipulated in the contract. A jury was waived, and the cause submitted to the court on the following agreed statement of facts: '(1) The plaintiff is a corporation organized under the laws of the state of California. The defendant is a citizen of the state of Missouri, and a resident of the city of St. Louis, and engaged in the business of a merchant at said city under the name and style of John Gorman & Bro. (2) On the 19th day of December, 1895, the plaintiff contracted to sell to the defendant two car loads of oranges, to wit, one car to contain 300 boxes of fancy Redland navel oranges, at the price of \$2.50 per box; the other car to contain 300 boxes of fancy Redland seedling oranges at the price of \$1.75

per box. (3) The plaintiff, at the time of said sale, specially agreed with the defendant as part of said contract to deliver said oranges free on board of railroad cars at Redlands, California, and to cause the same to be shipped to the defendant not later than December 21, 1895, as the defendant desired the oranges at St. Louis as early as possible, of which the plaintiff was at the time of said contract informed. (4) The said oranges were not delivered on said cars by the plaintiff on the 21st of December, 1895, and were not shipped to the defendant on that date, but said oranges were (without the knowledge or consent of the defendant) delivered by plaintiff on board of cars at Redlands, and by him caused to be shipped to the defendant on the 23d and 24th days of December, 1895; one of said cars being loaded and shipped on the 23d and the oth-

one they ordered from the vendor failed to arrive promptly. *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. Ct. 184.

In a few cases the fact that the damages are lessened by such acceptance has been regarded as important. Thus, in *Halstead Lumber Co. v. Sutton*, 46 Kan. 192, 28 Pac. 444, the court, in holding that the mere acceptance of lumber at a later date than that agreed upon in the contract of sale did not amount to a waiver of the right to counterclaim, in a suit for the purchase price, the damages suffered by reason of the delay, relied on the fact that the acceptance and use of the lumber lessened the injury to the vendees, and correspondingly reduced the vendor's liability. It appeared that the lumber was of such a character as could not be procured in the market at the place of delivery, and that the owners of the buildings for whom it was purchased were daily incurring expense by the failure of the vendor to provide the lumber at the time specified. The court said that under such circumstances it was the duty of the vendees to make the injury as light as possible by taking and using the lumber upon its arrival, and that to have returned the lumber would not have lessened the damages which had already accrued, but would have aggravated the injury and enhanced the vendor's liability.

So, in *Van Winkle v. Wilkins*, 81 Ga. 104, 7 S. E. 644, which was an action to recover the contract price of machinery sold for a cotton-seed-oil mill, the court, in allowing damages resulting from its nondelivery in due time by way of recoupment, notwithstanding the objection that receiving the machinery was a waiver of such damages, said: "As to the damages resulting from delay, these had already been sustained when the mill was received; its reception, in so far as it affected them at all, could only hinder more from accruing; it certainly could not increase them. There was no inconsistency between the reception of the machinery and retention of the claim for damages on account of delay to furnish it by the time stipulated. To hold that there was a waiver by implication would be very unreasonable."

It has even been held error to charge the jury, in an action to recover the purchase price of building material in which defendant counterclaimed damages sustained by reason of nondelivery within the time agreed upon, that they had a right to consider whether the receipt of the goods was not a waiver of any claim for damages. *Gaylord v. Karst*, 43 N. Y. S. R. 531, 17 N. Y. Supp. 720. The court said that the charge obviously had "no other purport than to instruct the jury that if they found the defendant consented in April to ac-

cept future delivery of the building material, which plaintiffs had originally agreed to deliver on the 4th of the previous month, they were at liberty to find further that defendant had thereby waived all claim for damages accruing to him from plaintiff's default in delivery by the time first appointed; and as this seems to be in direct conflict with the law as declared by the court of appeals in *Ruff v. Rinaldo*, 55 N. Y. 664, and *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417, it is impossible to escape from the conclusion that the charge was erroneous and the exception thereto well taken. That the defendant was prejudiced by this error is a proposition the validity of which is apparent upon its mere assertion, as the error vitally affected the meritorious consideration by the jury of defendant's counterclaim."

But it was held in *Hansen v. Kirtley*, 11 Iowa, 565, that the acceptance of the goods after the time fixed for delivery may be considered by the jury as evidence of a waiver of the damages sustained by the delay, but that its weight must depend upon the circumstances of the case.

And in a suit on a promissory note given for the iron work and cells for a jail, the action of the court in charging the jury that the acceptance by the vendee of such articles as they were delivered, together with the payment of a portion of the purchase price at that time, and the giving of the note sued upon for the balance thereof, amounted to a waiver of any damages that might have accrued for any failure to perform the contract at the time originally contracted for, was, on appeal, held to be error upon the ground that no such conclusive effect could be given to the transaction, and the question was one for the jury, and not for the judge, to decide. *Strain v. Pauley Jail Bldg. & Mfg. Co.* 80 Tex. 622, 16 S. W. 625. See also *infra*, *Ramsey v. Tully*, 12 Ill. App. 463; *Merrimack Mfg. Co. v. Quintard*, 107 Mass. 127; *Davis v. Fish*, 1 G. Greene, 406, 43 Am. Dec. 387.

It seems impossible to reconcile *Gaylord v. Karst*, 43 N. Y. S. R. 531, 17 N. Y. Supp. 720, *supra*, with the other cases from the New York courts hereinafter cited, and a reference to the two cases in the court of appeals on which that court relied will show that they give little or no support to this decision. *Ruff v. Rinaldo*, 55 N. Y. 664, was an action to foreclose a mechanic's lien in which the court held that the owner of the building, by permitting the contractor to complete his contract to do the mason work after the time for performance had expired, did not thereby waive his right to the damages sustained by reason of the delay. *McMaster v. State*, 108 N. Y. 542, 15 N. E.

er on the 24th day of December, 1895. (5) At the time when said oranges arrived at St. Louis, and when they were delivered to the defendant, the market value of said oranges was \$450 less than it was at any time at which said oranges would have arrived at St. Louis, or at which they would have been delivered to the defendant if they had been shipped within the time provided by said contract. (6) The defendant received notice by letter from the plaintiff two days prior to the arrival of said oranges in St. Louis of the dates at which the same had actually been delivered at and shipped from Redlands, California. (7) Upon the arrival of said oranges at St. Louis, the defendant, having notice of shipment as aforesaid, accepted the same without objection or pro-

test. (8) The contract price of the oranges actually shipped as aforesaid amounted in the aggregate to the sum of \$1,236. The defendant had paid to plaintiff of said amount the sum of \$749.50, and refused, and still refuses, to pay the balance, to wit, \$486.50, being the amount herein sued for.

(9) It is agreed, if the defendant is entitled to any damages on his counterclaim, the amount of \$450 shall be allowed therefor, and in such case the judgment shall be in favor of plaintiff for \$36.50 and costs; otherwise, the judgment shall be for \$486, with interest from the 1st of January, 1896, and costs.' The court allowed the defendant's counterclaim and rendered judgment in favor of plaintiff for \$36.50, and for costs. The plaintiff has appealed.

417, was an appeal from an award of damages by the board of claims for the breach by the state of a contract with plaintiff's assignors for work, labor, and materials for building a state asylum for the insane. The state claimed that the contractors, by furnishing materials after a change by the state in the contract, and by receiving pay therefor, waived any claim for damages by reason of such change. The court said: "The contention that where there is a breach of contract by one party, and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority. It is undoubtedly the rule that where one party to a contract breaks the same, the other party may stop and refuse further performance. But instead of doing so he may perform so far as he is permitted and then claim the damages he has suffered from the breach."

The rule laid down in the cases thus far considered has not met with the approval of all the courts. On the contrary, it has been held that a vendee of logs, by accepting them after the time fixed for delivery in the contract of sale, waives his right in an action for the purchase price to recoup the damages on account of the failure of the vendor to deliver within that time. *Fraser v. Ross*, 1 Penn. (Del.) 348, 41 Atl. 204.

And the acceptance by the vendee of goods after the time fixed for delivery seems to have been regarded in *Toplits v. King Bridge Co.* 20 Misc. 576, 46 N. Y. Supp. 418, as such a waiver of strict performance as would defeat his right to counterclaim damages for the delay in delivery in an action to recover the purchase price.

So, a vendee, by accepting goods delivered after the day agreed upon without making any objection on that ground, waives any claim for damages from that source. *Pomeroy v. Shaw*, 2 Daly, 267; *Bock v. Healy*, 8 Daly, 156; *Minneapolis Threshing Mach. Co. v. Hutchins*, 65 Minn. 89, 67 N. W. 807.

This principle was applied in an action by a vendor to recover possession of the property on chattel mortgage given by the vendee to secure the payment of the purchase price with the result of denying the right of the vendee to prove the damages sustained by reason of the vendor's failure to deliver the goods at the time agreed upon, where the vendee accepted the property and provided for payment therefor according to the terms of the contract, with no reservation of the right to claim damages caused by the delay. *Minneapolis Threshing Mach. Co. v. Hutchins*, 65 Minn. 89, 67 N. W. 807.

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So, in an action to recover the unpaid balance of the purchase price of fruit trees the vendee's claim for damages because of delay in packing and delivering the trees was denied where they waited until the trees were packed ready for delivery, and then accepted them without requiring the vendor to become responsible for any losses which they might sustain in consequence of the delay. *Baker v. Henderson*, 24 Wis. 509. The court said: "They might have refused to take the trees, but with full knowledge of all the facts saw fit to accept them in fulfillment of the contract, and cannot now complain that they have sustained damages."

An absolute and unqualified acceptance of goods by the vendee without any complaint or suggestion of any violation of the contract in respect to the time of delivery—especially where payment is offered without complaint on that ground—amounts to a waiver of the right to claim damages for the delay. *Roby v. Reynolds*, 65 Hun, 486, 20 N. Y. Supp. 336. But see *Gaylord v. Karst*, 43 N. Y. S. E. 531, 17 N. Y. Supp. 720, *supra*.

In *Reld v. Field*, 83 Va. 26, 1 S. E. 395, which was an action on a promissory note, defendant's plea of equitable set-off based upon the failure of the vendor of the goods for which the note was given to deliver within the time specified in the contract of sale was held insufficient as against a demurrer on the ground that, as it showed that defendant had accepted delivery at a later date, and had executed the note sued on after the breach, defendant by such plea virtually admitted a waiver of such defense.

But the failure of the vendee at the time of accepting dredging machinery manufactured and delivered under a contract of sale to reserve the right to complain because of the delay in delivery does not seem to have been regarded important in *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25, which was an action on notes given for the purchase price in which the vendee was permitted to recoup the damages occasioned by the delay in not furnishing the machinery within the time prescribed. By the terms of the contract in this case a large cash payment was to be made on March 1st, which was also the day fixed for delivery. This payment was made March 4th without regard to the actual delivery, which was not made until about thirty days later. The court said that acceptance of the machinery under such circumstances was practically an acceptance under compulsion, and that the giving of the notes was not conclusive of an intention to waive the claim for damages.

And in an action to recover the purchase price of building stone under a contract to deliver as needed by the vendee all the stone necessary

"The position of the appellant is that, when goods are delivered out of time, and the vendee accepts them without protest, he thereby waives his right to damages resulting from the breach of the contract, except where the goods are accepted of necessity; that is, where the surrounding circumstances are such as to make it necessary for him to accept in order to avoid the accumulation of much greater damage. We cannot accede to this view of the law. We believe the law to be that, where time is made the essence of the contract, delay beyond the stipulated time in the shipment or delivery of goods does not preclude the vendee from accepting them. If he does so, and is damaged on account of the delay, and he has paid the purchase money, he may bring this action, and recover his damage. If he has

not so paid, he may recoup his damage when sued for the purchase price. The authorities treat such a stipulation in the name of a warranty or condition precedent that the goods will be shipped or delivered within the stipulated time. Beach, *Modern Law of Contracts*, § 616. To hold that in such case an acceptance out of time, without objection or protest, is a waiver by the vendee of his claim for damages resulting from the violation of the agreement, is, to our minds, unreasonable. With equal reason it could be said that where goods are bought with an express warranty of quality, and goods of an inferior quality are accepted by the vendee, he thereby waives his right to rely on the warranty. All of the authorities are against that proposition. Our views find ample support in the authorities. Lord

for the erection of a county jail which he had contracted to build, the latter may counterclaim the damages sustained by reason of delay in delivery, even though he received and used what was delivered without objection or notice that he would claim such damages. *Schweickhart v. Stuewe*, 71 Wis. 1, 36 N. W. 405.

So, in an action for the breach of a contract to make and set up on a steamboat engines and other machinery suitable for propelling the same, and for damages for delay and defective construction, such damages were deemed recoverable, notwithstanding a contention of counsel that the machinery was accepted and reduced to use by the plaintiff without any sufficient notice that he would claim damages. *Fiak v. Tank*, 12 Wis. 808, 78 Am. Dec. 787. The court said: "We were at first in doubt whether the plaintiff's claim for board and wages of seamen should not be confined to such time as was lost after the machinery was delivered and up to and including a reasonable time for supplying other, on the ground of his right, upon the failure of the defendants to furnish it on the 1st of August, to consider the contract at an end and to proceed to supply himself elsewhere; and because his waiver of performance as to time might be considered an abandonment of any claim for damages on that account. But on further consideration we are satisfied this would be wrong. A waiver in such cases is made for the benefit of the party in default, and, as against him, should be construed strictly and liberally in favor of the party making it. It is supposed to be granted at the request of the party indulged, and should be confined to the precise right waived (which in this case was the right to refuse the machinery after the day), and should not be extended to collateral matters. In this case there can be little doubt that the plaintiff was deterred from making exertions to procure other machinery by the conduct and assurances of the defendant Verbeck, that that contracted for would be speedily completed."

Even if a voluntary acceptance without objection does not of itself amount to a waiver of the damages sustained by reason of a delay in delivery, such acceptance may properly be regarded as evincing an intention to waive the time specified for delivery. *Ramsey v. Tully*, 12 Ill. App. 463.

In *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387, the court, in approving an instruction that the jury if they should find certain boats of less value for having been delivered after the time contracted should deduct the amount from the contract price, said that the act of the vendee in accepting the boats without com-

plaint and appropriating them to his own use furnishes strong presumption at least of a waiver of all objections to the delay in their delivery.

In *Merrimack Mfg. Co. v. Quintard*, 107 Mass. 127, the question whether the vendees of coal, who sought to recover damages for the failure of the vendor to deliver within the time named in the contract of sale, had, by their acceptance, waived their right to claim damages for the delay in delivery, was held correctly to have been submitted to the jury by an instruction that if they received the coal without complaint or objection on account of the delay in delivery it would be prima facie evidence of a waiver of the objection on that ground, but that if, on consenting to receive the goods, they gave notice that they should claim damages for increased expenses growing out of such delay, receiving it under such circumstances would not be evidence of a waiver of the latter objection.

Where the acceptance is accompanied with an express reservation on the part of the vendees to claim damages by reason of a delay, such damages are a proper subject for recoupment in an action for the purchase price. *Jones v. National Printing Co.* 13 Daly, 92.

The vendee of oleomargarine to be delivered in specified quantities weekly, who complained of deliveries of less amounts, and gave notice that damages would be claimed therefor, did not, by accepting so much of the oleomargarine as he could get, waive his claim under the contract for the special damages agreed on in case of short delivery. *Re Kelly*, 51 Fed. 194.

But a protest at the time of delivery of goods shipped under an executory contract of sale that the acceptance is without prejudice is ineffectual to reserve to the vendee the right, in an action for the purchase price, to counterclaim damages for a breach of the contract as to time and manner of shipment causing the goods to arrive later than they would if shipped as agreed. *Wallace v. Valentine*, 10 Misc. 645, 32 N. Y. Supp. 121. This case cannot, however, justly be regarded as conflicting with the decisions just above cited, as the court rests its decision upon an entirely different principle, *vis.*: that the time, place, and manner of shipment were part of the description of the goods and material elements in the identification of the property, and that in such case where there is no independent collateral warranty no claim for damages survives the acceptance and use of the goods by the vendee with full knowledge of the facts, although the goods do not in all respects answer the description of the contract.

W. W. N.

Blackburn, in his work on Contracts, p. 377, states the law on the subject as follows: 'When the contract was to deliver goods at a certain date, and that date is passed, the vendee may accept the goods, and bring his action for any damages he may have actually suffered in consequence of the late delivery. He does not, by accepting a late delivery, waive any claim he may have for damages arising from the delay; just as where, by accepting goods which were not up to the warranted quality, he does not waive his right to damages for breach of warranty.' Hare on Contracts, p. 537, states the rule thus: 'When the thing tendered under an executory contract differs as regards time, quality, amount, or kind from what the buyer agreed to receive, it may be declined, and the breach treated as entire, or it may be accepted as so much on account of what the contractor agreed to do or render, and an action brought for the amount by which the performance falls short of the promise.' This statement of the rule is subject to the qualification that time must be of the essence of the contract, and there must be an express warranty as to the quality of the goods. In the case of *Digman v. Spurr*, 3 Wash. 315, 28 Pac. 529, the supreme court of the state of Washington had the question before it. The court said: 'Counsel contend that appellant waived no right to damages arising out of any delay in delivering the brick by respondent notwithstanding they were accepted at a later date than that fixed for their delivery by the agreement between the parties; and we are inclined to the opinion that the objection is well founded.' So, in the case of *Whalon v. Aldrich*, 8 Minn. 349, Gil. 305, the supreme court of Minnesota says: 'The defendant, as the case shows, was entitled to have the logs in the St. Croix boom in 1857. Six or seven hundred thousand feet of them were not so delivered, but were delivered the next year, and received by the defendant. This acceptance did not cut off any claim the defendant had for the nondelivery of the logs at the contract time, but enters as an element into the question of what damages he was entitled to recover.' In the case of *McMaster v. State*, 108 N. Y. 553, 15 N. E. 417, the court says: 'The contention that where there is a breach of contract by one party, and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority. It is undoubtedly the rule that, where one party to a contract breaks the same the other party may stop, and refuse further performance. But, instead of doing so, he may perform, so far as he is permitted, and then claim the damages he has suffered from the breach.' In *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033, the supreme court of Maryland said: 'Mere acceptance of the lumber after the expiration of the time fixed in the agreement for its delivery was not of itself a waiver of the breach com-

mitted by the failure to deliver it according to the terms of the contract; nor did such an acceptance preclude the vendee from subsequently suing to recover the damages resulting to them by reason of the nondelivery from the time of default up to the date of acceptance, nor from recouping, when sued by the vendors, those damages against the latter's claim for the purchase money.' So, in *Van Winkle v. Wilkins*, 81 Ga. loc. cit. 104, 7 S. E. 644, the supreme court of Georgia expressed the same view. It said: 'It was urged in the argument that receiving the machinery was a waiver both of its defects and of damages resulting from its nondelivery in due time. Why so? . . . Under the circumstances there was no obligation to return the machinery, or to offer to return it. . . . As to the damages resulting from delay, these had already been sustained when the mill was received. Its reception, in so far as it affected them at all, could only hinder more from accruing. It certainly could not increase them. There was no inconsistency between reception of the machinery and retention of the claim for damages on account of delay to furnish it by the time stipulated. To hold that there was a waiver by implication would be very unreasonable.' To the same effect is *Gaylord v. Karst*, 43 N. Y. S. R. 531, 17 N. Y. Supp. 720. In the case at bar it was stipulated that the oranges should be shipped not later than the 21st of December. Was the time of shipment intended to be of the essence of the contract? If so, then the stipulation must be construed as a warranty or condition precedent, and not a mere representation. The doctrine of the foregoing cases must rest on this distinction. On no other principle can they be distinguished from the cases which hold that in the absence of an express warranty as to quality an acceptance of goods of an inferior quality to those bargained for will be held to be a waiver of the breach of the contract. 'In determining whether stipulations as to the time of performing a contract of sale are conditions precedent, the court seeks to discover the intention of the parties; and, if time appears, from the language used and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent.' Beach, *Modern Law of Contracts*, § 618. There is no difficulty in determining the question in the present case. It was the evident purpose and intention of the parties that the shipment should be made at the stipulated date, so that the oranges might reach St. Louis in time for defendant to get the advantage of the better prices for such fruit, which usually prevails at the beginning of the holidays. The appellant cites in support of its position *Bock v. Healy*, 8 Daly, 156. That case declares the law as appellant contends. The opinion does not attempt to discuss the question on principle, but merely decided that, where goods are delivered out of time, the vendee, by accepting them without protest, waives his claim

for damages for breach of the contract. The other authorities relied on hold that in executory contracts for the sale of goods, if there is no express warranty as to kind or quality, the vendee must examine the goods promptly, and, if they are not according to contract, he must return to the vendor. Failing in this, he will be held to have waived his objection to the quality of the goods. This we concede to be the law, but we deny its application in the present case. The judgment will be affirmed.

"Judge Bland concurs in this opinion as written. Judge Bond dissents, and is of the opinion that the decision is opposed to that of the supreme court in the case of *Estel v. St. Louis & S. E. R. Co.* 56 Mo. 282. The cause will therefore be certified to the supreme court for final determination."

In our opinion, the law is correctly ruled by the majority of the court of appeals. As said by the Supreme Court of the United States in *Norrington v. Wright*, 115 U. S. 188, 20 L. ed. 366, 6 Sup. Ct. Rep. 12: "In the contracts of merchants, time is of the essence. . . . A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract." 1 Beach, Modern Law of Contracts, p. 744, § 616, adopts Mr. Justice Gray's language as the law in such cases. As shown by Judge Biggs's opinion, such a stipulation is regarded by the courts as a warranty, and the rule is well settled that the stipulation is a warranty as to the time of delivery, and the vendee may receive the goods after the stipulated time of delivery, and, if he has paid the purchase money, may maintain his action for the damages occasioned by the breach, or, if he has not paid for the goods, may recoup the amount of his damages out of the purchase price. The difference in opinion between the judges of the court of appeals is based upon the different views they entertain as to the character of the stipulation as to time. We think, with the majority, it is a warranty. As to the case of *Estel v. St. Louis & S. E. R. Co.* 56 Mo. 282, we think it is plain that the waiver of the time in that case was an express waiver of the time before the delivery began, and a consequent estoppel of the defendant under the facts to complain of the failure to deliver at the time specified in the contract, whereas the cases cited by Judge Biggs clearly demonstrate that the mere reception of the goods without protest or objection is not a waiver of the breach committed by the failure to deliver the oranges according to the contract.

The judgment of the Circuit Court is affirmed, and the opinion of Judge Biggs adopted.

All concur.

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Veronica FRANTA *et al.*, *Respts.*,
v.

BOHEMIAN ROMAN CATHOLIC CENTRAL UNION OF THE UNITED STATES OF AMERICA, *Appt.*

(.....Mo.....)

A requirement of the constitution of a mutual benefit society that its privileges shall be limited to members of a specified religious denomination, and that members neglecting to comply with the rules governing that denomination shall be suspended or expelled, does not violate a provision of the state Constitution securing the right to worship God according to the dictates of one's own conscience, and providing that no human authority can control or interfere with the rights of conscience.

(June 12, 1901.)

APPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis in favor of plaintiffs in an action brought to recover the amount alleged to be due on a certificate of membership in a mutual benefit society. *Reversed.*

The facts are stated in the opinion.

Messrs. Daniel Dillon and John Dillon, for appellant:

The constitution and laws of organizations such as defendant are binding on its members.

Coleman v. Supreme Lodge K. of H. 18 Mo. App. 194; *Smith v. Knights of Father Mathew*, 26 Mo. App. 184; *Grand Lodge, A. O. U. W. v. Sater*, 44 Mo. App. 452; *Theobald v. Supreme Lodge, K. of P.* 59 Mo. App. 87; *State ex rel. Schrempp v. Grand Lodge, A. O. U. W.* 70 Mo. App. 466; *Ellerbe v. Faust*, 119 Mo. 653, 25 L. R. A. 149, 25 S. W. 390.

These laws are not unreasonable. To maintain the society according to its constitution, they were almost a necessity. Without them members might cease to be Catholics and still retain their membership, and in course of time, instead of being a society composed exclusively of Catholics, as its constitution provides, it would become a society composed of all religious denominations.

Ellerbe v. Faust, 119 Mo. 656, 25 L. R. A. 149, 25 S. W. 390.

The constitution and laws are authorized by the statutes of this state.

Theobald v. Supreme Lodge K. of P. 59 Mo. App. 87.

The constitution and laws of defendant are not in conflict with the Constitution of this state, in operating as a denial of religious liberty.

Hitter v. German Roman Catholic St. Aloysius Soc. 4 Ky. L. Rep. 871; *Matt v. Roman Catholic Mut. Protective Soc.* 70 Iowa, 455, 30 N. W. 799; *Stack v. O'Hara*, 98 Pa. 213; *Hennessey v. Walsh*, 55 N. H. 515.

Even though the suspension of Franta was

NOTE.—See, on this same question, the following case of *Mazurkewicz v. St. Adelbertus Soc.*

void, still if he acquiesced in it he must be regarded as holding the position of a suspended member.

Glardon v. Supreme Lodge K. of P. 50 Mo. App. 45; *Miller v. United States Grand Lodge, O. B. A.* 72 Mo. App. 499.

Messrs. Koehler & Reiss and W. R. Schery, for respondents:

An unreasonable by-law is void. The by-law in question here was unreasonable.

People ex rel. Schmitt v. Saint Francis Benev. Soc. 24 How. Pr. 216; *Mulroy v. Supreme Lodge K. of H.* 28 Mo. App. 463; *Niblack, Ben. Soc. ed. 1888*, p. 30, § 26; *Bacon, Ben. Soc. new ed. 1894*, p. 136, § 85; *State ex rel. Kennedy v. Union Merchants' Exchange*, 2 Mo. App. 96; *Cartan v. Father Matthew United Benev. Soc.* 3 Daly, 20; *People ex rel. Gray v. Medical Soc.* 24 Barb. 571; *Com. v. St. Patrick's Benev. Soc.* 2 Binn. 441, 4 Am. Dec. 453; *Angell & A. Priv. Corp.* 11th ed. p. 387, § 347.

The by-law in question exacts the observance of and performance of certain religious duties upon the pain of forfeiture of property interests. This is clearly in violation of the Constitution.

People ex rel. Schmitt v. Saint Francis Benev. Soc. 24 How. Pr. 216; *People ex rel. Gray v. Medical Soc.* 24 Barb. 571; *Niblack, Ben. Soc. ed. 1888*, p. 23, § 20; *Bacon, Ben. Soc. new ed. 1894*, p. 135, § 84.

The laws of this state applicable to this class of corporations do not authorize the making of by-laws such as the one in question.

Rev. Stat. 1899, § 1403; *People ex rel. Schmitt v. Saint Francis Benev. Soc.* 24 How. Pr. 216; *People ex rel. Gray v. Medical Soc.* 24 Barb. 571; *Niblack, Ben. Soc. ed. 1888*, p. 53, § 44.

Defendant is a fraternal beneficial society as distinguished from a mere religious society. Members to whom certificates are issued acquire property rights. Any by-law not necessary to preserve and protect such rights is unreasonable and void.

Mo. Const. art. 2, § 8; *People ex rel. Schmitt v. Saint Francis Benev. Soc.* 24 How. Pr. 216; *Mulroy v. Supreme Lodge K. of H.* 28 Mo. App. 471; *Com. v. St. Patrick's Benev. Soc.* 2 Binn. 441, 4 Am. Dec. 453; *Niblack, Ben. Soc. ed. 1888*, p. 30, § 26; *Bacon, Ben. Soc. new ed. 1894*, p. 137, § 85.

There being no occasion for a confession, the by-law, even though valid, does not constitute a defense; hence the demurrer was properly sustained. The law does not ask of anyone to do that which is unnecessary; nor will the law presume that Franta had sinned.

Matt v. Roman Catholic Mut. Protective Soc. 70 Iowa, 455, 30 N. W. 799.

Where the suspension of a member of a mutual benefit society by his lodge is without jurisdiction—as where it takes place upon a charge of which the lodge has no jurisdiction to try him—his expulsion is null and void, and, being so, it is not incumbent upon him to take steps to have it reversed in a higher judicatory of the order.

Glardon v. Supreme Lodge K. of P. 50 Mo.

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App. 50; *Hoeffner v. Grand Lodge G. O. of H.* 41 Mo. App. 359; *Mulroy v. Supreme Lodge K. of H.* 28 Mo. App. 463.

Valliant, J., delivered the opinion of the court:

Plaintiffs are the minor children of Peter Franta, deceased, who, in his lifetime, had been a member of the defendant corporation, which is a fraternal beneficiary society incorporated under the laws of this state, and the suit is to recover on a benefit certificate or quasi life insurance policy for \$1,000 issued by the society to plaintiff's father. The answer of the defendant pleads that it is an association of persons who are members of the Roman Catholic Church; that by its constitution no person can be a member who is not a Roman Catholic, and who does not perform his duties as required by the church, and that one of those duties is to go to confession, and receive the sacrament of the holy communion every year during Easter time, and the constitution and by-laws require every member to perform that duty, and to produce to the society a certificate of the priest that he had done so, or, failing therein, the society has the authority to suspend him indefinitely, or for such time as it may deem just, first giving him an opportunity to clear himself of the charge; that every applicant for membership in the association is required to sign an agreement that he will be governed by its constitution and laws, and the plaintiff's father signed such agreement, and was admitted to membership thereupon; that plaintiff's father did not receive the sacrament of the holy communion during Easter in 1896, and was charged in the society with that omission, and in a regular meeting he admitted the truth of the charge, and thereupon in due course the society suspended him from membership indefinitely, and he died while so suspended; that by the laws of the order a suspended member lost all benefits during his suspension. The plaintiffs demurred to that plea, and the court sustained the demurrer on the ground that the provision of the law of the defendant society was in violation of § 5, art. 2, of the Constitution, and, defendant not pleading further, judgment for the plaintiffs was rendered for \$1,069.16, from which the defendant appeals.

The only question in the case is whether persons of any religious denomination may form a corporation under our statutes in reference to fraternal beneficiary societies, and by its laws limit its membership to persons of the same religious belief, and suspend or expel a member for failure to observe a duty prescribed by the church and required by the law of the corporation. The clause of our Constitution which the circuit court adjudged to have been violated by the law of the defendant corporation is § 5 of the Bill of Rights, and is in these words: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no person can, on account of his religious opinions, be rendered ineligible to any of-

fice of trust or profit under this state, nor be disqualified from testifying, or from serving as a juror; that no human authority can control or interfere with the rights of conscience; that no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace, or safety of this state, or with the rights of others." When we consider the purely voluntary character of the society in question; that no one can be brought into its membership but by his own free will, nor restrained to keep his membership when he wishes to withdraw; that he can be admitted only on terms and conditions upon which he and the society mutually agree; that he can be expelled or suspended only in conformity to laws of the society which he has agreed he would obey and submit to; and when we also consider that by expulsion or suspension he is deprived of no right or privilege which he holds independent of the society, which was not created by the society itself, and which, in so far as it may have assumed the character of a right, is purely contractual, and depends for its continuance on the observance of the terms of the contract,—it would be a strange construction of the clause of the Constitution guaranteeing freedom of conscience if we should interpret it to mean that one under those circumstances was entitled to receive the fruits of his contract, while declining from scruples of conscience to perform the conditions which entitle him to the same. The defendant corporation is organized under article 10, chap. 42, Rev. Stat. 1889. Fraternal beneficiary corporations necessarily have the character of fraternal or social community. That is their foundation. The pecuniary benefit or quasi insurance that the law allows to be contracted for is merely incidental to the social or fraternal character. The language of the statute specifying the purposes for which corporations under that article may be formed is "for benevolent, religious, scientific, fraternal, beneficial, or educational purposes." Insurance is not one of the fundamental purposes for which a corporation, under that article, may be formed. When the purpose is to form a life insurance company on the assessment plan, the organization must be effected under another statute enacted for that purpose. Having prescribed the purposes for which such corporations may be formed, and the procedure for their organization, the statute goes on to confer upon fraternal beneficiary associations the power to make provision by assessments to pay benefits to the families or dependents of deceased members, and to their sick or disabled members living; but it avoids the word "insurance" in that connection, and expressly exempts such societies from the operation of the insurance laws of the state. Benefit certificates issued by such societies have some of the characteristics of life insurance policies, and are enforced

in the courts according to the contract; but there is something more in the contract evidenced by such a certificate than there is in that evidenced by an ordinary life insurance policy. These societies are sometimes referred to as organized for charitable purposes; but death losses on such benefit certificates are not to be classed under that head, for they are enforced according to the terms of the contract; and even sick benefits do not fill the legal meaning of the word "charity," because they are limited to the members of the society. An act, to be charitable in a legal sense, must be designed for "some public benefit open to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being. . . . Money contributed by the members of a club to a common fund, to be applied to the relief and assistance of the particular members of the club when in sickness, want of employment, or other disability, is not a charitable fund, to be controlled by a court of equity." *Ferry, Tr. § 710.* It is not charity to give to your friend because of friendship, nor to your associate in a society because of your duty imposed by the laws of that society. Charity, in the legal sense, has been illustrated by reference to the custom of the ancient Jews to leave at random a sheaf of corn here and there in the field for the poor gleaners who followed the harvesters, it being unknown who would get it. Therefore there is nothing in the idea of a charitable trust to influence the decision in this case. If the plaintiffs are entitled to recover, it must be upon the theory that their father held a contractual relation with the defendant corporation at the time of his death, which entitled him to membership therein, and the benefits incident to such membership.

Fraternal beneficiary societies appear to have received the approbation and encouragement of the legislatures in many of the states, and have greatly increased in number and in the volume of their peculiar insurance within the last twenty years. Such has certainly been their history in Missouri. This encouragement has arisen from the fact that in their dealings with the families of their deceased members they have not been influenced alone by the strict letter of their contractual obligation, but also to a great extent by that spirit of fraternity which is the life of their organizations. It not infrequently happens that the dues or assessments of an unfortunate sick member are paid by the members of his subordinate lodge, or out of its treasury, to keep him in good standing, in the face of impending death, for the very purpose of securing the payment of the benefit fund to his family. Such is not the conduct of mere strangers with each other, or of those who are bound only by the ties of a contract of insurance. And the law recognizes in that spirit of fraternity not only a guaranty of life insurance when the member dies, but also the develop-

ment of better character among the members while living, and thus the state derives a moral benefit. But the idea of fraternity on which these societies are founded is not that of the mere abstract principle, which includes all mankind; it is rather fraternity in the concrete, embracing only those who have some feature common to themselves, but not universal, which renders them for that reason a separate and peculiar band of friends or associates, distinct from the rest of the world. Such a peculiar quality, common to them, but distinguishing them from mankind in general, is absolutely essential to a fraternal society, and it alone distinguishes these societies in their conduct from life insurance companies on the assessment plan. In the invitation that our statute gives to the people to form such societies it does not specify what sentimental bonds of union may be used for that purpose. Whatever sentiment a number of men may have in common and peculiar to themselves, which draws them together for a purpose that is not immoral or inimical to the state, may be made by them essential to admission to membership in their society, and it follows as a corollary it may be made essential to retention of such membership. If men of a particular religious faith prefer to be associated with those of that faith, and desire to form a corporation composed alone of members who are in harmony with them on that subject, there is nothing in our law to forbid them. But a fraternal beneficiary society founded on and limited to such membership is in no sense a religious corporation. It is not formed to teach or propagate the religious faith, but to cultivate the spirit of fraternity among its members who are of that faith, and incidentally to provide a pecuniary benefit for them and their families as the statute contemplates. And if the corporation may lawfully prescribe as a condition precedent to admission to membership that the applicant be one who is a member in good standing of a certain church, and who conforms to its teachings, it may also prescribe as a condition subsequent to retaining his membership in the corporation that he continue in good standing in the church and in observance of its requirements. The corporation does not thereby become a propaganda of religious dogma, but only secures to its members that exclusive congenial association which it promised. The Masonic fraternity is generally reputed to be a society having for one of its objects, at least, the practice of charity in its broadest sense, yet a corporation known as the United Masonic Benefit Association, which was only a life insurance company on the assessment plan, and in no sense a charitable society, had prescribed as a qualification for membership that the applicant be a Mason in good standing, and it was held that a by-law of the corporation declaring that, upon a member thereof ceasing to be a member in good standing of the Masonic fraternity, *ipso facto*, forfeited his membership in the corporation, was valid. *Ellerbe v. Faust*, 119 Mo. 656, 25 L. R. A. 149, 25 S. W. 390. 54 L. R. A.

In that case the purpose of the corporation was life insurance, and it had nothing to do with teaching or propagating the tenets of Masonry; yet it was held that, as it was a mutual society, and those who had organized and composed it had seen fit to limit their association to Masons in good standing, no one not belonging to that class could come into it, or, being in, no one ceasing to be of the class could remain in. The clause of the constitution invoked in the case at bar as much protects a man in refusing to be or to remain a Mason against his conscience as it does in refusing to be or to remain a member of a particular church. The law is not greatly concerned in guarding a man in that freedom of conscience which would permit him to enter into a contract, and keep it to the extent that it suits him, and repudiate it otherwise. If the father of the respondents in this case acquired any rights which he or they could enforce against this corporation, it was by virtue of an express contract, which prescribed the terms upon which he was admitted to membership, and as expressly prescribed the conditions necessary to be observed on his part to continue that membership; and the terms of continuing were exactly the same as the terms of admission. He expressly represented as a condition to his admission that he was a member of the Roman Catholic Church, and that he observed its laws, and would continue to do so while he remained a member of the corporation; and that, if he should cease to conform to the laws of the church in the particular mentioned in the answer, he expressly agreed that the corporation might suspend or expel him, and thereby exclude him from its benefits. Under the Constitution and laws of this state a man cannot be coerced into observing the sacraments of any church, and, even if he should enter into a solemn contract to do so, he is free to break the contract, and for breaking it he cannot be deprived of any right that he has independent of it. But if, by the contract, a special benefit is created for him, he cannot break the contract and have the benefit too. The court of appeals of Kentucky, passing on exactly the question we are now discussing, said: "But, apart from this, we cannot see that appellee's rules are in any way inconsistent with the Constitution of Kentucky. The plaintiff never acquired the right to be thus watched and cared for in sickness, and to have his family provided for after his death, except upon the condition that he performed certain religious duties required of members of the Roman Catholic Church. Those duties were to be performed every year during his membership, in order to keep alive the corresponding obligations of his fellow members. This right was at most but a conditional one, and has never been 'diminished' by any act of the society's. . . . To compel them [other members of the society] to watch and care for plaintiff in times of sickness, and contribute to the support of his family after death, when they have only agreed to do this for those who remain true to their church, would be to disregard and

trample upon that mutuality which lies at the foundation of all contracts. . . . The religious liberty of every denomination in this land demands that no such principle as this be declared as the law of Kentucky." *Hitter v. German Roman Catholic St. Aloysius Soc.* 4 Ky. L. Rep. 871. And to like effect also is *Matt v. Roman Catholic Mut. Protective Soc.* 70 Iowa, 455, 30 N. W. 799. If any court of last resort has ever held to the contrary, our attention has not been drawn to the case.

The facts stated in the defendant's plea constituted a complete defense to the plaintiffs' cause of action, and the court erred in sustaining the demurrer.

The judgment is reversed, and the cause remanded to the Circuit Court to be proceeded with according to the law as herein expressed.

All concur.

Rehearing denied.

MICHIGAN SUPREME COURT.

Franciszk MAZURKIEWICZ

v.

St. ADELBERTUS SOCIETY OF GRAND RAPIDS, Plff. in Certiorari.

(.....Mich.....)

1. A by-law prohibiting members from being connected with societies not approved by a particular church is authorized by a provision in the statute authorizing the incorporation of mutual benefit societies that they shall have power to establish rules for the regulation of the affairs of the corporation not contrary to the laws of the state or United States, and to decide the necessary qualifications of membership.
2. One who joins a mutual benefit society whose by-laws provide that no one can be a member of it who is a member of a society not approved by a particular church cannot complain if he is expelled from the society for membership in a society prohibited by such church.

(June 17, 1901.)

CERTIORARI to the Circuit Court for Kent County to review an order reinstating relator in a mandamus proceeding as a member of the defendant society. *Reversed.*

The facts are stated in the opinion.

Messrs. McKnight & McAllister, for plaintiff in certiorari:

The by-laws restricting members are not contrary to the laws of the United States or this state, and are not void as being against public policy, and therefore the same are valid and binding on each member.

Bretzloff v. Evangelical Lutheran St. John Sick Ben. Soc. 7 Det. L. N. 442, 83 N. W. 1000; 3 Am. & Eng. Enc. Law, 2d ed. pp. 1081-1083; 1 Bacon, Ben. Soc. § 217; *Douville v. Farmers' Mut. F. Ins. Co.* 113 Mich. 158, 71 N. W. 517; 13 Am. & Eng. Enc. Law, 2d ed. p. 1079.

A person who joins such a society is bound by the charter and by-laws, which are a part of his contract.

Douville v. Farmers' Mut. F. Ins. Co. 113 Mich. 158, 71 N. W. 517; *Van Poucke v. Nederland St. Vincent De Paul Soc.* 63 Mich. 378, 29 N. W. 863.

NOTE.—See, in connection with this case, the preceding case of *Franta v. Bohemian Roman Catholic Central Union*.
64 L. R. A.

Messrs. Dunham & Malcolm, for defendant in certiorari:

The by-law constituting subdiv. c, § 5, of art. 12, is not binding upon any member of the respondent society, because it is against public policy, unreasonable and void, and is such a by-law as is not within the power of the society to pass under the express and implied terms of its charter.

This by-law was undoubtedly reasonable, legal, and binding upon the members of the unincorporated society.

Courts have no power to determine whether such a by-law is reasonable or unreasonable in an unincorporated society.

The theory of a voluntary society is founded upon the idea that men shall come together of their own free will and accord, and be bound by such laws as shall be passed in the manner agreed upon.

Where an unincorporated society becomes incorporated under a general law, the provisions of its constitution and by-laws become subject to the rules of law governing the provisions of the constitution and by-laws of corporations. The court will, upon proper application, determine whether such provisions are reasonable and necessary to effect the object for which the society was incorporated.

State ex rel. Waring v. Georgia Medical Soc. 38 Ga. 608, 95 Am. Dec. 408; *Niblack Ben. Soc.* §§ 25, 26.

The by-law in question may have been a proper by-law of the Polish-Roman Mutual Society, and yet be absolutely void as a by-law of the respondent society.

Where a society is organized and incorporated for beneficial and benevolent purposes, under the statute of the state, a member may not be deprived of his rights in the society by a by-law not necessary for, or connected with, the purposes and objects of the society, and relating to religious discipline, even though he may have assented to it.

People ex rel. Schmitt v. Saint Francis Benev. Soc. 24 How. Pr. 216; *People ex rel. Stewart v. Young Men's Father Matthew Total Abstinence Benev. Soc.* No. 1, 41 Mich. 67, 1 N. W. 931; *Niblack, Ben. Soc.* § 44.

Only such by-laws can be held valid as are, in their operation, fairly within the as-

sociate purposes expressed in the constitution.

Duke v. Fuller, 9 N. H. 536, 32 Am. Dec. 392; *Ashton v. Dashaway Asso.* 84 Cal. 61, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091; *Supreme Council, A. L. of H. v. Perry*, 140 Mass. 592, 5 N. E. 634; *Sherry v. Plasterers' Union*, 139 Pa. 470, 20 Atl. 1062; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 599, 7 N. E. 317; *Diligent Fire Co. v. Com.* 75 Pa. 296; 3 Am. & Eng. Enc. Law, 2d ed. p. 1062.

By-laws, in order to be valid, must be uniform in their operation,—that is, they must be binding upon all members alike.

3 Am. & Eng. Enc. Law, 2d ed. p. 1064.

The respondent society does not pretend to enforce this by-law against any of its members who were members of the Polish-Roman Catholic Mutual Society.

People ex rel. Roehler v. Mechanics' Aid Soc. 22 Mich. 86; *People ex rel. Pulford v. Detroit Fire Department*, 31 Mich. 458; *People ex rel. Stewart v. Young Men's Father Matthew Total Abstinence Benev. Soc. No. 1*, 41 Mich. 67, 1 N. W. 931; *Allnutt v. Subsidiary High Court, U. S. A. O. of F.* 62 Mich. 110, 28 N. W. 802; *Erd v. Bavarian Nat. Aid & Relief Asso.* 67 Mich. 233, 34 N. W. 555.

The qualification for membership in a benefit society is one thing, while the qualification for membership in a religious society is quite another. The one is civil, the other religious. The one is authorized by the statute, the other is wholly alien to its intents and purposes.

Niblack, Ben. Soc. § 44; *People ex rel. Schmitt v. Saint Francis Benev. Soc.* 24 How. Pr. 216.

The by-law in question is not necessary for, or connected with, the purposes and objects of a benevolent society, or with those of the respondent society, as indicated by its articles of incorporation; and although one may have assented to submit to such a by-law, it is not legally binding upon him, and he may ignore it at any time without danger of forfeiting his rights in such society.

Niblack, Ben. Soc. § 44; *Cartan v. Father Matthew United Benev. Soc.* 3 Daly, 20; *Com. v. St. Patrick's Benev. Soc.* 2 Binn. 441, 4 Am. Dec. 453; *People ex rel. Gray v. Medical Soc.* 24 Barb. 571; *Leech v. Harris*, 2 Brewst. (Pa.) 571; 3 Am. & Eng. Enc. Law, 2d ed. p. 1062.

A member of a corporation, whether it be municipal, eleemosynary, or private, is in the enjoyment of a franchise, the right to which is not derived from the body, but is created by statute or exists by prescription, and, therefore, cannot be taken away by the act of the corporation, except in certain extreme cases.

Rea v. Liverpool, 2 Burr. 723.

Offenses against corporate duty consist of "things done that work to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof."

Angell & A. Priv. Corp. 349; 2 Kent, Com. 297; *People ex rel. Gray v. Medical Soc.* 24 Barb. 571.

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Where the charter confers upon a society the right to expel its members under such rules and regulations as it shall adopt, this power may not be used in an arbitrary and unjust manner, and without regard to the objects and necessities of the society.

Niblack, Ben. Soc. § 40; *State ex rel. Graham v. Milwaukee Chamber of Commerce*, 20 Wis. 63; *Earle's Case*, Carth. 173; *Evans v. Philadelphia Club*, 50 Pa. 107; *Re Benevolent Soc.* 10 Phila. 19; *People ex rel. Schmitt v. Saint Francis Benev. Soc.* 24 How. Pr. 216; *State ex rel. Kennedy v. Union Merchants' Exchange*, 2 Mo. App. 96; *Sweeney v. Rev. Hugh McLaughlin Beneficial Soc.* 14 W. N. C. 406; *State v. Williams*, 75 N. C. 134; *Com. v. St. Patrick Benev. Soc.* 2 Binn. 441, 4 Am. Dec. 453; *People ex rel. Gray v. Medical Soc.* 24 Barb. 570; *Mulroy v. Supreme Lodge, K. of H.* 28 Mo. App. 463; *Ludowski v. Polish Roman Catholic St. S. K. Benev. Soc.* 29 Mo. App. 337; *Com. ex rel. Fischer v. German Soc.* 15 Pa. 251; 3 Am. & Eng. Enc. Law, p. 1072.

The respondent society is possessed of real estate of the value of upwards of \$20,000, which upon a dissolution of said society would belong to its members, each of whom would be entitled to his distributive proportion thereof. The relator clearly has a vested right, not only in the property interests of the society, but also in the benefits which necessarily accrue to him by reason of his membership.

Lavalle v. Société St. Jean Baptiste de Woonsocket, 17 R. I. 685, 16 L. R. A. 392, 24 Atl. 467; *Allnutt v. Subsidiary High Court, U. S. A. O. of F.* 62 Mich. 110, 28 N. W. 802.

The prohibition against the Polish-American Industrial Society did not exist at the time the relator became a member of the respondent society. *Ex post facto* laws are no more lawful for corporations than for states.

People ex rel. Pulford v. Detroit Fire Department, 31 Mich. 459; Niblack, Ben. Soc. § 22.

Relator's expulsion from the respondent society on July 17, 1899, was without any notice whatever of such contemplated proceeding.

By-laws which vest in a majority of the members the power of expulsion for minor offenses are void *pro tanto*.

Evans v. Philadelphia Club, 50 Pa. 107.

Where authority is given to suspend or expel, it cannot be exercised arbitrarily or without notice and a chance to defend.

Caine v. Benevolent & Protective O. of E. 88 Hun, 157, 34 N. Y. Supp. 528; *Grand Grove, U. A. O. of D. v. Garibaldi Grove, No. 71, U. A. O. of D.* 105 Cal. 219, 38 Pac. 947; *Sourwine v. Supreme Lodge, K. of P.* 12 Ind. App. 447, 40 N. E. 646; *Gay v. Farmers' Mut. Ins. Co.* 61 Mich. 245, 16 N. W. 392; *Stewart v. Lee Mut. F. Ins. Asso.* 64 Miss. 499, 1 So. 743; *Burlington Voluntary Relief Dept. v. White*, 41 Neb. 547, 59 N. W. 747.

It is irregular to expel a member without giving him an opportunity of being heard in his defense before the society at large.

Com ex rel. Fischer v. German Soc. 15 Pa. 251; *Erd v. Bavarian Nat. Aid & Relief Asso.* 67 Mich. 233, 34 N. W. 555; *Niblack, Ben. Soc.* § 65; *State ex rel. Waring v. Georgia Medical Soc.* 38 Ga. 608, 95 Am. Dec. 408; *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248; *People ex rel. Gray v. Medical Soc.* 24 Barb. 570; *People ex rel. Schmitt v. Saint Francis Benev. Soc.* 24 How. Pr. 216.

A member of a private corporation cannot be expelled without any notice that such a proceeding is contemplated, and without full opportunity to be heard in reply to the charge against him, since such a proceeding is abhorrent to all reason.

People ex rel. Pulford v. Detroit Fire Department, 31 Mich. 459; *Merrill, Mandamus*, § 168.

Long, J., delivered the opinion of the court:

This was an application for a mandamus, made to the court below to compel the respondent society to reinstate relator as a member of that society, from which it is claimed he has been unlawfully expelled. There are only two questions involved: (1) Is subdiv. "c," § 5, of art. 12, which reads as follows: "No member of the St. Adelbertus Aid Society of Grand Rapids, Michigan, can be a member of any society that is not approved by the Roman Catholic Church,"—a valid, legal, and binding by-law of said respondent society? (2) Was relator legally expelled from the respondent society?

It appears that in November, 1872, there was an unincorporated society organized in the city of Grand Rapids under the name of the Polish Roman Catholic Mutual Society under the Guardianship of St. Albert. This unincorporated society adopted certain by-laws for the conduct of its business, and which society was organized as an adjunct of St. Albert's Church of said city, and which church organization was composed entirely of Poles of the Roman Catholic faith. The society existed until 1892, when several of its members desired to incorporate it, and did so in the month of November of that year, under the corporate name of St. Adelbertus Aid Society of the City of Grand Rapids, Michigan. This incorporation was under act No. 155 of the Public Acts of this state for the year 1879. It was provided in said articles of incorporation as follows: "The purposes and objects for which said corporation is formed shall be to provide for the relief of distressed members, the burial of the dead, and such other benevolent and worthy purposes and objects as affect the members of the corporation." Immediately upon the incorporation of the Polish Roman Catholic Mutual Society under the name of the respondent society, it adopted as its by-laws the same by-laws that had governed it in its unincorporated condition, and one of which by-laws is the one above stated. On October 2, 1894, relator became a member of the respondent society. In the year 1895 he became a member of the Polish-

American Industrial Society. On July 17, 1899, respondent undertook to remove relator from its society, and claims it did so for the reason assigned by respondent that the Polish-American Industrial Society was not approved by the Roman Catholic Church, and that this was a violation of said by-law. Relator was removed from the respondent society for no other cause, always having paid his dues promptly, and in all respects had conducted himself in conformity to the by-laws of said society. At the time relator was removed, all other members of the respondent society were likewise dismissed and removed from said society who were members of the said Polish-American Industrial Society, excepting all those persons who had formerly belonged to the Polish Roman Catholic Mutual Society under the Guardianship of St. Albert. At the time relator was removed from the respondent society, there were many members of it who were also members of the Polish-American Industrial Society, but which members had formerly belonged to the aforesaid unincorporated society. All such members were permitted to remain, and enjoy all rights, benefits, and privileges of the respondent society, for the sole reason that they had formerly belonged to said unincorporated society. At the time relator became a member of the respondent society it was possessed of real estate of the value of at least \$20,000, and at the time of his removal from said society its real estate was worth much more than that. It owned a large and valuable club house located upon its grounds in the city of Grand Rapids, where its business and social meetings were held. At the time relator joined the respondent society, its by-laws provided for an entrance fee of from \$4 to \$10, depending upon the applicant's age (§ 7, by-law 12); that a yearly tax of \$3, payable monthly, as dues, must be paid by each member (§ 1, by-law 12). Section 3 of this by-law also provides: "It is the duty of every member to confess and receive holy communion twice a year in the St. Albert's Church, together with the society, on St. Albert's day, as a patron of our church and society, and again near the 2d of November, on Sunday, as a yearly remembrance of the organizing of the society." Section 6 of the same by-law provides: "For the reason that this is a Catholic society, it should therefore be under the guidance of the local pastor." By-law 14 provides that, "in case of death of any member or member's wife, in either case the society is to pay \$50 for funeral expenses, and the amount of assistance to such members shall be \$3 per week." By-law 12 provides: "Every member of this society shall send his children to the Polish school, and, if a member of this society fails to live up to the laws of this society, and practices other immoralities concerning the Catholic Church, and the society still considers him a member, in that case the local pastor reports to the society, and it is the duty of the society to dismiss such member." The Polish-American Industrial Society, to which relator also

belonged, provided a weekly indemnity of \$3 in case of sickness, and a payment of \$50 for funeral expenses of a member or his wife. The membership of the respondent society were Poles of the Roman Catholic faith. Father Pongannus, pastor of the St. Albert's Catholic Church of this city, was a member of the respondent society from the fact of his being the local pastor of said church. During the whole time relator was a member of the industrial society, respondent was cognizant of the fact, solicited and accepted his dues, covering a period from July, 1895, to October, 1899. There are many members now of the respondent society who are also members in good standing of the condemned society for the simple and only reason that they were members of the Polish Roman Catholic Mutual Society prior to 1892. On the evening of July 17, 1899, at a meeting of the members of the said respondent society in its hall in this city, the said Father Pongannus came into said meeting, and took the president's seat, and demanded that all persons present who were members of the Polish-American Industrial Society should leave the society. There were no written or other charges preferred against relator except the said statement of Father Pongannus. Relator asked that he might be heard in his defense, immediately whereupon the said meeting was dismissed, and relator and other members of the condemned society, save the excepted members before mentioned, were required to leave the hall; and, after they had gone out, and the doors closed, a resolution was passed by the remaining members of respondent society requiring that relator and the others who were expelled from the hall renounce their membership in the Polish-American Industrial Society within three months, or stand dismissed and expelled from the respondent society. Relator was afterwards notified of this resolution by personal friends of his, who remained in said hall while said resolution was passed; but he continued to pay his dues for three months thereafter, when the respondent society refused to accept any further dues, and refused to permit relator to enter said hall, or to enjoy any of the benefits of said society, and since which time he has been excluded from participating in either the business or social gatherings of said society upon its premises. On January 2, 1900, without any notice to relator, the respondent society passed another resolution, giving relator and the other expelled members one month's time in which to drop out of the Polish-American Industrial Society and return to the respondent society. Relator refused to give up his protection and the protection of his family in the Polish-American Industrial Society, and he is now, and has been since July 17, 1899, excluded from all the benefits and privileges of being a member of said respondent society. The case was heard in the court below, testimony taken, and the whole case considered there. The case comes into this court by writ of certiorari.

The return made by the court below fully
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sets out the facts found. That court found that the Polish-American Industrial Society was not at any time under the ban of the Roman Catholic Church prior to the hearing of the case in May, 1900, and that the ban appears to consist wholly of the disapproval of Father Pongannus. The court also found that the respondent society is the owner of real estate of the value of \$20,000, and that the order of dismissal, if valid, not only dismissed relator from said society after paying his dues therein for six years, but also dismissed others who had been paying dues there for more than eighteen years, and for no other reason than that they had provided themselves additional weekly indemnity of \$3 per week in case of sickness by becoming members of the Polish-American Industrial Society. The act under which the respondent society is organized (being act No. 155, Laws 1879) provides that "any ten or more persons, residents of this state, desiring to become incorporated for benevolent purposes, may make and execute under their hands and seals articles of association, which said articles of association shall be acknowledged before some officer of this state," etc. Subdivision 3 of § 1 provides: "The purposes and objects for which said corporation is formed shall provide for the relief of such distressed members, the visitation of the sick, the burial of the dead and such other benevolent and worthy purposes and objects as affect the members of the corporation," etc. Pursuant to the provisions of the act, articles of association were filed, setting forth the purposes of the organization in the language of subdivision 3 of the act. By-laws were adopted, and subdiv. "c," § 5, of art. 12, as above set forth, became a part of the by-laws. The court below found this by-law unreasonable and void, for the reason that it was not incidental to or necessary for the carrying out of the purposes of the organization, and that the relator was unlawfully deprived of his rights in the association. The conclusions of the court below cannot be sustained. The act under which the respondent society was organized provides by § 4 that "said corporation shall have full power and authority to make and establish rules and regulations for the regulation and governing of the affairs and business of said corporation and members thereof not contrary to the laws of the United States or of this state, to decide as to the necessary qualifications for and who shall be eligible to membership therein, to provide for the election of members and to designate, elect, or appoint in such manner as they see fit by the rules and regulations such officers under such name and style as they shall decide, who shall exercise such powers and such supervision, control, and management of the affairs of such corporation as shall be delegated to them respectively by the constitution, rules, regulations, and by-laws of said corporation." Under the power thus conferred, the respondent society passed the by-law in controversy. Such by-law is not in conflict with any law of the United States or of this state. It is,

therefore, binding upon the members of the society. A very similar question was presented in the case of *Bretzlaff v. Evangelical Lutheran St. John Sick Ben. Soc.* (Mich.) 7 Det. L. N. 442, 83 N. W. 1000. Section 1, art. 2, of the constitution of that society provided: "Only such persons can be members of the society that adhere and belong to the Evangelical Lutheran Church, the congregation belonging to the synodical conference. They must lead a moral and virtuous life, and must not belong to any secret society, or any other sick benefit society. Members that leave the above-named church thereby lose their membership in the society." It was held that Mr. Bretzlaff was bound by this provision in the articles of the society, and that it was not unreasonable or against public policy; citing note to 13' Am. & Eng. Enc. Law, 2d ed. p. 1079. We think the present case falls directly within the rule there laid down. A person who joins such a society is bound by the charter and by-laws, which are a part of his contract. *Douville v. Farmers' Mut. F. Ins. Co.* 113 Mich. 158, 71 N. W. 517; *Van Poucke v. Netherland St. Vincent De Paul Soc.* 63 Mich. 378, 29 N. W. 863.

The order of the court below must be reversed, with costs in favor of respondent.

The other Justices concur.

Emma R. GRAY

H. M. LOUD & SONS LUMBER COMPANY, Impleaded, etc.

(.....Mich.....)

1. One obtaining a contract which he fails to record, for the conveyance of a parcel of a tract of land the whole of which is subsequently mortgaged, cannot cast the burden of the mortgage upon subsequent purchasers of the remainder of the tract, who have no notice of his rights, he not having taken possession so as to charge the subsequent purchaser with constructive notice.
2. Advantage of a clause in a mortgage covering several parcels of land, by which any parcel may be released upon payment of a certain sum, cannot be taken after foreclosure of the mortgage, by a purchaser of a parcel who has unsuccessfully sought to cast the whole burden of the mortgage upon subsequent purchasers of the remaining parcels who purchased before the prior conveyance was recorded.
3. A purchaser of mortgaged property cannot take advantage of usury in the mortgage contract.

(October 8, 1901.)

CROSS-APPEALS by complainant and the defendant corporation from a decree in chancery of the Circuit Court for Wayne County in a proceeding to have complain-

NOTE.—As to priority of unrecorded deed over subsequent mortgage, see, in this series, *Phelan v. Brady* (N. Y.) 8 L. R. A. 211.

As to order of sale of parcels of mortgaged 54 L. R. A.

ant's property released from the lien of a mortgage; the complainant appealing from so much as refused to free the property from the lien; and the defendant corporation appealing from so much as refused to cast the entire burden of the mortgage upon complainant's property. *Reversed on defendant's appeal.*

The facts are stated in the opinion.

Messrs. Bacon & Yerkes, for complainant:

Complainant, having purchased and substantially paid for her lot before lots 251, 252, and 253 were sold to defendant's grantors, although her conveyance was recorded subsequent to the record of the first conveyance of the other lots, was entitled to have those lots sold first for the satisfaction of the mortgage.

Cooper v. Bigly, 13 Mich. 464; *James v. Hubbard*, 1 Paige, 228; *Ellison v. Pecore*, 29 Barb. 333; *Libby v. Tufts*, 121 N. Y. 172, 24 N. E. 12.

Where it would be inequitable to apply the general rule all the parcels should bear the burden of the mortgage *pro rata*.

Cooper v. Bigly, 13 Mich. 464; *Bernhardt v. Lymburner*, 85 N. Y. 172; *Woods v. Spalding*, 45 Barb. 602; *Hill v. McCarter*, 27 N. J. Eq. 41.

Complainant was entitled to have her lot released at any time from the mortgage on payment of \$300, and her lot should not be made liable to more than that amount on foreclosure of the mortgage, and any excess over that amount would have to be borne by the other lots, in any view of the case.

Clark v. Fontain, 135 Mass. 464.

Payments in excess of the legal rate of interest should be applied as general payments on the mortgage debt.

Comp. Laws 1897, §§ 4857, 4858; *Frets v. Murray*, 118 Mich. 302, 76 N. W. 495; *Bateman v. Blake*, 81 Mich. 227, 45 N. W. 831; *Gill v. Rice*, 13 Wis. 549; *Reinback v. Crabtree*, 77 Ill. 182.

Mr. William H. McBryan, for defendant:

It was complainant's duty to record her land contract.

Comp. Laws 1897, § 8988; *Balen v. Mercier*, 75 Mich. 47, 42 N. W. 666.

That duty having been neglected, she has no equity existing in her favor.

Cooper v. Bigly, 13 Mich. 475.

When Richards sold to Mann, her grantee was clothed with all her rights as a bona fide purchaser, and when Mann conveyed to the Lounds they in turn succeeded to all the rights and privileges to which Richards was originally entitled, even though they may have had actual knowledge of the Gray land contract.

Godfroy v. Disbrow, Walk. Ch. (Mich.) 265.

The protection which the recording acts statute gives to a bona fide purchaser does not proceed upon the theory, and is not

land previously conveyed, see *Boone v. Clark* (Ill.) 5 L. R. A. 276, and cases in note on page 282, especially as to equitable rights of first purchaser on page 284.

made to depend upon the fact, that the grantor at the time of such conveyance had any interest in the premises whatever, or that any passed from him by his conveyance to such subsequent purchaser. It is not by force of the conveyances, but by the terms of the statute, that such subsequent purchaser acquires title to the premises.

Burns v. Berry, 42 Mich. 179, 3 N. W. 924; *Payne v. Avery*, 21 Mich. 524; *Shotwell v. Harrison*, 22 Mich. 421.

The recording laws protect the purchaser who first records his conveyance.

Cooper v. Bigly, 13 Mich. 475; *Chapman v. West*, 17 N. Y. 125; *Chase v. Woodbury*, 6 Cush. 143; *Brown v. Simons*, 44 N. H. 475.

The register act applies to the equitable right which is acquired by a purchaser of a parcel of the mortgaged property, to have the residue first applied to the payment of the mortgage debt.

LaFarge F. Ins. Co. v. Bell, 22 Barb. 54; *Montgomery v. Dorion*, 6 N. H. 255; *French v. Gray*, 2 Conn. 108; 4 Kent, Com. 456; *Brown v. Manter*, 22 N. H. 468; *Chapman v. West*, 17 N. Y. 125.

Any particular grantee may by his subsequent omissions, or by his subsequent dealings with other grantees, disturb the order of the equities in his own favor, and create equities in behalf of other owners, and even render his own parcel primarily liable as between all the grantees.

Pom. Eq. Jur. § 1225; *Brown v. Simons*, 44 N. H. 475; *LaFarge F. Ins. Co. v. Bell*, 22 Barb. 55; *Chapman v. West*, 17 N. Y. 125; *New York L. Ins. & T. Co. v. Cutler*, 3 Sandf. Ch. 178; *Jones, Mortg.* 4th ed. § 1620; *McKinney v. Miller*, 19 Mich. 142; *Cooper v. Bigly*, 13 Mich. 463.

There can be no equities superior to those of bona fide purchasers without notice.

Loomis v. Brush, 36 Mich. 47.

Moore, J., delivered the opinion of the court:

On the 22d day of October, 1887, complainant purchased from Hibbard Baker, by land contract, lot No. 162 of the Waterworks subdivision of private claim 257, in the township of Hamtramck, county of Wayne, for a consideration of \$500. Fifty dollars of the purchase price was paid at the date of the contract, \$50 and interest November 25, 1887, \$300 and interest during the year 1888, \$50 February 1, 1890, and the final payment of \$50 and interest April 1, 1890. Complainant did not record her contract. The lot was a vacant unimproved one. Complainant received a warranty deed of the lot from Hibbard Baker and wife, in pursuance of said contract, on the 22d day of September, 1890, and four days later recorded it. On May 3, 1887, Hibbard Baker and Howard G. Meredith executed to the State Savings Bank a mortgage on 45 lots of the Waterworks subdivision for a consideration of \$5,000, which mortgage contained the following clause: "With the privilege of having any lot released at any time on payment of \$300, with accrued interest, with three

months' extra interest." This mortgage includes lots 162, 251, 252, and 253. Releases were executed by the State Savings Bank at various times, releasing all the lots from this mortgage, except the four lots mentioned. On the 20th day of February, 1889, Hibbard Baker and Howard G. Meredith executed to Caroline E. Richards a warranty deed for lots 251, 252, and 253. On the 18th of March, 1889, Caroline E. Richards deeded said lots to Gustave E. Mann, and on January 1, 1890, he deeded them to the H. M. Loud & Sons Lumber Company, which deed was recorded on the 15th of March, 1890. On the 12th day of April, 1895, after all the lots subject to the mortgage had been discharged therefrom except lots 162, 251, 252, and 253, the State Savings Bank assigned the mortgage to the H. M. Loud & Sons Lumber Company for \$472.42. Immediately on obtaining the assignment of this mortgage, the H. M. Loud & Sons Lumber Company commenced foreclosure proceedings against all of these lots, and on the 12th day of August, 1895, lot 162 was bid off to the H. M. Loud & Sons Lumber Company for \$520.49, being the entire amount claimed to be due on said mortgage, together with the costs and expenses of foreclosure and sale. On the 13th of October, 1890, the H. M. Loud & Sons Lumber Company sold and deeded lot 162 to Anthony Muer for the sum of \$750. The defendant the H. M. Loud & Sons Lumber Company had no knowledge of the existence of this mortgage to the State Savings Bank until some time after they purchased, in 1892. The complainant had no knowledge of the existence of this mortgage until the 3d day of February, 1896, and she paid all the taxes on this property from the time she purchased it until November, 1895. November 24, 1890, complainant filed this bill, asking: (1) That the purchase of the mortgage by the Louds from the bank be decreed to be a full payment and satisfaction thereof as against Gray; (2) that the foreclosure and sale of lot 162 by the Louds may be declared null and void against Gray, and that the Louds may be decreed to release Gray all their title and interest in and to lot 162 under and by virtue of the mortgage and foreclosure thereof; (3) for general relief. The court made a decree that neither party was entitled to have the other's land sold prior to its own, but that the balance due on the mortgage, and expenses, amounting to \$520.49, should be paid ratably by each of the four lots. The court also held that, as the defendant had sold lot 162 to a bona fide purchaser for \$750, that amount was a fair valuation of the lot, and that the defendant should account to the complainant for that sum, less \$130.12; and a decree was entered requiring the defendant to pay to the complainant the sum of \$619.88, that being the difference between the amount for which the lot was sold and one quarter of the mortgage and expenses. Both parties appealed from this decree, though complainant does not object to having it affirmed.

It is the claim of the complainant that,

having purchased, and substantially paid for, her lot before the other lots were sold to defendant's grantors, although her conveyance was recorded subsequent to the record of the first conveyance of the other lots, she was entitled to have those lots sold first for the satisfaction of the mortgage; citing *Cooper v. Bigly*, 13 Mich. 464; *James v. Hubbard*, 1 Paige, 228; *Elison v. Pecare*, 29 Barb. 333; *Libby v. Tufts*, 121 N. Y. 172, 24 N. E. 12. In *Libby v. Tufts*, though the second purchaser put his conveyance on record first, the first purchaser had fully completed his contract, and entered into possession of the premises. A reference to the other cases will show they, too, are not controlling in this one. Complainant insists that, even though she may not insist upon the lots being sold in the inverse order of alienation, the decision of the circuit judge is undoubtedly in accordance with the law applicable to all cases where it would be inequitable to apply the general rule, and is as favorable to the defendants as the circumstances warrant; citing *Cooper v. Bigly*, 13 Mich. 464; *Bernhardt v. Lyburner*, 85 N. Y. 172; *Woods v. Spalding*, 45 Barb. 602; *Hill v. McCarter*, 27 N. J. Eq. 41. In *Hill v. McCarter* the first purchaser took his deed subject to the mortgage, and the court very properly held his land was not wholly relieved from the lien. An inspection of the other cases cited will show they are not decisive of this case in favor of complainant. If Miss Gray's contract had been put upon record, or if she had gone into possession of her lot, and her possession had been so obvious that it would have been notice to subsequent purchasers, her contention that the lots purchased by the defendants must first be sold would be sustained by the great weight of authority. As she did not put her contract upon record, and her lot was a vacant unoccupied lot, can the decree of the circuit judge be sustained? When Miss Gray obtained her land contract, and made payments thereon, she obtained an interest in the land described therein. *Balen v. Mercier*, 75 Mich. 47, 42 N. W. 666. Section 9088, Comp. Laws, reads: "Every conveyance of real estate within this state, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." Sections 9035-9038, Comp. Laws, provide for the recording of land contracts. The object of the recording laws is to protect subsequent bona fide purchasers (*Godfroy v. Disbrow*, Walk. Ch. (Mich.) 262), and to prevent fraud by securing certainty and publicity in such dealings (*Atwood v. Beers*, 47 Mich. 72, 10 N. W. 112). In *Burns v. Berry*, 42 Mich., at page 179, 3 N. W. 924, in commenting on the policy of the recording acts, the court says: "The protection which this statute gives to a bona fide purchaser does not proceed upon the theory, and is not made to depend upon the fact, that the grantor at the time of such

conveyance had any interest in the premises whatever, or that any passed from him by his conveyance to such subsequent purchaser. It is not by force of the conveyances, but by the terms of the statute, that such subsequent purchaser acquires title to the premises. His grantor, having previously conveyed, has no title left to convey, and could therefore by his deed, unaided by the statute, pass none to any third person. Our registry laws, however, step in, and, for the purpose of protecting an innocent purchaser, give him what he supposed, and from an examination of the records had a right to suppose, he was acquiring by his purchase, and to this extent cut off the previous purchaser who negligently failed to record his conveyance."

Cooper v. Bigly, 13 Mich. 463, throws much light upon the question involved in this case. Justice Campbell, speaking for the court, said: "It has always been understood to be the settled law of this state that, where mortgaged premises are conveyed or encumbered in parcels, they are, upon a foreclosure, to be sold in the inverse order of such conveyances or encumbrances, unless the mortgagees will be prejudiced by having the property sold in parcels,—a thing which can never happen where the property, when mortgaged to him, was treated as separate. This doctrine was recognized in *Mason v. Payne*, Walk. Ch. (Mich.) 459, and *Caruthers v. Hall*, 10 Mich. 40, in both of which cases the principal exception to the rule was referred to and enforced. The same principle was recognized and explained in *James v. Brown*, 11 Mich. 25. It rests chiefly, perhaps, upon the grounds that, where one who is bound to pay a mortgage confers upon others rights in any portion of the property, retaining other portions himself, it is unjust that they should be deprived of their rights, so long as he has property covered by the mortgage out of which the debt can be made. In other words, his debts should be paid out of his own estate, instead of being charged on the estates of his grantees. Any other rule would be, in effect, to enable him to enjoy for his own benefit that which he has once vested in another, and in a measure to recall his own grant. The rule cannot, therefore, depend upon the existence or nonexistence of covenants of warranty. It depends simply on the fact whether he has or has not seen fit, in making a disposition of a part of his encumbered premises, to charge it primarily with the payment of the encumbrance. Whenever he so charges any part, the purchaser takes it subject to the burden, and the relative date of his purchase is immaterial. See cases cited above; *Welch v. Beers*, 8 Allen, 151; *Kilborn v. Robbins*, 8 Allen, 466. It has, indeed, in several cases cited at the bar, been held that the covenant of warranty was very important in determining the intent of the mortgagor not to charge the mortgage on the property sold. But there is no satisfactory authority holding that, in the absence of such a warranty, no such intent could be presumed. On the contrary, wherever the

doctrine of priority is respected at all, it has been enforced, unless an opposite intent was made out. And such appears to us the common sense inference; for a man owing a debt, for which his own property remains liable, must naturally be supposed to expect to have it paid out of his own means, unless he has bargained to the contrary. And this equity, having arisen in favor of the first purchaser, must remain in his favor against any subsequent equities of other parties derived from his grantor. There are same states in which all parcels of mortgaged land are held liable ratably. See cases collected in notes to Story, Eq. Jur. §§ 633, 635, 1233a. And it has been suggested by Judge Story, and was claimed on the argument, that a purchaser of one lot cannot be expected to search the record for the title of other lots, and therefore should not be subjected to equities attaching to them. But this reasoning entirely passes over the well-settled rule that, where a person is obliged to take notice of a deed, he is bound by notice of all that it contains which can affect him. Having notice of a mortgage covering other lots besides his own, he is bound to ascertain whether those lots have been sold previously in such a way as to throw any peculiar burden on the one he is purchasing, just as much as whether that lot has been directly, instead of indirectly, conveyed or charged, prior to his purchase, by his grantor or his predecessors in the title. The registry laws furnish the means for one investigation as easily as for the other. And the construction put upon these laws is in accordance with this view. *Chapman v. West*, 17 N. Y. 125; *Chase v. Woodbury*, 6 Cush. 143; *Brown v. Simons*, 44 N. H. 475. This latter case is a well-considered case, and collects the authorities quite fully upon the whole subject, so that it will not be desirable to multiply the citations."

Brown v. Simons is an instructive case, not only because it is quoted with approval by Justice Campbell, but also because it comments upon and disapproves *Ellison v. Pearce*, which is relied upon by the complainant. We quote: "If, however, at the time of the subsequent conveyance by the mortgagor, the grantee has no notice of the prior conveyance, in fact or constructively (the same not having been registered), such subsequent grantee ought not to take the land so granted, subject primarily to the whole debt. On the contrary, as the prior grantee has failed to record his deed, and thus give notice of the true state of the title, the subsequent grantee, unless otherwise notified, may rightfully regard the land, which is thus apparently in the hands of the mortgagor, as primarily liable for the whole debt. It is true that the first grant by the mortgagor of a part of the property does not in terms impose a lien upon what is left, but in effect it creates upon it, as between the parties, a new encumbrance, and makes it liable primarily for the whole debt, as much as if such mortgagor had mortgaged it to such purchaser to indemnify him against the original mortgage. It makes a case

then that clearly comes within the spirit of our statute of enrollments, which is designed for the security of subsequent purchasers and creditors, to give notice of all conveyances of any estate in lands, whether legal or equitable. 1 Story, Eq. Jur. § 403; *Parkist v. Alexander*, 1 Johns. Ch. 398; 4 Greenleaf's Cruise, Real Prop. 448, 452, and notes; *General Ins. Co. v. United States Ins. Co.* 10 Md. 517, 69 Am. Dec. 174; *Brush v. Ware*, 15 Pet. 113, 10 L. ed. 680. The Middlesex register act, which requires to be enrolled 'all deeds and conveyances,' was held to extend to every species of deed or instrument by which lands may be conveyed or affected, and therefore an appointment under a power is considered as a conveyance within the register acts. 4 Greenleaf's Cruise, Real Prop. 448; *Scrafton v. Quincy*, 2 Ves. Sr. 113. In that case it was contended that this deed was not a separate conveyance, but only the execution of a power under a deed that was registered; but the court held that, if this construction was to prevail, there would be an end of the registry law, for by this means a secret deed might be set up to defeat him who had registered before; and the court says the case is clearly within the mischief recited, which is to prevent a party from being defeated by a secret or pocket deed. In *Brush v. Ware*, before cited, the court, in discussing the general doctrine of notice, lays it down that 'no principle is better established than that a purchaser must look to every part of the title which is essential to its validity.' And again, it is laid down in the same case that 'the law requires reasonable diligence in a purchaser to ascertain any defect of title; but when such defect is brought to his knowledge no inconvenience will excuse him from the utmost scrutiny.' In accordance with such views it was held in *Reeder v. Barr*, 4 Ohio, 458, 22 Am. Dec. 762, that when a patent was issued to Newell, the assignee of Henson, Reeder's administrator, a subsequent purchaser was charged with notice of the equitable rights of the heirs of Reeder, because by the laws of Ohio an administrator has no power, unless authorized by the court of common pleas, to convey an interest in land. So, in *Brush v. Ware* it was held that, as the executor had no power of sale, unless given him by the will, the purchaser was bound to look into the will, and see if such power was given. See also *Backman v. Charlestown*, 42 N. H. 134. If the first conveyance by the mortgagor after the mortgage is duly registered by the grantee he has done all that he can do to give notice of the new burden that is thereby thrown upon the part which is retained by the mortgagor; and a second purchaser, charged, as he clearly is, with notice of the mortgage upon the whole land, and when the deed is registered, knowing that the extent of the burden upon his own purchase must depend upon the fact of there having been a prior conveyance by the mortgagor, would, upon due inquiry, and in the exercise of reasonable diligence, be led by the record to a knowledge of the true state of the title, and

the extent of the encumbrance upon the land conveyed to him. This he is directly interested to know, and the first purchaser has placed the means of knowledge reasonably within his reach, and it is his own fault if he neglects to avail himself of it. In the examination of the title to the part he proposes to buy he is led directly to the original mortgage, and he finds that his is but part of an entire tract in which his grantor has only a right of redemption, and which was originally subject to a common burden, but liable to be affected by a prior sale of another part of the entire tract. Under such circumstances the different parcels of the tract mortgaged cannot, we think, be regarded as separate and distinct, so as to relieve him of the duty to inquire into the title to the other part; but we think that in examining the title to the part he proposes to buy he is led directly to a deed that puts him on inquiry as to the remaining part of the land. 2 Fonblanque, Eq. B. 3, chap. 3, § 1, note; 4 Greenleaf's Cruise, Real Prop. 452, note; *Parkist v. Alexander*, 1 Johns. Ch. 398. In accordance with these views is the doctrine of *Chase v. Woodbury*, 6 Cush. 143, where a mortgagor conveyed the whole of the mortgaged property to S. & R., to each an undivided half; and S., having recorded his deed, conveyed his half to C. before the deed to R. was registered; and upon the payment by the representative of R. of the whole mortgage debt it was held that he could not require contribution of C., because C. had purchased without any notice of the sale to R., and might, therefore, rely upon the other half being first held for the whole debt, although, had the deed to R. been recorded, it would have been notice of a lien on the land sold to S. equally with the other; but the failure to record it was a failure of one claiming an encumbrance, namely, a lien on the estate for a contribution for one half the money he might pay to redeem it, and this the court held, stood upon the same footing as if R. had a mortgage from the first grantor, which he had failed to record. The result of this case is that a party purchasing a part of an estate under mortgage would be charged with notice of a registered conveyance of another part, when the effect would be to render his part so purchased liable to contribution equally with the other; and for the same reason he would be charged with such notice in a case where the effect would be to make his purchase primarily liable for the whole debt. The case of *Chase v. Woodbury* is directly in point, and fully sustains the views we have expressed. It is true it has been suggested that this right to have first applied the lands remaining in the mortgagor's hands and those last sold is a mere equity, and not a lien or encumbrance that comes within the provisions of the register laws, and so it is directly held in *Ellison v. Pearce*, 29 Barb. 333; and therefore it was decided that the deed first delivered would take precedence over a subsequent deed of another parcel, although the latter was first recorded. In this case, however, it appeared

that neither of these purchasers had knowledge of the original mortgage at the time of their purchase, and the court expressly declines to give an opinion as to the result had the second purchaser known of the existence of the mortgage, and had he examined the records, and, finding no previous conveyance, been induced to buy, supposing in good faith that he was the first purchaser; in which case it is said there would be some show of equity in favor of the second purchaser. In the case of *LaFarge F. Ins. Co. v. Bell*, 22 Barb. 54, it was held upon much consideration that the register act, which provides that 'every conveyance not recorded shall be void against a subsequent purchaser in good faith of the same real estate, or any portion thereof, whose conveyance shall first be duly recorded,' does apply to the equitable right which is acquired by a purchaser of a parcel of the mortgaged property to have the residue first applied to the payment of the mortgage debt, and that such equitable right will not be defeated by a prior conveyance of that residue, unless it be by deed duly recorded, or other notice at the time of his purchase; and the reasons assigned for this doctrine are in no degree shaken by the subsequent case of *Ellison v. Pearce*, which appears to have been decided without an examination of the case of *LaFarge F. Ins. Co. v. Bell*. Indeed, it is difficult to see how any other result can be reached. The deed of a parcel of the tract mortgaged carries with it a well-established right to require the mortgagee first to exhaust the residue in the hands of the mortgagor before applying the parcel so conveyed; and, whether this right can be enforced only in equity or not, it is clearly a substantial interest in such residue, and one which it is the policy of the registry laws to protect. See *Montgomery v. Dorion*, 6 N. H. 255; *French v. Gray*, 2 Conn. 108; 4 Kent, Com. 456; *Brown v. Manter*, 22 N. H. 468." See Jones, Mortg. 4th ed. § 1620. When the defendants' grantor purchased the three lots, the record did not disclose a sale to Miss Gray, and he had a right to assume that the mortgagees would resort to the land still standing in the name of Mr. Baker before selling the land purchased by him.

Counsel say: "The mortgage contained the following provision: 'With the privilege of having any lot released at any time on payment of \$300 and accrued interest, with three months' extra interest.' Under this clause complainant was entitled to have her lot released at any time from the mortgage on payment of \$300, and her lot should not be made liable to more than that amount on foreclosure of the mortgage, and any excess over that amount would have to be borne by the other lots, in any view of the case,"—citing *Clark v. Fountain*, 135 Mass. 404. It is doubtless true that complainant might have had her lot released from the mortgage by paying to the mortgagee \$300, but she never sought to do so. She waited nearly four years after the mortgage foreclosure before filing this bill, and it is not a part of the theory of the bill.

It is claimed there was paid to the bank about \$70 extra interest, which was usury, and which should have been applied as a general payment on the mortgage debt. It has been repeatedly held that the defense of usury is a personal one, and may be waived. *Sellers v. Botsford*, 11 Mich. 59; *Gardner v. Matteson*, 38 Mich. 200.

The case is an unfortunate one for the complainant, but it is made so by her failure to put her contract upon record.

The decree is reversed, and the bill of complaint dismissed, with costs.

The other Justices concur.

George R. MATHEWS

v.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 1 of Kalamazoo, *Plff. in Certiorari*.

(.....Mich.....)

Power to make vaccination a condition to admission to the schools is not conferred by statutory authority to determine the qualifications for admission thereto, to do all things needful and desirable for their prosperity and success, and to make and enforce suitable rules and regulations for their government and management, where the children are in good health, there is no smallpox in the town, although there are some cases in other parts of the state, and the statute makes failure to send children to school, and failure on their part to attend, a penal offense.

(*Long and Grant, JJ., dissent.*)

(July 10, 1901.)

CERTIORARI to the Circuit Court for Kalamazoo County to review a judgment granting a writ of mandamus to compel respondents to allow relator's children to attend the school maintained by them without complying with a rule requiring vaccination. *Affirmed.*

The facts are stated in the opinions.

Mr. Walter B. Taylor for relator.

Mr. Alfred J. Mills for respondent.

Moore, J., delivered the opinion of the court:

I cannot agree with the conclusion reached by Justice Long. The children of the relator are of school age, in good health. They have not got the smallpox, nor have they been exposed to it. The law of the state makes it their duty to attend school, and it is the duty of the parent to send them. Comp. Laws, § 4847. In case he fails to do so, he may be subject to fine or impris-

onment, or both, in the discretion of the court. Comp. Laws, § 4848. The effect of the rule adopted by the school board is to compel the vaccination of the child, or subject him and the parents to the penalties of the law. The practical result, if this rule can be sustained, is to give the board of education the right to compel compulsory vaccination. It is said that the board does not undertake to compel vaccination, but it simply says that until the child is vaccinated it cannot attend school. We have already shown that it is made by law the duty of the child to attend school, and of the parent to send him; and, as long as the broad rule adopted by the board exists, the child must be vaccinated, or it and its parents must be law breakers. If the rule was that during the prevalence of the smallpox in Kalamazoo the child could not attend school unless vaccinated, a very different result would be reached. These epidemics never last very long, and the parent and child might well say, if they desired, that they would absent themselves from school during the epidemic; and this could be done without their being lawbreakers. In the case cited by Justice Long (*Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742), the record shows that smallpox then existed in the school district. The school board had, because of this fact, and at the request of the board of health, adopted the rule requiring vaccination. A very different case than the case at bar. In *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383, the legislature itself passed a law requiring vaccination, and it was held to be within the police power; but it is not believed that a case can be found where a board of education, under the general power conferred upon it, is held to have the power to pass a general rule shutting the schools against all children not vaccinated. The question has never before been raised in this state, but the principles involved are not new. In *Potts v. Breen*, 167 Ill. 67, 39 L. R. A. 152, 47 N. E. 81, the state board of health adopted a rule that no pupil should attend a public school unless vaccinated, and by their directions the school board excluded unvaccinated children from the school. The power given to the board of health was much greater than that conferred upon the Kalamazoo board of education. In holding that the board of health and the school board had exceeded their authority, the court said: "While school directors and boards of education are invested with power to establish, provide for, govern, and regulate public schools, they are in these respects no wise subject to the direction or control of the state board of health; and, as before pointed out, they have no authority to exclude children from the public schools on the ground that they refuse to be vaccinated, unless, indeed, in cases of emergency, in the exercise of the police power, it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox. Undoubtedly, also, children infected with or exposed to smallpox may be temporarily ex-

NOTE.—For vaccination as condition of attending school, see, in this series, *Duffield v. Williamsport School Dist.* (Pa.) 25 L. R. A. 152, and note; *Blissell v. Davison* (Conn.) 29 L. R. A. 251; *State ex rel. Adams v. Burdge* (Wis.) 37 L. R. A. 157; *Potts v. Breen* (Ill.) 39 L. R. A. 152; and *Blue v. Beach* (Ind.) 50 L. R. A. 64.
54 L. R. A.

clude it, or the school be temporarily suspended; but, like the exercise of similar power in other cases, such power is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases. No one would contend that a child could be permanently excluded from a public school because it had been exposed to smallpox, or that the school could be permanently closed because of the remote fear that the disease of smallpox might appear in the neighborhood, and that if the school should then be open, and children in attendance upon it, the public would be exposed to the contagion. And, upon the same line of reasoning, without a law making vaccination compulsory, or prescribing it, upon grounds deemed sufficient by the legislature as necessary to the public health, as a condition of admission to or attendance upon the public schools, neither the state board nor any local board has any power to make or enforce a rule or order having the force of a general law in the respects mentioned.

... However fully satisfied, by learning and experience, a board might be that anti-toxine would prevent the spread of diphtheria, no one would contend that a rule enforcing its use as a condition precedent to the admission of a child to the public schools would, as the law now is, be valid. It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health, and in conformity to law, be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be." In *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347, the board of health, under its general powers, adopted a rule excluding from the public schools pupils who had not been vaccinated. The school board undertook to carry out the rule. The court said: "The police power of the state is relied on to support the rule in question. This power has been defined in varying language, but of substantially the same general import. 'All laws for the protection of life, limb, and health, for the quiet of the person, and for the security of property,' fall within the general police power of the government. 'All persons and property are subjected to all necessary restraints and burdens, to secure the general comfort, health, and prosperity of the state;' and it has been said that 'it is coextensive with self-protection, and is not inaptly termed the law of overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." *Tiedeman*, Pol. Power, 2-5; *Cooley*, Const. Lim. 572; *Redfield*, Ch. J., in *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Lakeview v. Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep. 71; *State v. Noyes*, 47 Me. 189. As the police power imposes restric-

tions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support, and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions; and, in general, it is the province of the lawmaking power to determine in what cases or upon what conditions this power may be exercised. As applied to the present case, the relator had a right, secured by statutory enactment, to have his children continue to attend the city schools in which they were respectively enrolled as pupils; and they, too, had a right to so attend such schools. Whether it be called a "right" or "privilege" cannot be important, for in either view it was secured to the relator, and to his children as well, by the positive provisions of law, and was to be enjoyed upon such terms and under such conditions and restrictions as the lawmaking power, within constitutional limits, might impose. There is no statute in this state authorizing compulsory vaccination, nor any statute which requires vaccination as one of the conditions of the right or privilege of attending the public schools; and, in the absence of any such statute, we think it cannot be maintained that the rule relied upon is a valid exercise of the rightful powers of the state board of health. The state board of health is a creature of the statute, and has only such power as the statute confers. It has no common-law powers. To lawfully exclude the relator's children from the city schools for the cause relied on required such a change in the existing law as the legislature alone could make,—a change that should make vaccination of pupils compulsory, or at least prescribe it as a condition of the right or privilege of attending the public schools generally, or during the occurrence of certain emergencies, or upon the happening of certain contingencies or conditions in respect to the prevalence of smallpox. The powers of the state board of health, though quite general in terms, must be held to be limited to the enforcement of some statute relating to some particular condition or emergency, in respect to the public health; and, although they are to be fairly and liberally construed, yet the statute does not, either expressly or by fair implication, authorize the board to enact a rule or regulation which would have the force of a law changing the statute in relation to the admission, and the right of pupils of a proper school age to attend the public schools. It is not a question as to what the legislature might do, under the police power, about requiring vaccination as a prerequisite to attending school; nor is it a question of whether the legislature could confer this power upon the school board. The board of education is a creature of the statute. It possesses only such powers as the statute gives it. The legislature has said who may and should attend the public schools. It has nowhere undertaken to confer the power upon the school board to change these conditions by passing a general, continuing rule excluding children from

the public schools until they comply with conditions not imposed upon them by the legislative branch of the government. In what I have said I do not mean to intimate that during the prevalence of diphtheria or smallpox, or any other epidemic of contagious disease, in a school district, the board may not, under its general powers, temporarily close the schools, or temporarily say who shall be excluded from the schools until the epidemic has passed; but what I do say is that the legislature has not undertaken to give them the power, when no epidemic of contagious disease exists, or is imminent in the district, to pass a general, continuing rule which would have the effect of a general law excluding all pupils who will not submit to vaccination. I think the learned judge was right in saying the school board exceeded its power.

The order of the court below is affirmed.

Montgomery, Ch. J., and Hooker, J., concurred with Moore, J.

Long, J., dissenting:

The relator is a taxpayer and resident of the city of Kalamazoo and school district No. 1, above named. He has three children, aged, respectively, eleven, nine, and seven years; being all within the school age, and entitled to attend the public schools of said district. It appears that in 1894 the school-district board enacted the following rule: "No pupil shall be admitted into any public school who cannot furnish satisfactory evidence that he or she has been vaccinated or otherwise secured against smallpox, and no pupil affected with any contagious disease, or coming from a house where such a disease exists, shall be allowed to remain in any public school." This rule has been in force since its adoption, and is still in force. The relator's three children have never been vaccinated. He sent them to school at the opening of the term in January last, but admission was refused by the respondent because they had not been vaccinated or otherwise protected against smallpox in accordance with the above rule. Upon such refusal the relator petitioned the circuit court for mandamus to compel the board to permit his said children to attend said school notwithstanding such rule. The court below granted the prayer of the petition. The case comes into this court by certiorari.

Counsel for relator contends that the rule is unreasonable and unconstitutional; that the relator, being a Christian Scientist, cannot conscientiously consent to have his children vaccinated, because to do so would infringe upon his religious beliefs and scruples; that his children could not be vaccinated without his consent, and therefore without any act of their own would be excluded from the enjoyment of the public schools, secured to them by the Constitution; that the statute is mandatory that they shall attend the public schools during a certain portion of the year; and that the parents, as well as the children, are liable to punishment under the truancy laws of 54 L. R. A.

this state for failure of the children to attend school. It is also contended that there is no statute of the state providing for compulsory vaccination, and no statute giving any school district authority or power to require children to be vaccinated, as a condition precedent to attending school. It is admitted that there has been no smallpox in the city of Kalamazoo or in such school district No. 1, but it is known that the disease has been and is prevalent in several parts of the United States and in this state. We do not feel called upon to enter upon or discuss the question of the religious scruples of the relator. The only question is whether the respondent had lawful authority to adopt and enforce the rule complained of. It is not a rule compelling vaccination, but one adopted for the safety of the children in attendance upon the school, and for the safety of the whole community; and providing that those who do not submit to such protection, such as science and experience have shown it to be, against smallpox, cannot be permitted to endanger the lives of those who do comply therewith. The respondent district was organized under act No. 335, Local Acts 1891. The general management and conduct of the affairs of the district are vested in a body of six trustees. By § 8 the board is given power to hire any and all necessary teachers for the several schools of the district, and fix the amount of their compensation and of all teachers employed by the board, and to determine the ages and qualifications for admission therein. By the same section the board is given authority to enact such rules and by-laws as may be necessary for the preservation of all the property belonging to the district and for the government of the schools, and in reference to all business connected therewith, and to regulate the conduct of all persons in the schools and on the grounds belonging to said district. Section 11 of the act provides: "It shall be the duty of the board of education to . . . generally do all things needful and desirable for the maintenance, prosperity, and success of the schools and the library in the district." Section 34 of the act provides: "School district No. 1 of the city and township of Kalamazoo shall in all things not herein otherwise provided be governed by its powers and duties defined by the general laws of this state regulating school districts and district libraries therein, and all acts and parts of acts inconsistent with this act are hereby repealed." The general school law provides: "The district board shall have the general care of the school, and shall make and enforce suitable rules and regulations for its government and management." We think, under these provisions, that the board of trustees had the power to make the rule now sought to be set aside, and that such rule is a reasonable regulation. A case similar in principle was before the supreme court of Pennsylvania in 1894. *Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742. It appeared there that the school board

adopted a resolution providing that "no pupils shall attend the schools of this city, except they be vaccinated, or furnish a certificate from a physician that such vaccination has been performed." The child who was excluded from attendance was within the school age and in good health, and was excluded solely on the ground of noncompliance with the rule of the board. Mandamus was sought to compel the board to permit the child to attend without complying with the rule. The writ was denied in the court below, and that order affirmed in the supreme court. It was there said: "We are not required to determine judicially whether the public belief in the efficacy of vaccination is absolutely right or not. We are to consider what is reasonable in view of the present state of medical knowledge, and the concurring opinions of the various boards and officers charged with the care of the public health. The answers of the city and the school board show the belief of the proper authorities to be that a proper regard for the public health and for the children in the public schools require the adoption of the regulation complained of. They are doing in the utmost good faith what they believe it is their duty to do; and, though the plaintiff might be able to demonstrate by the highest scientific tests that they are mistaken in this respect, that would not be enough. It is not an error of judgment or a mistake upon some abstruse question of medical science, but an abuse of discretionary power, that justifies the courts in interfering with the conduct of the school board, or setting aside its action. It is conceded that the board might rightfully exclude the plaintiff's son if he was actually sick with, or just recovering from, the smallpox. Though he might not be affected by it, yet, if another member of the same family was, the right to exclude him, notwithstanding he might be in perfect health, would be conceded. How far shall this right to exclude one for the good of many be carried? That is a question addressed to the official discretion of the proper officers, and when the discretion is honestly and impartially exercised the courts will not interfere." In that case it appeared that by no legislative act had school districts been given express power to prescribe vaccination as a necessary qualification for admission into the common schools, or to suspend or expel pupils for failure to comply with the rule requiring vaccination. It was found that there was smallpox within the city, and we think that court very properly held that it was within the discretionary power of the board to adopt such a rule. See also *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 56 N. E. 59. In the present case, while it did not appear that smallpox was prevalent in the city of Kalamazoo, it did appear that it was in many places within the state. The board enforced the rule as a precautionary measure to prevent the spread of the disease. We think this was within the discretionary

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power of the board. The order of the court below should be reversed.

Grant, J., concurred with Long, J.

John G. MCGANNON

v.
MICHIGAN MILLERS' MUTUAL FIRE
INSURANCE COMPANY, *Plff. in Err.*

(.....Mich.....)

1. All policies, whether standard or not, are covered by a statute declaring that no policy of fire insurance shall be declared void by the insurer for breach of any condition if the insurer has not been injured by it.
2. The legislature may provide that no breach of condition in an insurance policy shall avoid it, as to an insurer not injured thereby, without interfering with any constitutional right of contract, or, as to future contracts, impairing their obligation, since, insurance companies being the creatures of the legislature, it may prescribe limitations in relation to forfeiture of their contracts.
3. The temporary absence of a competent watchman regularly employed for a mill, during which the mill is destroyed by fire, will not avoid a policy of insurance on the property, which provides that statements in the application shall be a part of the contract, although in the application the insured agrees to keep a watchman on the premises at such times as that when the fire occurs.

(Grant, J., dissents.)

(July 19, 1901.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Crane, Norris, & Drew, for plaintiff in error:

This application was a warranty.

On the night of the fire, and at the time it occurred, the watchman was not present.

A warranty must be literally performed.

Hoose v. Prescott Ins. Co. 84 Mich. 317, 11 L. R. A. 340, 47 N. W. 587; *American Ins. Co. v. Gilbert*, 27 Mich. 433; 1 Biddle, Ins. § 543; 1 May, Ins. § 156; *Ostrander*,

NOTE.—For another case in this series as to effect of failure to keep watchman on liability under insurance policy stipulating that watchman shall be employed, where the loss is not due to such failure, see *Hart v. Niagara F. Ins. Co.* (Wash.) 27 L. R. A. 86.

As to constitutionality of statute making void all stipulations in policies which limit liability to less than full amount of loss, if this does not exceed the amount of the insurance, see *Dugger v. Mechanics' & T. Ins. Co.* (Tenn.) 28 L. R. A. 796.

As to statute making nonoccupancy immaterial notwithstanding a provision of the policy, unless the risk is thereby increased, see *Moody v. Amazon Ins. Co.* (Ohio) 26 L. R. A. 818.

Fire Ins. § 136; *Jefferies v. Economical L. Ins. Co.* 22 Wall. 47, 22 L. ed. 833.

Where the assured warrants to keep a watchman on the premises he must see to it that the watchman attends to his duty. If the watchman does not, the policy is avoided.

Au Sable Lumber Co. v. Detroit Mfrs. Mut. F. Ins. Co. 89 Mich. 407, 50 N. W. 870; *Spies v. Greenwich Ins. Co.* 97 Mich. 310, 56 N. W. 560; *Rankin v. Amazon Ins. Co.* 89 Cal. 203, 26 Pac. 872; *McKensie v. Scottish Union & Nat. Ins. Co.* 112 Cal. 548, 44 Pac. 922; *Whitlaw v. Phoenix Ins. Co.* 28 U. C. C. P. 63; *Blumer v. Phoenix Ins. Co.* 45 Wis. 627, 48 Wis. 535, 33 Am. Rep. 830, 4 N. W. 674; *May v. Buckeye Mut. Ins. Co.* 25 Wis. 304, 3 Am. Rep. 70; *Brooks v. Standard F. Ins. Co.* 11 Mo. App. 349; *Wensel v. Commercial Ins. Co.* 67 Cal. 438, 7 Pac. 817; *Glendale Woolen Mfg. Co. v. Protection Ins. Co.* 21 Conn. 19, 54 Am. Dec. 309; *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *First Nat. Bank v. Insurance Co. of N. A.* 50 N. Y. 45; *Sheldon v. Hartford F. Ins. Co.* 22 Conn. 235, 58 Am. Dec. 420.

The contract being that the matter is as represented or shall be as promised, unless it proves so, whether from fraud, mistake, negligence, or other cause not proceeding from the insurer, or the intervention of the law, or the act of God, the insured can have no claim.

1 May, Ins. § 156, p. 293; *Fowler v. Aetna F. Ins. Co.* 6 Cow. 673, 16 Am. Dec. 460; *Sirison v. Massachusetts Mut. F. Ins. Co.* 4 Mass. 337, 3 Am. Dec. 217; *Worcester v. Worcester Mut. F. Ins. Co.* 9 Gray, 27; *Duckett v. Williams*, 2 Crompt. & M. 348; *Cooper v. Farmers' Mut. F. Ins. Co.* 50 Pa. 299, 88 Am. Dec. 544; *Sayles v. Northwestern Ins. Co.* 2 Curt. C. C. 610, Fed. Cas. No. 12,422.

It is immaterial whether the assured knows that the fact warranted is true or not.

1 Biddle, Ins. § 559; *Duckett v. Williams*, 2 Crompt. & M. 348; *Mutual Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264; *Dennison v. Thomaston Mut. Ins. Co.* 20 Me. 125, 37 Am. Dec. 42; *Co-operative Life Assn. v. Leflore*, 53 Miss. 2; *Connecticut Mut. L. Ins. Co. v. Pyle*, 44 Ohio St. 19, 4 N. E. 465; *Commonwealth Mut. F. Ins. Co. v. Huntsinger*, 98 Pa. 41; *West Rockingham Mut. F. Ins. Co. v. Sheets*, 26 Gratt. 854; *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876.

The act in question is unconstitutional.

This is a law impairing the obligation of the contract as effectually as if the law declared that the clause broken should be stricken from the contract.

Shaver v. Pennsylvania Co. 71 Fed. 931; *Wallace v. Georgia C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Com. v. Potomska Mill Corp.* 155 Mass. 122, note, 54 L. R. A.

28 N. E. 1128; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 170, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288.

Breach of an express warranty in insurance works an avoidance, whether so expressly provided or not.

Joyce, Ins. § 1951; Wood, Fire Ins. § 190; Ostrander, Fire Ins. § 136; Beach, Ins. § 457; *Merchants' Life Assn. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 267; *American Ins. Co. v. Gilbert*, 27 Mich. 433; *Livingston v. Maryland Ins. Co.* 7 Cranch, 506, 3 L. ed. 421; *Newcastle F. Ins. Co. v. Macmorran*, 3 Dow, 255; *Quin v. National Assur. Co.* 1 Jones & C. 316; *De Hahn v. Hartley*, 1 T. R. 343; *Glendale Woolen Mfg. Co. v. Protection Ins. Co.* 21 Conn. 19, 54 Am. Dec. 309; *Texas Bkg. & Ins. Co. v. Stone*, 49 Tex. 11; N. Y. Ins. Code, § 1421; Cal. Ins. Code, § 2610; Barber, Ins. pp. 92, 93.

Messrs. Cahill & Wood, for defendant in error:

In dealing with warranties, common sense is not to be lost sight of, and the fair, practical intent of the parties is to be sought, not the hair-splitting of a college of wit crackers, and substantial fulfillment of a warranty is enough.

1 May, Ins. § 156; *Merchants' Life Assn. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251.

No paragraph relating to the watchman appears in the policy, and the one in the application suggests no penalty. This omission in an instrument replete with clear and explicit declarations of forfeiture is worthy of note. The presence of the declaration of forfeiture in every other instance, and its absence in this, is clearly not an oversight.

Steele v. German Ins. Co. 93 Mich. 82, 18 L. R. A. 85, 53 N. W. 514.

If it was intended that any failure to keep a watchman rendered the policy void the parties would have so declared.

Au Sable Lumber Co. v. Detroit Mfrs. Mut. F. Ins. Co. 89 Mich. 407, 50 N. W. 870; *Hall v. Concordia F. Ins. Co.* 90 Mich. 403, 51 N. W. 524; *Aetna L. Ins. Co. v. King*, 84 Ill. App. 171.

The policy should not be declared void for the breach of any condition unless it is expressly so stated in the policy.

Merchants' Life Assn. v. Yoakum, 39 C. C. A. 56, 98 Fed. 251; *Connecticut F. Ins. Co. v. Juary*, 60 Neb. 338, 51 L. R. A. 693, 83 N. W. 78; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563.

The clause is complied with by employing a reliable watchman and charging him with the duty of watching the premises, though he is asleep at the time of the fire.

Phoenix Assur. Co. v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810; *Burlington F. Ins. Co. v. Coffman*, 13 Tex. Civ. App. 439, 35 S. W. 406.

The watchman must perform his duties in the manner in which men of ordinary care and skill in similar departments manage their own business of like kind. A substantial compliance with the contract is all that is required.

Hanover F. Ins. Co. v. Gustin, 40 Neb. 828, 50 N. W. 375; *London & L. F. Ins. Co. v. Gerteson*, 21 Ky. L. Rep. 471, 51 S. W. 617; *Crocker v. People's Mut. F. Ins. Co.* 8 Cush. 79; *King Brick Mfg. Co. v. Phoenix Ins. Co.* 164 Mass. 291, 41 N. E. 277.

The temporary absence cannot be regarded as a violation of the condition.

Au Sable Lumber Co. v. Detroit Mfrs. Mut. F. Ins. Co. 89 Mich. 407, 50 N. W. 870; *Kansas Mill Owners' & Mfrs. Mut. F. Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68; *London & L. F. Ins. Co. v. Gerteson*, 21 Ky. L. Rep. 471, 51 S. W. 617; *Hovey v. American Mut. Ins. Co.* 2 Duer, 554; *Busk v. Royal Exch. Assur. Co.* 2 Barn. & Ald. 73; *Henderson v. Western Marine & F. Ins. Co.* 10 Rob. (La.) 164, 43 Am. Dec. 176; *Walker v. Maitland*, 5 Barn. & Ald. 171; *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35, 35 Am. Rep. 589; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713, 41 Am. Dec. 661; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 164, 30 L. R. A. 209, 28 S. W. 877; *Rankin v. Amazon Ins. Co.* 89 Cal. 203, 28 Pac. 872; *Metzger v. Manchester F. Assur. Co.* 102 Mich. 334, 63 N. W. 650.

Breach of an agreement to keep a barrel of water in a certain part of the building does not defeat recovery where it does not appear that the building could have been saved if it had been there.

Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 So. 40.

Such contracts must receive a reasonable interpretation which will not work injustice or lead to absurd consequences.

Liverpool & L. & G. Ins. Co. v. Kearney, 36 C. C. A. 265, 94 Fed. 314; *Western Assur. Co. v. Redding*, 15 C. C. A. 619, 30 U. S. App. 442, 68 Fed. 708; *East Texas F. Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 26 S. W. 720; 1 Phillips, Ins. § 872; *Knights of Honor v. Dickson*, 102 Tenn. 255, 52 S. W. 662; *Niles v. Farmers' Mut. F. Ins. Co.* 119 Mich. 252, 77 N. W. 933; *Cronin v. Fire Asso. of Philadelphia*, 123 Mich. 277, 82 N. W. 45; *Boyer v. Grand Rapids F. Ins. Co.* 124 Mich. 455, 83 N. W. 124; *Sheldon v. Michigan Millers' Mut. F. Ins. Co.* 124 Mich. 303, 82 N. W. 1068.

Defendant is a corporation organized under the laws of the state, and it is entirely within the police power of the state to prescribe limitations upon the forfeiture of a policy, just as it is within its power, as in the standard policy act, to regulate the whole form and substance of the contract to be made.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Jones v. Great Southern Fire Proof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370; *Merchants' Life Asso. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251.

Moore, J., delivered the opinion of the court:

The defendant is a fire insurance company organized under the laws of the state 54 L. R. A.

of Michigan, with its principal office at Lansing, Michigan. The plaintiff is the owner, by assignment from the Verona Mill Company, of a policy of insurance issued to said Verona Mill Company by the defendant company. In March, 1899, the Verona Mill Company made a written application for insurance. Among other things stated in the application is the following:

What facilities have you in the way of force pumps, extinguishers, etc., for putting out fire?

A. Waterworks.

Do you agree to keep a watchman on the premises at all times when not in operation?

A. Yes.

Do you agree to keep at least one cask of salt water on each floor of the buildings, and one or more buckets to each cask, always in order and ready for use in case of fire?

A. Yes.

Do you agree not to use open, movable lights on the premises insured?

Yes.

If both water and steam power are used, state what proportion of the time a permit for steam is wanted.

Is smoking permitted except in the office?

No.

What is the capacity of the mill in twenty-four hours?

200 bbls.

State anything affecting the risk, not otherwise fully explained.

Through what bank do you prefer to have collections on you made?

Farmers' Bank.

And the undersigned applicant hereby warrants that the above is a just, full, and true exposition of the facts and circumstances in regard to the property to be insured, and is and shall be considered as the basis on which insurance is to be effected and continued in force, and the same is understood as incorporated in and forming a part and parcel of the policy as a continuing warranty during the life of such policy. And it is covenanted and agreed that if the situation or circumstances affecting the risk shall be so altered or changed as to render the risk more hazardous, or if there be any change affecting the title, interest, or possession of the property, the assured will notify the secretary of said company forthwith, in writing, of such alteration or change.

Upon this application a policy of insurance was issued. The provisions of said policy which counsel deem material in this controversy read as follows: ". . . Reference is made to assured's application and survey on file in the office of this company, and which is made part of this policy. . . . This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not

truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. This entire policy, unless otherwise provided by agreement indorsed hereon and added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than 10 o'clock, or if it cease to be operated for more than ten consecutive days. . . . If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract, and a warranty by the insured. . . . This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provisions or conditions of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." Afterwards a loss occurred, and this suit was brought. A stipulation of facts was filed, the material parts of which read as follows: "April 17, 1899, at or about 11:30 P. M., fire originated from an unknown cause in the insured property, and the same was totally destroyed by fire. The mill was generally running from 7 o'clock A. M. until 6 o'clock P. M. It was not running during the night nor on Sundays. The mill company maintained in the mill a small electric light plant, which furnished electric lights in the village of Verona; said light plant being started up at dusk in the evening, and closing at 10 o'clock P. M. The Verona Roller-Mill Company employed J. U. Robinson, who was also secretary of the company, as one of its engineers and watchman. He was a competent man to perform the duties for which he was employed. He was hired and had agreed to take charge of the machinery as millwright, engineer, and watchman, as follows: To go on duty at 12 o'clock noon of each day, Sundays excepted, and so long as the mill was running to run the engine, do the firing, look after the repairs to the mill machinery, and when the mill ceased running at 6 o'clock P. M. to run the electric plant above referred to until 10 o'clock P. M., and while running the plant to perform the duties of night watchman at the mill, and after 10 o'clock P. M. to remain on the premises and perform the duties of night watch-

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man until 12 o'clock midnight, when he was relieved by W. B. Taylor and went off duty. He ran the electric light plant Sundays from dark until 10 P. M., and watched Sunday nights from 10 to 12 P. M. W. B. Taylor was employed by the Verona Roller-Mill Company as second engineer and watchman, to perform duties as follows: He was to go on duty every night at 12 o'clock midnight, act as watchman until the mill started up in the morning, when he ran the engine as engineer and fireman until 12 o'clock noon, when he was relieved by J. U. Robinson, and went off duty. On Saturday nights Mr. Taylor went on at 12 o'clock midnight, and watched until daylight, when he went off duty, and no watchman, or other person having the duties of watchman, was in charge of the mill premises on Sundays until the electric light plant was started up in the evening. The employees and officers of the mill company were around the mill on Sundays, there being some one of them at the mill once or twice each Sunday, but no one performing the duties of watchman on Sundays during the day. Mr. Taylor was a competent man for his employment, and was paid by the Verona Roller-Mill Company for performing the duties as above detailed. On the night when the fire occurred, J. U. Robinson ran the electric light plant until 10 o'clock. At that hour he shut down the lighting plant, carefully inspected all the stories of the mill, and went home, leaving the mill at about 10:15 P. M.; his wife being quite sick at the time, which was the occasion of his leaving the mill on this occasion prior to 12 o'clock P. M. Robinson went straight home and went to bed, and at the time the fire broke out was in bed at his house at the other end of the village of Verona, about 200 yards away from the mill, and out of sight of the mill. The other officers and stockholders of the Verona Roller-Mill Company were not aware that Robinson had left the mill that night. Said Robinson had on a few occasions prior to the date of the fire left the mill alone in a similar way between the hours of 10 and 12 o'clock P. M., but his absence on these occasions was likewise unknown to any of the other officers or stockholders of the Verona Roller-Mill Company. It is admitted that the officers and stockholders of the Verona Roller-Mill Company used due diligence in the selection of Robinson and Taylor as watchmen at the mill; that Robinson's absence was occasioned solely by the sickness of his wife, who was quite sick; that the mill property destroyed was worth in excess of the total amount of the insurance upon the same; that the company sustained quite a loss not covered by insurance; and that there was no fraud or bad faith upon the part of the plaintiff or his assignor, the Verona Roller-Mill Company. It is admitted that all of the conditions and agreements set forth in said application and policy have been fully and literally complied with by the Verona Roller-Mill Company and the plaintiff herein, except as regards the absence of the watchman, as hereinbefore set out, and

as to whether this condition of the application of the policy has been complied with is to be determined by the court upon this agreed state of facts; and, if the facts herein set out constitute such a compliance, then judgment is to be rendered for the plaintiff for \$2,849.67, with interest at 6 per cent per annum from the 25th day of April, 1899; otherwise, judgment is to be rendered for the defendant." The circuit judge rendered a judgment in favor of plaintiff for the full amount of his claim. The case is brought here by writ of error.

The circuit judge held that § 5180, Comp. Laws 1897, applies to this policy of insurance, and the policy did not become void for failure to keep a watchman upon the premises on Sundays; the loss not having occurred during such times, or by reason of the absence of the watchman on Sundays. This policy was issued in March, 1899, nearly two years after the provisions of § 5180, Comp. Laws, took effect. Counsel insist that the provisions of that section apply only to a Michigan standard policy, and that the policy sued upon is not a Michigan standard policy. We do not need to decide whether this policy issued by a Michigan company, with an indorsement on the back, "Standard Policy," is a Michigan standard policy or not. Section 5180 reads as follows: "That no policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach; or where a loss has not occurred during such breach, or by reason of such breach of condition." This language is broad enough to cover the policy in suit, whether it is regarded as a Michigan standard policy or not, and we think it was intended to cover all policies issued in this state after it became a law. Though there is no direct adjudication to that effect, we think the opinion of the court in this respect is foreshadowed in *Niles v. Farmers' Mut. F. Ins. Co.* 119 Mich. 252, 77 N. W. 933; *Cronin v. Fire Assn. of Philadelphia*, 123 Mich. 277, 82 N. W. 45; *Shelden v. Michigan Millers' Mut. F. Ins. Co.* 124 Mich. 303, 82 N. W. 1068; *Boyer v. Grand Rapids F. Ins. Co.* 124 Mich. 455, 83 N. W. 124. Counsel say: "The act in question is unconstitutional. It puts an unconstitutional limit on the right of parties *sui juris* to make contracts for themselves. The legislature has no authority to deprive a party of his right to make contracts not immoral or contrary to public policy. Any limitation which transgresses this private right is unconstitutional and invalid. Also this statute as now set up by plaintiff impairs the obligation of contract, and is for that reason invalid." We cannot agree with counsel in this respect. The defendant corporation is a creature of the statute. It could not engage in the business of insurance except by virtue of the statute. It is entirely competent for the legislature to prescribe the forms of its contracts, and the limitations in relation to forfeitures therein. It, of course, would not be competent to

impair the obligation of contracts already entered into, but that is not what is attempted to be done here. The idea of the legislature, doubtless, was to protect policy holders, and to see that their insurance did not fail because of any breach in the terms of the policy or the application which did not result in injury to the insurance company. See note a, § 156, May, Ins., and cases there cited. The court also held that the act of Robinson, the watchman, in leaving the mill the night of the fire at 10:15 P. M. and remaining away from there during the time he was to act as watchman, under the facts stipulated, did not constitute a breach of the warranty which avoided the policy.

It is insisted upon the part of the defendant that the application is the basis of the insurance, and the agreement to keep a watchman is a warranty, and the failure to do so avoids the policy. It is said: "There is no room for construction, no latitude, no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed." 1 May, Ins. § 156. On the part of the plaintiff it is said the agreement to keep a watchman is a promissory agreement, and not a warranty, the literal observance of which is necessary to keep the policy in force, inasmuch as there is no express provision in the policy that a failure to keep a watchman at all times shall make the policy void. The authorities upon these several propositions are very conflicting. The old rule as to warranties fully sustains the contention of counsel for defendant, but there has been a tendency of late years to hold that the substantial fulfillment of an agreement like that contained in the application is sufficient. In May, Ins. § 156, it is said, after the language before quoted: "A learned judge and author declares it to be unfortunate that so strict a rule has been established, and intimates—what is no doubt entirely true—that courts are not at all inclined to go beyond the precedents to support a warranty. There are even authorities to the effect that in dealing with warranties common sense is not to be lost sight of, and that the fair, practical intent of the parties is to be sought, not the hair-splitting of a college of wit crackers, and that substantial fulfillment of a warranty is enough." In the policy sued upon it is provided the policy shall be void for any one of seventeen different reasons. It also provides the company shall not be liable for loss occasioned by invasion, or from loss resulting from a number of other causes, but it nowhere provides the policy shall be void if a competent watchman is hired by the insured, and is temporarily absent from his post, or if one or more of the buckets to each cask of salt water should be temporarily removed. If it had been intended to avoid the policy for these reasons, it would not have been difficult to say so. The following illustrations will serve to show the tendency of courts: The case of *Hanover F. Ins. Co. v. Gustin*,

40 Neb. 828, 59 N. W. 375, was much like the one at bar. We quote from the opinion: "Watchman.—Is one kept on the premises during the night, and at all other times when the works are not in operation, or when the workmen are not present? A. Yes. Q. Is any other duty required of the watchman than watching for the safety of the premises? A. Yes; cleaning the floors and premises. The evidence shows that the fire occurred about half-past seven o'clock, and that the watchman, with Mr. Gustin, left the premises about 6:15 o'clock. Before their departure, however, the watchman had inspected the different parts of the mill, and found everything apparently safe from fire. He locked up the building, and went to the business part of the city of Kearney to buy a padlock with which to secure a door of an outside building. While he was gone he went to the depot of the Burlington & Missouri River Railroad Company and purchased a ticket for a lady friend of his, and in the interval between his leaving the planing mill and returning thereto he ate his supper. While on his way to the planing mill to resume his duties of watchman the alarm of fire was sounded. It is insisted that the absence of the watchman for the purposes named, with the assent of Mr. Gustin, necessarily avoided the policy. To this doctrine we cannot assent. Even giving the statements of the application 'that a watchman is kept on the premises during the night and at all other times when the works are not in operation' the effect of a warranty,—a claim not necessary now to be settled,—the language should receive a reasonable construction. We are aware that on this proposition there is not accord of authorities; possibly in number they are adverse to this view, yet it is believed that the language of Judge Shaw in *Crocker v. People's Mut. F. Ins. Co.* 8 Cush. 79, is reasonable and just. He said: "The stipulation, 'a watchman kept on the premises,' inserted as it is in the body of the policy immediately after the description of the property insured, is in the nature of a warranty, and must be substantially complied with by the assured, but the terms are not explicit as to the time and manner of keeping a watch. It does not stipulate for a constant watch. It therefore requires construction, as matter of law, to determine what is meant in this policy by keeping a watch. It relates to a factory, to its safety against fire; and this depends upon the habit or practice in this respect, and upon the fact whether that usage has been followed. When there is an express stipulation that a thing shall be done, but the contract is silent as to the time and manner, the law holds that it must be reasonable in this respect, having regard to the object and purpose of the stipulation, in this case, to the safety of the building. If it is done in the manner in which men of ordinary care and skill in similar departments manage their own affairs of like kind, this is one strong ground to hold it reasonable, and to war-

rant the admission of evidence of usage." The same principle requiring a reasonable construction of the language used is recognized and enforced in *Sheldon v. Hartford F. Ins. Co.* 22 Conn. 235, 58 Am. Dec. 420; *Frisbie v. Fayette Mut. Ins. Co.* 27 Pa. 325; *Houghton v. Manufacturers' Mut. F. Ins. Co.* 8 Met. 114, 41 Am. Dec. 489; *Percival v. Maine M. M. Ins. Co.* 33 Me. 242; *Stout v. City F. Ins. Co.* 12 Iowa, 371, 79 Am. Dec. 539. These views have quite directly received the sanction of this court in *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846, 45 N. W. 171." It was held the company was liable. In *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810, the application contained an agreement to have a watchman on the premises at night and at all times when the work was suspended. It was held that the insured, by employing a reliable watchman, and charging him with the duty of watching the premises, substantially complied with the contract in that respect, though the watchman may have been asleep at the time of the fire. The court used the following language: "Appellee testified: 'At the time of the fire I had a watchman at the mill, named Dean. I employed him as a watchman. I assigned him the duty to be at the mill at a certain hour in the evening, when the hands left, and to stay there until the hands came back in the morning, and to watch the mill to see that nobody bothered anything or stole anything.' In the absence of any testimony pointing out more clearly the duties required of a watchman, we must hold that the appellee complied with the contract by placing on the premises a reliable watchman, charged with the duties of watching the property during the night, even though such watchman may have been asleep when the fire began. *Sierra Mill Smelting & Min. Co. v. Hartford F. Ins. Co.* 76 Cal. 235, 18 Pac. 267; *Au Sable Lumber Co. v. Detroit Mfrs. Mut. F. Ins. Co.* 89 Mich. 407; 50 N. W. 870; *Houghton v. Manufacturers' Mut. F. Ins. Co.* 8 Met. 123, 41 Am. Dec. 489. In the last-named case the question was asked: 'Is a watch kept constantly in the building? If no watch is constantly kept, state what is the arrangement respecting it.' Answer. 'No watch is kept in or at the building, but the mill is examined thirty minutes after work.' In that case Chief Justice Shaw said: 'Two questions were made at the trial: 'First. Whether this representation of the usual practice amounted to any condition or stipulation that it should be continued. It was ruled at the trial, and the whole court are now of opinion, that as this examination was manifestly intended as a substitute for a constant watch, as it was one which the assured had in their power to make or cause to be made, as it was one of the precautions tending to secure the property against danger of fire and tending to its safety, it was one which, as a general practice, the assured were bound to follow, although an occasional omission, owing to accident or the negligence of subordinate persons, serv-

ants, or workmen, not sanctioned nor permitted by the assured, or by their superintendent, manager, or agent, might not be a breach or noncompliance." See *Hovey v. American Mut. Ins. Co.* 2 Duer, 554; *Crocker v. People's Mut. F. Ins. Co.* 8 Cush. 79; *London & L. F. Ins. Co. v. Gerteson*, 21 Ky. L. Rep. 471, 51 S. W. 617; *Burlington F. Ins. Co. v. Coffman*, 13 Tex. Civ. App. 439, 35 S. W. 406. In *Kansas Mill Owners & Mfrs. Mut. F. Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68, in the application the question was asked, "Do you agree to keep a watchman on the premises at all times when . . . not in operation?" The answer was, "Yes." A watchman was employed, who was in and about the mill until 10 o'clock, when he went to a tent occupied by his family, about 200 feet away, and remained until the fire occurred, nearly two hours later. The company was held liable. In *Rankin v. Amazon Ins. Co.* 89 Cal. 203, 26 Pac. 872, under the facts in that case it was held the company was not liable, but in the opinion the following language is used: "If a loss is occasioned by the mere fault or negligence of the watchman, unaffected by fraud or design on the part of the insured, it is within the protection of the policy; but, to entitle the insured to recover, it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the warranty. *Trojan Min. Co. v. Fireman's Ins. Co.* 67 Cal. 27, 7 Pac. 4; *Wenzel v. Commercial Ins. Co.* 67 Cal. 438, 7 Pac. 817; *Cowan v. Phenix Ins. Co.* 78 Cal. 181, 20 Pac. 408; *Waters v. Merchants' Louisville Ins. Co.* 11 Pet. 219, 9 L. ed. 604." In *King Brick Mfg. Co. v. Royal Ins. Co.* 164 Mass. 291, 41 N. E. 277, attached to each of the policies of insurance was a rider containing, among other things, these words: "Situated on east side of Pleasant river, in Columbia Falls, Maine. Steam pump, with sufficient hose to cover buildings. Constant watch." The watchman was absent when the fire occurred, without the knowledge of the insured. It was claimed the words "constant watch" were a warranty, and not a representation, and that the company was not liable. The court said: "Was there a breach of any of the terms of the policy by the insured? This depends upon whether the insured absolutely promised that there should be 'a constant watch;' in other words, whether it warranted this, or whether the words constitute a representation, merely, and are governed by the familiar rules applicable to representations. Unless they amount to a warranty, there is no breach of the agreement. In this part of the case we assume, of course, that the first clause of the section is not broad enough to include a statement as to the future. It is a familiar rule of construction that a promise in regard to the future, which is not clearly made a warranty, is a representation only, and not a warranty. *Houghton v. Manufacturers' Mut. F. Ins. Co.* 8 Met. 114, 41 Am. Dec. 489; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 59 Am. Dec. 192; 54 L. R. A.

First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 873, 24 L. ed. 563; *Garcelon v. Hampden F. Ins. Co.* 50 Me. 580. On the principles laid down in these cases, we cannot regard the words 'constant watch' as constituting a condition precedent to the right to recover, and consider them as a representation that a constant watch would be kept. The duty was imposed upon the insured to use all reasonable care, and to take all reasonable means to see that a constant watch was kept. This was done by making a rule to that effect and providing a watch. No negligence or fraud is imputed to the assured. The loss was caused by the negligence of a servant, and this is a risk covered by the insurance. There was therefore no breach of the terms of the policy by the insured. *Shaw v. Robberds*, 6 Ad. & El. 75; *Dobson v. Sotheby*, Moody & M. 90; *Houghton v. Manufacturers' Mut. F. Ins. Co.* 8 Met. 114, 41 Am. Dec. 489; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 59 Am. Dec. 192; *Loud v. Citizens' Mut. Ins. Co.* 2 Gray, 221; *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120, 131, 99 Am. Dec. 497; *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213, 219; *Mickey v. Burlington Ins. Co.* 35 Iowa, 174, 14 Am. Rep. 404." In *East Texas F. Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 26 S. W. 720, the assured agreed to keep correct books and the last inventory locked in a fireproof safe, or in some place not exposed to fire, and in case of loss to produce the books and inventory. They were kept as required, but when the store was on fire the bookkeeper, fearing the safe was not fireproof, took the books and inventory to remove them to a safe place. As he ran out of the building he dropped some of them, and they were destroyed by fire. The company claimed, by way of defense, the plaintiff must literally comply with his covenant, and produce the books and inventory after the loss, before it could recover. The court declined to so hold, and the company was held liable. The case of *Liverpool & L. & G. Ins. Co. v. Kearney*, 30 C. C. A. 265, 94 Fed. 314, was much like the last case. Among other things, the court said: "Counsel for defendant company direct our attention, however, to the last paragraph of the 'iron-safe clause,' and urge, in substance, that the stipulation therein contained bound the plaintiffs, in any event, to produce the inventory after the fire, and that, even though it was lost and cannot be produced, they are not entitled to recover. This argument proceeds upon the theory that the last paragraph of the 'iron-safe clause' must be read literally, that it admits of no exceptions or qualifications, and that the failure to produce the books or inventory for any reason vitiates the policies. We cannot assent to this view of the case. Like all contracts made between private parties, and like all statutes, for that matter, they must receive a reasonable interpretation, which will not work injustice or lead to absurd consequences. *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Heydenfeldt v. Daney Gold & Silver Min. Co.* 93 U. S. 634, 23 L. ed. 995;

Church of Holy Trinity v. United States, 143 U. S. 457, 460, 461, 36 L. ed. 226, 228, 12 Sup. Ct. Rep. 511; *Scott v. Latimer*, 33 C. C. A. 1, 60 U. S. App. 720, 89 Fed. 843; *Thurber v. Miller*, 14 C. C. A. 432, 32 U. S. App. 209, 67 Fed. 371; *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325." See also *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *Au Sable Lumber Co. v. Detroit Mfrs. Mut. F. Ins. Co.* 89 Mich. 407, 50 N. W. 870; *Spies v. Greenwich Ins. Co.* 97 Mich. 310, 56 N. W. 560.

Judgment is affirmed.

Hooker, J., did not sit. **Montgomery**, Ch. J., and **Long**, J., concurred with **Moore**, J.

Grant, J., dissenting:

I cannot concur with my brethren in this case. Plaintiff agreed to keep a watchman upon the premises at all times when the mill was not in operation. The watchman whom plaintiff employed left his post in the night, went to his home, and retired to his bed. Who assumed the duty to keep the watchman? The plaintiff. Who assumed the risk of neglect of that duty by him? Clearly, it seems to me, the plaintiff. It was not contemplated that the defendant company should undertake to see that the watchman performed his duty or should be responsible for such neglect. Under the holding of my brethren, the premises might be unwatched night after night, and still the defendant would be liable. While there is an apparent conflict in the authorities on the question of warranties, I think the following rule is in harmony with the great weight of authority: "The courts are reluctant to import terms of warranty contained in the application for insurance into the completed agreement, when the policy does not clearly disclose the parties' agreement to the union of the two papers in one contract. *Phoenix Mut. L. Ins. Co. v. Radcliff*, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500. But when there is a distinct agreement that the application is a part of the contract, and the statements in the application, upon which the contract is based, are expressly declared to be warranties, the insured's intent to bind himself to the exact truth in his answers, even as to immaterial facts, is adequately manifested, and the parties themselves thereby agree upon the materiality of the things warranted. *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188, 40 Am. Dec. 345; *Armour v. Transatlantic F. Ins. Co.* 90 N. Y. 450; *O'Shaughnessy v. Working Women's Co-op. Asso.* 8 Misc. 491, 28 N. Y. Supp. 761; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* 36 C. C. A. 671, 95 Fed. 111; *Mutual L. Ins. Co. v. Nichols* (Tex. Civ. App.) 24 S. W. 910." Applying this rule to the facts of this case, I am compelled to hold that the agreement to keep a watchman upon the premises at all times when the mill was not in operation was a warranty to do so, and that its breach avoided the policy. See *American Ins. Co.* 54 L. R. A.

v. Gilbert, 27 Mich. 433; *Hoose v. Prescott Ins. Co.* 84 Mich. 317, 11 L. R. A. 340, 47 N. W. 587. I think the judgment should be reversed.

John HOFFMAN

v.

MICHIGAN HOME & HOSPITAL ASSOCIATION, *Plff. in Err.*

(.....Mich.....)

1. Failure to comply with the requirements of a policy insuring against illness, as to time of furnishing proofs of disability and as to allowing time for investigating the claim, will not defeat an action on the policy when liability is denied because the disease is not covered by the policy, and insured is not confined to the house.
2. Recovery on a policy insuring against illness, which limits liability to the period when insured is continuously confined to his house and subject to the personal calls of a registered physician in good standing, is not defeated by the fact that the insured went out by direction of his physician for an occasional and necessary airing, if, by reason of the illness, he was continuously confined to the house the larger portion of the time.

(*Montgomery, Ch. J., and Hooker, J., dissent.*)

(October 1, 1901.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of plaintiff in an action brought to recover upon a policy providing sick benefits. *Affirmed.*

The facts are stated in the opinions.

Messrs. Wolcott & Perkins for plaintiff in error.

Messrs. McKnight & McAllister, for defendant in error:

During the time that plaintiff was sick the defendant had its physicians examine into the facts, and before the time had elapsed for the filing of proof of disability defendant notified plaintiff that it would not pay him, for the reason that he had consumption. This dispensed with compliance with the requirements of the policy as to notice.

Coryeon v. Providence-Washington Ins. Co. 79 Mich. 187, 44 N. W. 431; *Young v. Ohio Farmers' Ins. Co.* 92 Mich. 71, 52 N. W. 454; *O'Brien v. Ohio Ins. Co.* 52 Mich. 131, 17 N. W. 728.

Under the terms of this policy the plaintiff was totally disabled and prevented from doing any work whatever, and was, under the proper construction, continuously confined to his house on account of such sickness and disability.

NOTE.—For denial of liability as waiver of proofs of loss, see, in this series, *German Ins. Co. v. Gueck* (Ill.) 6 L. R. A. 835; *Foust v. American F. Ins. Co.* (Wis.) 30 L. R. A. 783; and *Hicks v. British America Assur. Co.* (N. Y.) 48 L. R. A. 424.

Hohn v. Inter-State Casualty Co. 115 Mich. 84, 72 N. W. 1105.

If he was continuously confined to his house on account of such sickness to the extent that he was necessarily and in good faith there a larger portion of the time, and only went forth, either from necessity or for consultation with or by direction of his physician, in whose charge and care he was, this would, under the rules of construction given by this court, be a compliance with the requirements of the policy.

Ibid.; *Young v. Travelers' Ins. Co.* 80 Me. 244, 13 Atl. 896; *Sawyer v. United States Casualty Co.* (Mass.) 8 Am. L. Reg. N. S. 233; *Nesbitt v. Manufacturers' Acci. Indemnity Co.* 55 Hun, 111, 8 N. Y. Supp. 202; *Hooper v. Accidental Death Ins. Co.* 5 Hurlst. & N. 546.

Moore, J., delivered the opinion of the court:

The plaintiff obtained a judgment of \$150 against defendant. The case is brought here by writ of error. The plaintiff is engaged in the confectionery and bakery business. The defendant is a corporation organized under and in pursuance of the laws of the state of Michigan, doing an accident and sick benefit insurance business, with its principal office located at the city of Grand Rapids, Michigan. In October, A. D. 1894, the plaintiff joined the defendant association. There was issued to him a policy of insurance containing the following agreement: "First. If, at any time after this certificate has been in continuous force and effect for ninety consecutive days, said member shall, through any sickness or disease mentioned in Schedule A on the back of this certificate, beginning after the expiration of the above term, become totally disabled, and such disability shall, independent of all other causes, wholly and continuously disable and prevent said member from prosecuting any and all kinds of business, upon satisfactory proofs to the association of such total and continuous disability said member shall be entitled to receive at the rate of \$10 per week, after the first week, during the time he is continuously confined to his bed or to the house and subject to the personal calls of a registered physician in good standing, not to exceed thirty weeks in any one illness. But if the same member is sick for thirty continuous days, which sickness begins after ninety days from the date of certificate, he shall receive, under the terms of this certificate, payment from the date of sickness, without deduction for the first week." The diseases covered by Schedule A, among others, are inflammation of the lungs and la grippe. The plaintiff kept up his payments from October, 1894, to the 12th day of September, A. D. 1899, paying in advance. It is the claim of the plaintiff that, as the result of la grippe, he had a hemorrhage, which made it necessary for him to call a doctor, and that his illness continued so that he is entitled to recover for a period of fifteen weeks. After his illness began, the company were notified of it; and one of their physicians visited

the plaintiff and obtained some of his sputum, which the physician examined, and also submitted to another physician, both of whom concluded the plaintiff's disease was consumption. On the 22d of January, 1900, the manager of the company wrote Mrs. Hoffman, among other things: "There are two reasons why this claim, in accordance with Mr. Hoffman's policy contract, is not a legal claim against this association: In the first place, we do not, and never have, paid for consumption. In the second place, article 1, on the face of Mr. Hoffman's policy, states that the claimant, in order to be entitled to benefits, must be entirely confined to the house. In accordance with the above statements, Mr. Hoffman's claim against this association has been rejected." In his testimony as a witness the manager testified, among other things: "The reason I would not submit to paying this claim was because the physicians claimed that he had consumption. I had arrived at the conclusion that the doctors knew what ailed him. I refused to pay the claim because he had hemorrhage of the lungs. The doctors said that resulted in consumption." The articles of association provided for an arbitration in case the validity of a claim was in question. March 19, 1900, a stipulation was filed in which it was stated plaintiff asserted a claim which defendant disputed, waiving an arbitration, and consenting that suit might be brought, and that a judgment of the court should be binding upon the parties. It is the claim of defendant "that, in order to entitle the plaintiff to maintain a suit upon his policy, he must show: (1) His sickness, and its nature and duration. (2) That it was one of the diseases mentioned in Schedule A of his certificate. (3) That these facts must be made to appear in a final proof furnished to the association within thirty days after the end of the sickness for which indemnity is claimed. (4) That a period of three months, stipulated for the investigation of the claim by the association after receipt of the final proofs, has elapsed." The first two of these propositions is true, but in view of the rejection of the claim, not because of the failure to comply with the last two propositions, but because it was claimed plaintiff had a disease not within the terms of the policy, and because he was not entirely confined to the house, we think defendant cannot now insist upon a compliance with the third and fourth propositions. The case is ruled by *O'Brien v. Ohio Ins. Co.* 52 Mich. 131, 17 N. W. 726; *Young v. Ohio Farmers' Ins. Co.* 92 Mich. 71, 52 N. W. 454.

It is insisted the court erred in charging the jury as to the degree of illness required to entitle plaintiff to recover. It is said by counsel: "The standard of the degree and severity of the illness during which the policy holder was entitled to recover indemnity, as expressed in the contract itself, is that he must be continuously confined to his house and subject to the personal calls of a registered physician in good standing. The meaning of this language, upon its face, is

very plain. He must be so ill as to need the attendance of a physician at his house. It is difficult to see how the language of the contract can be construed to mean anything else without doing violence to the plain meaning of the words employed." The court charged the jury as follows: "First, then, what is meant by the provision in this policy, 'continuously confined to the house and subject to the personal calls of a registered physician in good standing?' A contract of insurance is to receive a reasonable construction, so as to effectuate the purpose for which it was made. At the same time, the proper force and effect should be given to all the language used, for the purpose of guarding the association against fraud and imposture. Provisions such as the one under consideration are inserted for this express purpose, as well as for other purposes. The object to be accomplished by this contract is to indemnify the plaintiff from loss from total or continuous disability to prosecute any and all kinds of business. And it is provided, in substance, that he shall receive \$10 per week during the time he is continuously confined to the house subject to the calls of a physician in good standing. That the plaintiff was totally and continuously disabled from prosecuting any business during the time claimed does not appear to be questioned by the defendant in this case. But it insists he was not continuously confined to his house. Was he, or was he not? That is the question. I charge you, gentlemen, that to constitute a compliance with this provision it is not necessary that the plaintiff should remain in the house continuously during the entire time of disability; that to step out of doors now and then, or to occasionally go to the office of his physician, would not be a violation of this clause, or defeat plaintiff's right of recovery. It may be that an occasional airing is essential to a speedy recovery. A rule which would make nugatory a contract having for its special object indemnity on account of sickness because the insured took an occasional and necessary airing would be unreasonable. Was the defendant sick, and with the disease covered by his policy, to the extent that he was totally disabled from prosecuting any business? and was he continuously confined to his house on account of such sickness, to the extent that he was necessarily and in good faith there the larger portion of his time, and only went forth, either from necessity for consultation with, or by direction of, the physician in whose charge and care he was? An answer to this question will determine this branch of the case. So, gentlemen, I charge you that if you find from the testimony in this case that the plaintiff was continuously confined to his home on account of a sickness or disease covered by the terms of his policy, to the extent that he was necessarily, in good faith, the larger portion of the time, and only went forth either from necessity for consultation with, or by direction of, his physician, Dr. Barth, in whose charge and care he was, if you so find, then and in that

case the plaintiff is entitled to recover for the term so continuously confined at the rate fixed in the policy,—\$10 per week." Questions of a similar character to this were involved in *Turner v. Fidelity & C. Co.* 112 Mich. 425, 38 L. R. A. 529, 70 N. W. 898, and *Hohn v. Inter-State Casualty Co.* 115 Mich. 79, 72 N. W. 1105. A reference to these cases will make an extended discussion here unnecessary. The charge of the court followed these cases. It is said the record does not justify the suggestion of the court that plaintiff left his home and went to Chicago by the advice of his physician. Counsel must have overlooked the testimony of Mrs. Hoffman, who said: "He had a hemorrhage at that time. It was September 11th. He was taken to his bed at that time. He was in the house from that time—oh, six weeks, I guess, or something like that—until he went to Chicago. He went down to the doctor's to get some medicine, and the doctor thought it would be a good change for him to get out, because we lived at the rear of the store, and to get away from business. He thought it would help him. He was not able to do any work during this time. I think the date when he went away was about the 25th of October. He didn't go out only just the day before, when he went for a walk, or he went away. He went to Chicago because the doctor advised him to. He thought it would be good for him." The plaintiff was a witness and was present at the trial. There was a conflict in the testimony as to whether his illness was consumption or not. The judge said to the jury: "If you find that the plaintiff during the time of his disability was suffering with the disease known as 'consumption,' I charge you that he cannot recover under any circumstances in this case, and your verdict must be, 'No cause of action.'" The question was submitted to them. We think the case was properly tried.

Judgment is affirmed.

Long and Grant, JJ., concurred with Moore, J.

Montgomery, Ch. J., dissenting:

The contract of the parties is explicit. The defendant has undertaken to pay weekly indemnity, not during the time that the beneficiary should be ill and until his complete recovery, but in case he should become totally disabled, and by a malady which should at the same time wholly and continuously disable and prevent his prosecuting any and all kinds of business, he was to receive indemnity during the time that he should by reason thereof be continuously confined to his bed or to the house, subject to the personal calls of the registered physician, etc. Plaintiff's own testimony shows that he was taken sick in September, and was confined to his house for six weeks; that about October 20th he went to his physician and said: "I am confined up there in that place of business, where I sleep right in the store there, and I don't think it is very healthy for me." I said: "I have a

friend living in Chicago. He wants me to come there." He said: "That is all right, and won't hurt you any to go there." He said: "You go over there. Take care of yourself over there in good shape, and you will come out all right." I was confined there all the time, only I used to take a morning walk. I went over there about the 24th—the 24th of October, I think, or September or August—the 24th or 25th of October. I went down to see Dr. Barth just the day before I started." In my opinion, it was error to permit the jury to find a lia-

bility during this period. The policy contains the contract which the parties saw fit to make, and we should not enlarge it by construction. It is obvious that during this period plaintiff was not continuously confined to the house, subject to the personal calls of a physician. It is a radically different contract from those in the cases cited.

The judgment should be reversed and a new trial ordered.

Hooker, J., concurred with Montgomery, Ch. J.

ALABAMA SUPREME COURT.

Mary C. DAVIS *et al.*, *Appts.*,

v.

J. L. WILLIAMS *et al.*

(.....Ala.....)

1. An agent's occupancy of a house on his principal's property as a part merely of the contract for service does not establish the relation of tenant and landlord between him and the principal, so as to preclude him from acquiring an adverse title to the property.
2. One entitled to specific performance of a contract to convey land is precluded from maintaining a suit therefor by the fact that after obtaining the contract he took a lease of the property, since such suit involves a denial of the landlord's title.
3. Relief must be denied to both complainants in a suit to enforce specific performance of a contract to convey land, if one cannot maintain his suit because he is in possession of the property as tenant.

(*Sharpe and Dowdell, JJ., dissent.*)

(June 29, 1901.)

APPEAL by defendants from a decree of the Chancery Court for Macon County in favor of complainants in a suit to compel specific performance of a contract. *Reversed.*

The facts are stated in the opinion.

Messrs. S. B. Paine, H. T. Davis, and W. W. Pearson for appellants.

Messrs. Watts, Troy, & Caffey, for appellees:

The doctrine of estoppel of a tenant in possession to deny the title of his landlord has no application to suits in which the tenant seeks specifically to enforce a contract with the landlord to convey, because it does not involve a denial of title at the time the relation of landlord and tenant was created.

Pope v. Harkins, 16 Ala. 323; *Dobson v.*

NOTE.—For a case in this series as to nature of an employee's occupancy of his employer's premises, see *Bowman v. Bradley* (Pa.) 17 L. R. A. 213.

As to adverse possession by tenant against landlord, see *Bedlow v. New York Floating Dry Dock Co.* (N. Y.) 2 L. R. A. 629, and *Haeussler v. Missouri Iron Co.* (Mo.) 16 L. R. A. 220. 54 L. R. A.

Culpepper, 23 Gratt. 352; *Otis v. McMillan*, 70 Ala. 52; *Randolph v. Carlton*, 8 Ala. 614; *Farris v. Houston*, 74 Ala. 168.

The only thing the tenant cannot deny is that the landlord had title at the beginning of the term. If he can dispute that the title continued after the beginning of the term, he may certainly ask a court of equity to discontinue it.

Dobson v. Culpepper, 23 Gratt. 352; *Otis v. McMillan*, 70 Ala. 46; *Randolph v. Carlton*, 8 Ala. 606; *Farris v. Houston*, 74 Ala. 162; 3 Brickell, Dig. 608; 2 Brickell, Dig. 200, §§ 103 *et seq.*

Tyson, J., delivered the opinion of the court:

The bill in this case was filed by complainants, as owners of a certain contract by assignment, against the respondents, as successors in interest and title to the lands agreed to be conveyed, and seeks a specific performance of that contract. The contract was executed by R. T. Davis and Mary C. Davis, his wife, in which they agreed to convey by warranty deed a half interest in 40 acres of land, to be selected by the complainants' assignors, in a certain section owned by R. T. Davis. The consideration of this contract was that the complainants' assignors were to build the Savannah, Americus, & Montgomery Railroad within one-half mile of the residence of the Davises, and to erect a depot within the same distance from their residence, at any point along the line of the road most suitable to themselves. The deed was to be executed as soon as the road was built, the depot established, and a train made a trip to Montgomery. The land agreed to be conveyed upon compliance with the conditions of the contract, and selected, was a part of a tract of land owned by him, comprising about 800 acres. R. T. Davis died shortly after entering into the contract, and after the selection of the land was made by complainants' assignors under it. He left surviving him his wife and two sons. His wife, who is one of the respondents, was at the date of the filing of the bill the owner of a two-thirds undivided interest in the entire tract; and Hubert T. Davis, a son, the other respondent, was the owner of the remainder. The evidence shows with-

out dispute that the road was built, the depot established, a train ran through to Montgomery, and the land selected during the year 1891. In other words, complainants' assignors had performed their obligation under the contract, and were entitled to a deed from the respondents during the year 1891. On April 20, 1896, the complainants by purchase became the owners of this contract, and by virtue of that ownership were entitled to a deed from the respondents.

One of the defenses invoked by the answer of the respondents is that complainant Williams for a period of about two years before the filing of this bill, at the date of its filing, and for one year subsequent thereto, tenanted and dwelt on a part of the lands in controversy. It appears from the evidence that Williams in 1892 built a house for respondents upon the land in controversy, which he occupied while "looking after the business" for them, until December, 1896, from which last-named date he paid rent for this house at the rate of \$5 per month for one year, and \$4 per month for eight months, ceasing to pay rent in August, 1898. The bill was filed on the 11th of February, 1897. It will be noted that when this bill was filed, and after the complainant Williams had become the owner of the contract, and after he became entitled to a deed to the lands from the respondents, he rented a part of the lands, and became the tenant of one of the respondents. His occupancy of the house which is situated upon the lands in controversy, for looking after the business of the respondents, prior to December 2, 1896, when he commenced to pay rent therefor, did not create the relation of landlord and tenant. That relation was simply that of employer and employee or master and servant, and the occupancy of the house was a part merely of the contract for service, and operated as a portion of the consideration of that agreement. *People ex rel. Hubbard v. Annis*, 45 Barb. 304; *Wilber v. Sisson*, 53 Barb. 258; *Haywood v. Miller*, 3 Hill, 90; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Doyle v. Gibbs*, 6 Lans. 180; *Bowman v. Bradley*, 151 Pa. 351, 17 L. R. A. 213, 24 Atl. 1062; *McQuade v. Emmons*, 38 N. J. L. 397; *School Dist. No. 11 v. Batsche*, 106 Mich. 330, 29 L. R. A. 576, 64 N. W. 196; *East Norway Lake N. E. Lutheran Church v. Froislie*, 37 Minn. 447, 35 N. W. 260; *White v. Bayley*, 10 C. B. N. S. 227.

The relation of landlord and tenant arose in December, 1896, which, as we have shown, was after Williams became entitled to a deed from the respondents to the land. We have the question presented as to whether Williams, being the tenant of one of the respondents at the time of the filing of the bill, and being the owner of the contract at the time he entered into that relation, can maintain the bill to require a specific performance of that contract. There is not an intimation that there was any understanding or agreement that his rental contract was subject to his right to have the contract of purchase of which he was part owner en-

forced, or that his landlord ever at any time in any way recognized his rights under that contract, or obligation under it to make a deed to him. It is a principle universally recognized and enforced by courts of law that a tenant is estopped to dispute the title of his landlord, unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy. It is only when there is a change in the condition of the landlord's title for the worse after the tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title. Under no circumstances, when there is no fraud or mistake of fact, will it be permitted to deny the title of the landlord at the beginning of his term. This doctrine has been enforced by this court from its earliest history. *Randolph v. Carlton*, 8 Ala. 606; *Pope v. Harkins*, 16 Ala. 321; *Rogers v. Boynton*, 57 Ala. 501; *Farris v. Houston*, 74 Ala. 162; *Robinson v. Holt*, 90 Ala. 116, 7 So. 441; *Barlow v. Dahm*, 97 Ala. 415, 12 So. 293; *Pugh v. Davis*, 103 Ala. 316, 18 So. 8. In 2 McAdam, Land. & T. pp. 1341 *et seq.*, this doctrine is stated in this language: "For reasons of public policy a tenant is never allowed to dispute his landlord's title after having accepted possession under him. This rule is elementary. The estoppel extends equally to both landlord and tenant, so that, while the tenant is estopped from denying the landlord's title, the landlord cannot allege that he had no title at the time of the demise. Where a tenant enters into possession under a lease, he is estopped from denying the title of his landlord. The tenant must surrender the possession to the landlord before he can assail or question the title under which he entered.

... 'He can no more show that the premises belonged to the state than he can that they belonged to himself. He must first restore the possession which he obtained from his landlord, and then, as plaintiff, he may avail himself of any title which he has been or may be able to acquire.' 'The foundation of the estoppel is the fact of the one obtaining possession and enjoying possession by the permission of the other. And so long as one has this enjoyment he is prevented by this rule of law from turning round and saying his landlord has no right or title to keep him in possession.' ... 'No dispute as to the title will be tolerated until the parties are placed in their original position.' " Nor can he "be heard to deny the title of his landlord, nor can he rid himself of such relation, without a complete surrender of the possession of the land. To allow him to agree and profess to hold possession under one as landlord, and at the same time to hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do." Continuing, the author says: "He must first surrender up the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter."

It may be urged that this proceeding is in equity, and that the suit involves no denial by Williams of his landlord's title. We apprehend that it is of no consequence in what court this question of estoppel may arise. If it exists, there is no reason why it should not be enforced by courts of equity as well as by courts of law. Indeed, such a distinction has never been asserted or recognized. In the case of *Barlow v. Dahm*, 97 Ala. 414, 12 So. 283, which was a bill for sale of land for partition by a tenant against his landlord, it was held that the tenant could not maintain the bill without first surrendering the possession. And in *Davis v. Pou*, 108 Ala. 443, 19 So. 362, which was a bill by a tenant to enjoin a writ of possession and execution at law issued upon a judgment in unlawful detainer in favor of his landlord, it was held that there was no equity in the bill, for the reason that the tenant could not be permitted to show that his landlord's title had terminated before the beginning of the tenancy. In *Homan v. Moore*, 4 Price, 5, it was held: "A lessee proceeded against by ejectment, and who has received notice from a claimant disputing his landlord's title not to pay him any more rent, and has been threatened with a distress by his landlord if he does not, cannot sustain an injunction in equity to restrain either the ejectment or the distress, for he is not permitted by such means to bring his landlord's title into dispute." In *Smith v. Targett*, 2 Anstr. 529, it was held that a tenant, though threatened with suits at law on a title adverse to his landlord's, cannot make them interplead. Said the court: "It would be extremely mischievous if he were allowed, in his own right, or that of others, to call in question the title of the person under whom he holds." To the same effect is *Johnson v. Atkinson*, 3 Anstr. 798. In these cases the tenant entered upon his lease after the termination of his landlord's title. The exception, however, was recognized by the chancery courts of England, as exists in courts of law, that, where the landlord has by his own act given title to another subsequent to the lease, he may thereby entangle the tenant in embarrassment, which a bill of interpleader may be the most proper mode of quieting. *Cowtan v. Williams*, 9 Ves. Jr. 107; *Clarke v. Byne*, 13 Ves. Jr. 386.

This brings us to a consideration of the question as to whether the assertion by the complainant Williams of his right to have his contract of purchase specifically enforced involves a denial of his landlord's title. At the threshold of the discussion of this question it is necessary to ascertain the relation of the complainants to the respondents with respect to the interest in the lands and in the contract of sale involved in this controversy. That it is a contract of sale, and establishes the relation of vendor and vendee between the parties, does not admit of dispute. Assuming this as true, "in law a contract . . . is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties. The vendor remains to all intents

the owner of the land. He can convey it free from any legal claim or encumbrance. He can devise it. On his death intestate it descends to his heirs. The contract in no manner interferes with his legal right to and estate in the land, and he is simply subjected to the legal duty of performing the contract, or paying such damages as a jury should award. On the other hand, the vendee acquires no interest whatever in the land. His right is a mere thing in action, and his duty is a debt—an obligation—to pay the price; and on his death both this right and this duty pass to his personal representatives, and not to his heirs. In short, he obtains at law no real property or interest in real property. The relations between the two parties are wholly personal. No change is made until by the execution and delivery of a deed of conveyance the estate in the land passes to the vendee. Equity views all these relations from a very different standpoint. In some respects, for some purposes, the contract is executory in equity as well as at law; but, so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. This theory must of necessity make a great difference in the respective rights, duties, and relations of the vendor and vendee. One of the grand principles of equity—one of the great foundation stones upon which the whole superstructure of particular doctrines and rules is erected—is the proposition: Equity regards and treats as done what in good conscience ought to be done. This principle, so brief in its statement, is most broad in its application and fruitful in its results. From it, as the root, spring a large part of the rules which make up the body of equitable jurisprudence. Apply the principle to the present case. By the terms of the contract, the land ought to be conveyed to the vendee, and the purchase money ought to be transferred to the vendor. Equity therefore regards these as done,—the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as owner of the land. An equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years. Although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed." Pom. Contr. § 314. See also *Ashurst v. Peck*, 101 Ala. 499, 14 So. 541. The foregoing extract clearly defines and fixes the status of Williams and one of the respondents after he became part owner of the contract, which status necessarily existed at the time of the filing of the bill, and continued up to the present time. It is only upon the theory of the existence of this status that he can have relief upon the bill, and, of necessity, the prosecution of the suit for the specific performance of the contract is an assertion by him that at the time of the filing of the bill he was the owner of the land. This assertion he cannot be per-

mitted to make until he surrenders up the premises to his landlord, since it puts him in a position of repudiating or of ridding himself of the relation of tenant, which he bore to one of the respondents when the bill was filed, or of assuming an attitude of hostility to the title or claim of title of his landlord. A "landlord can only be required to litigate title with his tenant upon the vantage ground of possession." *Barlow v. Dahm*, 97 Ala. 414, 12 So. 293. Surely it will not be controverted that the bill involves a litigation of title between Williams, the tenant, and Mrs. Davis, his landlord. For, as we have said, Williams asserts by the bill his ownership of the land, which is denied by the respondent Mrs. Davis.

It is argued, on the authority of *Bogan v. Daughdrill*, 51 Ala. 312, that this court can correct the decree of the lower court, and grant relief to complainants, if entitled to it, for the portion of the land not in the possession of Williams, at the date of the filing of the bill, as tenant. Assuming that complainants are entitled to that relief, without deciding it, the record furnishes no sufficient data upon which to predicate such a decree. It fails to disclose with any degree of accuracy the area of the parcel in the possession of Williams. To undertake to eliminate it out of the land, and to render a decree requiring the respondents to execute a deed for the balance, would, at best, be but a conjecture as to the area or boundaries of the land decreed to be conveyed. The ownership of the contract being joint, and the enforcement of it being sought jointly, the familiar doctrine that both complainants must be entitled to relief, or neither can have it, applies. Williams not being entitled to relief, the bill must be dismissed. *Wilkins v. Judge*, 14 Ala. 135; *Moore v. Moore*, 17 Ala. 631; *Tucker v. Holley*, 20 Ala. 426; *Plunkett v. Kelly*, 22 Ala. 655; *Plant v. Voegelin*, 30 Ala. 160; *Vaughn v. Lovejoy*, 34 Ala. 437; *James v. James*, 55 Ala. 525; *Larkin v. Mason*, 71 Ala. 231; 3 Brickell, Dig. 373, § 87. This dismissal will not preclude the rights of complainants to file another bill, if they are so advised.

Reversed and rendered.

Sharpe and Dowdell, JJ., dissent.

BIRMINGHAM RAILWAY & ELECTRIC COMPANY, Appt.,

v.

J. L. BAIRD, by Next Friend.

(.....Ala.....)

1. A street car company is liable for an assault by its conductor on a passenger because the latter, after being carried past his station, in order to stop the car

pulled the bell rope so hard that he broke it, and jerked the conductor several feet along the car floor, notwithstanding the passenger, upon the conductor's following him to the platform, attempted an assault on him.

2. Punitive damages may be awarded in an action against a street car company for an assault by its conductor upon a passenger.
3. Two thousand five hundred dollars is not an excessive award against a street car company for the act of its conductor in striking a passenger several times in the face merely because, in order to stop the car, he pulled the bell rope so hard as to break it.

(May 31, 1901.)

A PPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover damages for an assault committed upon him by one of defendant's conductors. *Affirmed.*

The facts are stated in the opinion.

Messrs. Walker, Porter, & Walker and Hugh Morrow for appellant.

Messrs. Lane & White, for appellee:

The case fully warranted the jury in awarding punitive damages.

Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39; *Haver v. Central R. Co.* 12 Am. & Eng. R. Cas. N. S. 261, and notes, 62 N. J. L. 282, 43 L. R. A. 84, 41 Atl. 916.

Under the facts of this case the acts of the servant were the acts of the corporation.

Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 308, 13 So. 57; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220, 30 Atl. 560; *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 715, 29 L. R. A. 465, 41 Pac. 952; *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L. R. A. 227, 24 N. E. 319.

A conductor of a train doubtless has his patience and forbearance severely tested at times, but he should not settle his own personal difficulties with passengers, while they are such, any more than he should permit others to do so when he can avoid it.

Baltimore & O. R. Co. v. Barger, 80 Md. 23, 26 L. R. A. 220, 30 Atl. 560.

McClellan, Ch. J., delivered the opinion of the court:

There appears to be some divergence of opinion as to a common carrier's liability for an assault, and the like, committed by its agent upon a passenger when the agent is acting beyond the scope of his employment in the usual acceptance of that phrase. Of course, the law is well settled that for torts committed by such agents or employees upon persons who are not passengers the employer is not liable, unless the act was in a sense in the line of duty imposed by the employment; as, where a conductor of a train, being under a duty to the railway company, and having authority to eject persons not entitled to carriage, commits, out of his own

NOTE.—For earlier cases in this series as to liability of carrier for assault on passenger by employee, see note to *Davis v. Houghtellin* (Neb.) 14 L. R. A. 737; *Baltimore & O. R. Co. v. Barger* (Md.) 26 L. R. A. 220; *Goodloe v. Memphis & C. R. Co.* (Ala.) 29 L. R. A. 729; *Krantz v. 54 L. R. A.*

Rio Grande Western R. Co. (Utah) 30 L. R. A. 297; *St. Louis S. W. R. Co. v. Jones* (Ark.) 39 L. R. A. 784; *Haver v. Central R. Co.* (N. J. L.) 43 L. R. A. 84; and *Savannah, F. & W. R. Co. v. Quo* (Ga.) 40 L. R. A. 483.

malice and personal ill will towards such a person, an unnecessary assault upon him in ejecting him from the train, the wrongful act, though against the express rules and regulations of the carrier, is yet within the scope of the conductor's employment, and the company would be liable in damages for it. But the reverse would be true—the company would not be liable—if such conductor should assault a person standing by the side of the train, for instance, and having no relations with the carrier, nor in any way encroaching upon the rights of the carrier; for in this latter case the wrongful act of the conductor would have no connection with his duties to the company, and would be entirely beyond the scope of his employment. Such is the law as between trespassers and strangers generally, on the one hand, and the carrier on the other. But as between the carrier and its passengers an entirely different rule prevails. As to them the contract of carriage imposes upon the carrier the duty, not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And this same duty is, of course, upon the carrier's agents. They are under the duty of protecting each passenger from avoidable discomfort, and from insult, from indignities, and from personal violence. And it is not material whence the disturbance of the passenger's peace and comfort and personal security or safety comes or is threatened. It may be from another passenger, or from a trespasser or other stranger, or from another servant of the carrier, or, *a fortiori*, from the particular servant upon whom the duty of protection peculiarly rests. In all such cases the carrier is liable in damages to the injured passenger. And it is of no consequence, when the wrong is committed by the carrier's own servant,—even that servant particularly charged with the duty of conserving the passenger's well-being *en route*,—that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any duty; but is utterly violative of all duty, and apart and away from the scope of employment as that term is understood in the class of cases first above referred to. The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice towards the passenger, and having no attribute of service to the carrier in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment, as ordinarily understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, be-

yond question, we think, the true doctrine on principle; and while, as indicated above, there are adjudications against it, the great weight of authority supports it. The doctrine is well stated in *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39, as follows: "The defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was wilful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this: that 'the master is not responsible as a trespasser, unless, by direct or implied authority to the servant, he consents to the unlawful act.' The fallacy of this argument when applied to the common carrier of passengers consists in not discriminating between the obligation which he is under to his passenger and the duty which he owes a stranger. It may be true that, if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of this duty to his servants the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and copassengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise." The same principles are declared in *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L. R. A. 224, 24 N. E. 319, following *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185, in this language: "The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing, or had

completed the performance of it, when the blow was struck. That blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract." And in *Stewart's Case*, just referred to, it was held that where a passenger on one of defendant's street cars was unjustifiably attacked and beaten by the driver, who was also acting as the conductor, because said passenger interfered to prevent him from beating a newsboy who had gotten on the car, it was held that the defendant was liable, the court declaring that the rule relieving a master from liability for a malicious injury inflicted by a servant when not acting within the scope of his employment did not apply between a common carrier of passengers and a passenger; Judge Tracy thus declaring the doctrine: "By the defendant's contract with the plaintiff, it had undertaken to carry him safely, and to treat him respectfully; and, while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passengers against any injury from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. . . . A common carrier is bound, so far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and copassengers, and he undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract;" or, as otherwise therein expressed, from "an assault committed upon a passenger by a servant intrusted with the execution of a contract of a common carrier." And so, in North Carolina, it has been decided that it is the duty of a common carrier, not only to carry its passengers safely, but to protect them from ill treatment from its servants, other passengers, and intruders; and it is liable for an injury or ill treatment committed by its servants, whether in the line of their employment or not. *White v. Norfolk & S. R. Co.* 115 N. C. 631, 20 S. E. 191. So, in Indiana, it has been declared that "one of the prime duties resting upon a railroad company is to protect its passengers from assaults and injuries by its servants; nor does the question of its liability for a breach of this duty depend upon whether or not the servant in the performance of the act is within the scope of his employment." *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219. In *Chicago & E. I. R. Co. v. Fleaman*, 9 Ill. App. 250, the doctrine is thus declared: "It is undoubtedly true that, where the employee goes outside of the line of his employment, and for purposes of his own inflicts an injury upon the person of one who has no claim upon the employer arising out of any special relation existing between them, being a stranger to the master, the principle contended for is properly applied, and has ever been enforced as a rule of the common law; but it does not appear to us that it should be extended so

as to embrace a case where the employee of a common carrier, engaged in operating the train, commits a tort upon a passenger upon such train. In every contract for carriage the carrier undertakes, not only that the utmost vigilance, care, and skill shall be exercised to safely transport the passenger to his destination, but that during the passenger's transit he shall be treated humanely, and protected from all dangers, from whatever source arising, so far as the efforts of the carrier or his servants can be made available for the protection of such passenger." The same doctrine obtains in Texas, where it is thus stated: And a carrier of passengers "cannot invoke the rule that the master is not liable for an injury resulting from the wilful and malicious acts of his agent not done in the course of his employment. That rule does not apply when the injury is inflicted upon a passenger by the carrier's servant." *Houston & T. C. R. Co. v. Washington* (Tex. Civ. App.) 30 S. W. 719. And in *Craker v. Chicago & N. W. R. Co.* 36 Wis. 667, 17 Am. Rep. 504, it was held that a female passenger who had been kissed by the conductor could recover from the company; Ryan, Ch. J., saying: "But we need not pursue the subject, for, however that may be in general, there can be doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal, because the principal is responsible for the duty, and, if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard or in the malicious violation of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another, and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it." Having reference to the rule as to scope of employment, and to the cases which apparently apply it to passengers, the court of errors and appeals of New Jersey in a recent case adopts the following language of Clifford, J., in *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922: "Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes towards his passenger, nor to the rights and duties which those relations create and imply. Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treatment, and against personal rudeness, and every wanton interference with their persons, either by the

carrier or his agent employed in the management of the ship or other conveyance; and for the fulfilment of those obligations the carrier is responsible as principal; and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation." *Haver v. Central R. Co.* 62 N. J. L. 282, 43 L. R. A. 84, 12 Am. & Eng. R. Cas. N. S. 261, with note, 41 Atl. 916. And a great number of cases cited in *Haver's Case* and the note thereto are to the same effect. On this subject Messrs. Elliott say: "There is much apparent conflict among the authorities upon this subject, but we think some of it is due to the use of the term 'scope of employment' or 'line of duty' in a different sense in different cases, or to a failure to place the decision upon the correct ground. It is not merely a question of negligence in such cases, nor is it strictly a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the wilful act of an employee or not. . . . Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is therefore but just to make the company, rather than the passengers, take this risk, and to hold it responsible." 4 Elliott, Railroads, § 1638.

Of course, a conductor has the right of self-defense against the assault of a passenger; but the right is the same in this connection as in criminal law. He must be imperiled, and he must be without fault. To be sure, he need not retreat from his car. And he may assault a passenger when necessary to protect other passengers from assault, using no more than necessary force, and this may become a duty,—indeed, it is a duty whenever it is a right. But he cannot assault a passenger in retaliation for an assault committed upon himself or upon another passenger, and, *a fortiori*, he cannot assault a passenger for abusive words, or in revenge or punishment, under any circumstances. And if he does assault a passenger otherwise than under a necessity to defend himself or a passenger from battery, or in rightfully ejecting a passenger, who, by his conduct towards other passengers, has forfeited his right of carriage, the carrier is liable. The fault of the passenger, short of producing a necessity to strike in self-defense, will neither justify the conductor in striking, nor relieve the carrier from liability for his act. Possibly, such fault could be considered in mitigation of damages. As was said by Caldwell, J.: 54 L. R. A.

"The office of a conductor of a passenger train is an exceedingly important and responsible one. There are few positions which demand of their incumbents more good judgment and self-possession. Not only the peace and comfort, but the lives as well, of passengers, are in their keeping. They must not, by any act of their own, disturb the one or endanger the other. They have to deal with all classes of people. They daily come in contact with the unscrupulous and dishonest, who are seeking to defraud the railroad company of what is justly its due, and are often grossly insulted by the ignorant and vulgar for a lawful and proper discharge of their duties. It is obvious that, if a conductor were to attempt to redress every personal insult, or enter a boisterous quarrel with every vulgar and rude person who might invite it, there would be no peace or safety for his passengers. He must decline all such contests. He can take action only in those cases where the rights of the railroad company, or the peace or safety of the passengers under his charge, or his own safety demand it; and then he can only act in the mode and manner heretofore indicated, accomplishing what he has a right to do in the given case with as little force, violence, and confusion as is practicable and reasonable under the circumstances. . . . Words [and acts short of producing a necessity for defensive effort stand upon the same plane], however irritating or opprobrious, will not justify an assault by one under no special obligation to keep the peace; much less will they justify an assault by a conductor, who is, by virtue of his position, not only bound to keep the peace himself, but whose duty it is to maintain peace and order in the cars, and protect the passengers . . . from assaults and violence." *Gallena v. Hot Springs R. Co.* 4 McCrary, 371, 13 Fed. 122, 123. To like effect is the case of *Baltimore & O. R. Co. v. Barger*, where the conductor struck a passenger for grossly abusing and insulting him. The company was held liable for punitive damages; and in the course of the opinion, referring to the charges, which are called "prayers" in the Maryland court, it was said: "The first is, in substance, that, if the jury believed the plaintiff used foul and abusive language to the conductor, which caused or provoked the assault complained of, and that in making said assault the conductor was not acting for the defendant, and within the scope of his duties as conductor, but was carrying out a personal purpose and feeling, the defendant was not liable for such act of the conductor. . . . To such a doctrine we cannot subscribe, under the circumstances of this case. There may be, and doubtless are, cases in which the conduct of a passenger towards the employee of a railroad company was such that the company would not be liable for the act of the employee. A conductor, for example, would be justified, in the defense of his own person or the property of the company in his charge, in using such force as would be necessary for

their protection against a passenger or anyone else, without rendering the company liable. . . . The plaintiff was at the time of the assault a passenger on the train which was in charge of this conductor, who was the agent of the company to see, as far as he reasonably could, that the plaintiff and other passengers were properly treated and carried to their respective points of destination. If the plaintiff persisted in misbehaving on the train, either by the use of foul and abusive language toward the conductor, or in any other way calculated to frighten or materially interfere with the comfort and safety of the other passengers, after being admonished by the conductor, the latter would have been justified in ejecting him from the train. The remedy in such case would be to eject the unruly passenger—not to assault him, and then let his employer escape all liability because he, the conductor, was carrying out 'a personal purpose and feeling.' . . . A conductor of a train doubtless has his patience and forbearance severely tested at times, but he must not settle his own personal difficulties with passengers, . . . any more than he should permit others to do so when he could avoid it." 80 Md. 23, 26 L. R. A. 222, 30 Atl. 500. The same principles are declared by the supreme court of Maine in the following opinion: "Passenger carriers are responsible for the misconduct of their servants. Railroad companies, as well as other carriers of passengers, are responsible for assaults and batteries committed by their employees upon passengers. . . . This responsibility, of course, rests upon the assumption that the battery cannot be justified. If it can be, no responsibility attaches to anyone. If it cannot be, both the servant and the carrier are liable. If the servant is first assaulted, he may defend himself. If he is resisted in the performance of any duty, he may use force sufficient to overcome the resistance. But, the assault being over, or the resistance ended, he cannot pursue and punish the wrongdoer. The rule applicable to such cases is this: That, when a prima facie case of assault and battery is sought to be justified, it is incumbent upon the one who justifies to show that no more force was used than the exigencies of the case called for. The force used must be suitable in kind and reasonable in degree, otherwise the justification fails. . . . It is the duty of the conductor and other employees upon a train of cars to treat the passengers with civility, and to abstain from all unnecessary violence towards them. It is also the duty of passengers to observe the rules and regulations of the company, and to conduct themselves generally so as not to invite uncivil treatment, nor provoke violence. But it is not true that disobedience to the rules of the company will operate as a license to the employees to maltreat a passenger. If a passenger persists in violating the reasonable rules of the company, after notice of the rules, and a request to him not to act contrary to them, the carrier will have a

right to rescind the contract for his conveyance, and refuse to carry him further. But he will have no right to maltreat him while continuing to perform the contract for his conveyance. Nor is it true that an uncivil word by a passenger at the beginning of his journey will justify the carrier's servants in treating him with insolence to the end of it. Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger, after the assault or the resistance is over. If he does, he makes the carrier as well as himself liable for the injury. If, therefore, it be true, as the defendants contend, that the plaintiff was the aggressor, that he first assaulted the brakeman, and resisted him in the performance of a legitimate duty, it was still a question of fact for the jury to determine whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased his resistance, and was returning to his seat with his back to the brakeman. Under the instructions of the court the jury must have so found, or they could not have returned a verdict for the plaintiff; and, in our judgment, the evidence fully justified the finding." *Hanson v. European & N. A. R. Co.* 62 Me. 84, 88, 16 Am. Rep. 404.

The present action is prosecuted by Baird, a minor, by next friend, against the Birmingham Railway & Electric Company, and sounds in damages for an assault and battery alleged to have been committed by one Sorsby, conductor of defendant's train, upon which plaintiff was a passenger. That the assault and battery was committed is proved beyond question, and not denied. It is not only not shown that the conductor was justified in the act, but, to the contrary, it clearly appears that he assaulted and beat the plaintiff without legal necessity or excuse; for, while one or two witnesses testify that Baird attempted to strike Sorsby, it is shown that they were not in a position to see what occurred as accurately as several other witnesses, including Sorsby himself, who depose that Baird made no such attempt; Sorsby testifying: "If Mr. Baird struck at me at all, I didn't know it. I didn't see him attempting to strike me when I struck him in the face, unless it was to throw up his arm. I don't think he made any effort to strike me at all. . . . Mr. Baird pulled me to the door of the car, and I followed him outside, and struck him. The momentum of the bell cord did not jerk my arm out that way. I hit him in the face as hard as I could. There was a decidedly angry expression on Mr. Baird's face, and he had grabbed the bell cord, and broke the cord loose, and pulled me along with it, which was an angry act. That is all that I know of. He didn't say anything out of the way to me. I hit Mr. Baird in the face of my own free will." And for all the purposes of this case it is to be taken that

Baird made no hostile demonstration towards Sorsby at or about the time this vicious assault was made on Baird by Sorsby, for, if any jury could be found to say that Baird struck at Sorsby on the testimony of the one or two witnesses above referred to, who were without opportunity to see what transpired, and who doubtless mistook the fending motion of Baird's arm for an effort to strike, against the overwhelming testimony of all the witnesses who were in a position to see accurately, and against the above-quoted testimony of Sorsby himself, it would yet remain true that Sorsby's act was not in defense against such attempted blow, and was not necessary, for he saw no such attempt, and says none was made, but that he struck Baird as a vent to his own wrath and malice, and in punishment for the conduct of the latter in attempting to pull the bell cord, breaking it while Sorsby had hold of it, and jerking him some feet along the aisle of the car. But if it be conceded that Baird attempted to strike Sorsby, and that Sorsby was aware of it, and even that he assaulted and beat Baird in consequence of such attempt by the latter, the act of Sorsby would be, nevertheless, a wrongful act for which the defendant is responsible, since it is altogether clear on the proof that Sorsby was at fault in bringing on the trouble, in that he unnecessarily followed Baird out on the platform of the car in an angry and threatening manner. So that, applying the principles of law to the facts in any possible aspect of them, the conclusion must be that Sorsby, defendant's conductor, committed an unjustifiable assault and battery on Baird, the defendant's passenger. Whether Baird had or had not the right to pull the bell cord in order to stop the car after being carried past his station, Sorsby had no right to strike him for doing so. Whether, when the cord broke, both having hold of it, he pulled or jerked Sorsby several feet along the aisle, and conceding this, if it occurred, to have been a technical assault, Sorsby had no right to strike him in "retaliation" for or in "response to" such assault. Even if Baird attempted to strike Sorsby with or without Sorsby's knowledge, Sorsby yet had no right to defend himself against such attack, being at fault in provoking it.

The case was tried below on views of the law and theories of the rights of the parties
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which were far too favorable to the defendant. The doctrine of scope of employment was given in charge to the jury, when, as we have seen, that doctrine does not obtain in cases of this character. Then, too, it was given in charge to the jury that plaintiff's right of recovery depended upon the further inquiry whether he or Sorsby was at fault in bringing on the difficulty, "that the plaintiff's right to recover in this case depends upon who was the aggressor, and that, if the plaintiff was the aggressor, he cannot recover," when, as we have declared, no aggression on the part of plaintiff short of producing a necessity for Sorsby to strike in defense of his person against physical harm would be a defense to the carrier. Very many charges were refused to the defendant. Those numbered respectively 1, 2, 3, 4, 5, 6, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27 were each properly refused, as being affirmative, or having a tendency opposed to the principles above set forth. Charges 7 and 8 are mere arguments. Charges 9, 11, 12, 13, and 14 are affirmative instructions for the defendant; and as the complaint, and each count of it, was supported by the evidence, they were, of course, properly refused. The clauses of the court's general charge to which exceptions were reserved really meant that the jury had a right on the evidence to impose punitive damages, and unquestionably they had such right. If it was apprehended that the form of expression might mislead the jury, an explanatory charge should have been requested. Charge 9 refused to defendant had a tendency to mislead the jury to the conclusion that they were not authorized to impose punitive damages. The several exceptions reserved by defendant to rulings on the competency of testimony and to rulings relating to the argument of plaintiff's counsel have been considered by the court in banc, and found to be without merit. We shall not further extend this opinion by a discussion of them.

All the questions arising on the motion for a new trial except one are covered by what we have said. The one not so covered has reference to the amount of the verdict, \$2,500, which is claimed to be excessive. We by no means think the recovery was for too great a sum.

Affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

Corcella E. TYLER *et al.*, *Appts.*,
v.

Florence S. ASPINWALL.

(78 Conn. 493.)

A man's heirs at law cannot maintain a suit to set aside a fraudulent divorce from a third person of a woman whom he afterwards attempted to marry, for the purpose of defeating her claims upon his estate, where they were not parties to the divorce proceedings and had no interest therein.

(January 3, 1901.)

APPPEAL by petitioners from a judgment of the Superior Court for Fairfield

NOTE.—Who may sue or take other proceedings to set aside judgments against other parties.

- I. Decrees of divorce.
- II. Judgments on confession.
- III. Matters of administration, probate, heirs, guardian.
- IV. Assignment for creditors.
- V. Garnishment.
- VI. Foreclosure of mortgage.
- VII. Judgments against partners.
- VIII. Judgments against corporations.
- IX. For death of party.
- X. For usury.
- XI. Application by surety or guarantor.
- XII. Application by party claiming property affected.
- XIII. Application by creditors seeking relief.
- XIV. Application by other persons.
- XV. Summary.

I. Decrees of divorce.

Third parties cannot have a judgment of divorce set aside.

In TYLER v. ASPINWALL it was held that the heirs of a second husband cannot maintain an action to annul, set aside, and vacate a decree of divorce obtained by his widow from her former husband by means of fraud. It was claimed that she had not resided in the state a sufficient time, and that her former husband never had resided in the state. The court held that a decree of this kind could not be attacked in this manner by strangers to the record. This is in accord with the decisions.

Quare.—Could not the judgment be attacked on the ground of fraud and want of jurisdiction whenever it was attempted to be used?—as in Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; Streitwolf v. Streitwolf, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553.

The children of a former wife of a second husband of a divorced woman have no standing to attack a *sumo pro tunc* order of appearance, and judgment of divorce. Brink v. Brink, 8 Kulp, 367.

So, a judgment cannot be attacked by a stranger to the record. Where a bill to set aside a divorce was filed by the infant children of the parties, appearing by another stranger to the record as their next friend, it was held that none but parties can intervene for such a purpose. Baugh v. Baugh, 37 Mich. 59, 28 Am. Rep. 495. In this case the court said that "where the judgment is only voidable, and not void, it cannot be attacked by strangers to the 54 L. R. A.

County refusing to set aside a decree of divorce which was alleged to have been procured by fraud. *Affirmed*.

Statement by Terrance, J.:

All the parties reside out of this state, and the complaint alleges, in substance, the following facts: The plaintiffs are the heirs at law of Charles D. Tyler, who died intestate in Newfoundland in 1897, leaving an estate valued at about \$25,000. The defendant, by virtue of an alleged marriage with the deceased, claims an interest in his estate as his widow. In 1882 the defendant was married to Sumner D. Aspinwall, of Newark, New Jersey, and as his wife she thereafter resided with him, and had her

record. And where it is absolutely void it needs no proceedings to set it aside."

So, where the court has jurisdiction of the parties to, and the subject-matter of, an action for divorce brought by a wife, and judgment is rendered therein dissolving the marriage, with permission to her to marry again, and she does so marry, her second husband cannot maintain an action to have such judgment canceled, and his own marriage declared void, on the ground that the judgment was obtained through fraud or collusion. Ruger v. Heckel, 85 N. Y. 483. In this case the court said: "In bringing this action the plaintiff meddled with a matter which did not concern him. Before he contracted matrimony with Theresa, he was told of her former marriage, its dissolution, and the terms thereof. He has had the full benefit of his bargain. No one has questioned his title, and the record which he produces shows a judgment binding upon both parties."

In Richardson v. Stowe, 102 Mo. 33, 14 S. W. 810, where an administrator and heirs claiming property brought a suit alleging that the defendant had falsely claimed to be the wife of their ancestor, and had fraudulently procured a decree of divorce, and asked to have the judgment and all sales made in pursuance thereof set aside, and a decree that the legal title be divested and be administered according to law, it was held that there was no fraud in procuring the decree of divorce. The court does not discuss the rights of the plaintiffs to attack in this manner such a decree, further than holding that the decree of divorce determined every fact and issue in this petition, and that it was not subject to review in this proceeding.

II. Judgments on confession.

There is a conflict in the decisions as to the right of a third party to set aside a judgment on confession that is erroneous, irregular, or that is based on an insufficient statement. In New York a judgment creditor may have such judgments set aside.

So, creditors cannot set aside a judgment entered against their debtor on confession in favor of another creditor on the ground that the firm name was signed to the warrant of attorney by a partner not authorized to do so. Cassem v. Brown, 74 Ill. App. 846. This was on the ground that such judgment was not void, and that the debtor himself could not set aside a judgment on confession without showing some legal or equitable defense to the amount of the judgment.

domicil in that state until May, 1893. In September, 1893, she brought a suit for divorce against him to the superior court, in Fairfield county, on the ground of his habitual intemperance and intolerable cruelty; and in February, 1894, said court granted her a divorce on the latter ground. Unless said marriage was dissolved by this judgment, it has never been dissolved; and said Aspinwall is now in full life. The complaint avers that Aspinwall was never a resident of this state, "nor had the defendant, at the time of the institution of said suit for divorce, . . . been a resident of Connecticut for a period of three years; neither had she, being domiciled in this state before her marriage, returned to this state with the intention of permanently remaining, and the court granting said decree was therefore without jurisdiction." The allegations of

the complaint that Aspinwall was habitually intemperate and had been guilty of intolerable cruelty, and the testimony of the defendant in support of these allegations, were utterly false and untrue. A wilful fraud was committed upon the court, and said judgment of divorce was wrongfully and fraudulently obtained, to the damage and injury of the plaintiffs. The plaintiffs have already been damaged by the claims of the defendant upon the estate of the deceased to the extent of \$1,000, and, if said judgment of divorce is allowed to stand, will be permanently injured to the extent of \$25,000, and they have no adequate remedy at law. The plaintiffs claimed \$1,000 damages, and that the judgment of divorce be "set aside, vacated, and annulled." The defendant appeared in court "for the purpose of pleading to the jurisdiction only," and,

But see *Mills v. Dickson*, 6 Rich. L. 487, *infra*, to the contrary.

And a person not a party to the record of a judgment cannot move the court to vacate the judgment for irregularities. *Packard v. Smith*, 9 Wis. 184. This case was a judgment of confession. The objections were made to the validity of the judgment, as to the time at which it was entered, that it was not properly signed by an officer authorized, that it was not docketed until nine months after it was entered up. The court said: "Smith does not complain of this judgment, nor object to the time and manner at and in which it was entered. He appears to be satisfied with the judgment. Why, then, should a stranger to the record, who is not in any sense a party to the suit, be suffered to come in, on motion, and set this judgment aside?"

A judgment cannot be vacated on the motion of one not a party to the suit, and such an order will be reversed on appeal without regard to irregularities in the judgment of confession, that it was not properly signed by an officer authorized, and was not docketed in the judgment book for nine months, etc. *Ibid.*

And strangers to a record cannot have a judgment stricken off the records, where it was not obtained by fraud. *Covey v. Wheeler*, 23 Pa. Co. Ct. 467. In this case it was insisted that the judgment was confessed by a "trustee," and that he had no power to confess judgment, and that the title of the defendant was not the name of any person or association. The court said that if the judgment was founded on fraud, these parties, if affected, could impeach the same collaterally.

And where one judgment creditor moved to set aside a judgment confessed by his debtor to another creditor, first, because it did not conform to the requirements of the statute; second, because sufficient facts were not disclosed by the affidavit and confession to enable the court to acquire jurisdiction; third, because the judgment was void upon the face of the facts set forth;—it was held that if the ground upon which it was sought to set it aside was irregularity only none could be heard to impeach it upon such ground but a party thereto. It was held that the confession was in full compliance with the terms of the statute. *Uxle v. Vinson*, 111 N. C. 188, 18 S. E. 6. In this case the court said: "If it were sought to vacate this judgment upon the ground of fraud it could not be attacked by motion in the cause, but only by an independent action."

A judgment by confession entered in the district court on a warrant to enter it in the common pleas cannot be set aside by a subsequent

judgment creditor. *Hauer's Appeal*, 5 Watts. & S. 478. In this case the court said: "A creditor, as I have said, may abate a fraudulent judgment for a pretended debt; but he cannot abate an erroneous one for a bona fide debt to gain priority by it, for he was entitled to no priority at the date of the judgment, and its erroneousness was no wrong to him."

And in *Drexel's Appeal*, 6 Pa. 272, where a judgment creditor claimed that a judgment confessed to another creditor was void because confessed by a president of a corporation not having authority, the court said: "In this case, as in that, it might have been reversed on a writ of error, or set aside in the court below, on motion, but only at the instance of the defendant; never at the instance of a stranger."

One judgment creditor has no right to make a motion to set aside a judgment on confession in, favor of another judgment creditor on the ground of irregularity of such judgment. *Kellogg v. Keith*, 4 Ill. App. 886. In this case the court said: "If the judgments were invalid they might insist that appellants should take nothing on it as against them, but they had no right to intermeddle in the matter to ask the court to set it aside."

So, where it was claimed that the confession of the judgment was irregular, but the evidence showed that the action of the attorney was ratified by the debtor, it was held that, as the judgment was only voidable, a third party could not have it set aside. *Martin v. Judd*, 80 Ill. 78. In this case the court said: "If a judgment should be collusively confessed in a case where no indebtedness whatever existed it would be fraudulent, and any party whose interest might be affected could properly attack it."

A judgment confessed in vacation for too large a sum, caused by the addition of attorney's fees which the clerk, under the power of attorney to confess, had no right to fix, can be complained of, in the absence of fraud, only by the defendant in such judgment, and not by other judgment creditors who are strangers to the judgment. *Havens & G. Co. v. First Nat. Bank*, 162 Ill. 85, 44 N. E. 884.

And a judgment by confession under a power cannot, at the instance of a stranger seeking a preference, be set aside on the grounds that the declaration counted upon an unsealed note payable generally, whereas the note filed with the clerk was a note made due and payable at a particular place; that it was for a sum in excess of the amount due; and that the notes were not due when the confession of judgment was entered. The warrant of attorney authorized confession of judgment at any time after the date of the note. *Adam v. Arnold*, 86 Ill. 185.

by way of plea in abatement, she alleged that the court had no jurisdiction, because (1) the parties when the suit was commenced were all nonresidents of this state; (2) no personal service of the process or of the complaint was ever made upon the defendant, nor had any estate of hers been attached in the suit; (3) neither of the plaintiffs were parties to the action of divorce in question, nor did they have any interest therein; (4) no recovery of damages can be had in this proceeding for the acts of the defendant alleged. The plaintiffs moved to strike out of this plea the third and fourth of the above paragraphs, on the ground that the matters alleged in them were (1) immaterial and impertinent; (2) could not be taken advantage of by plea in abatement; and (3) were not matters of which the defendant could take advantage

under an appearance for the sole purpose of pleading to the jurisdiction. The court denied the motion. The plaintiffs then demurred to the plea in abatement for the following reasons: (1) To the whole plea, because the allegations thereof are immaterial and irrelevant; (2) to the paragraphs relating to the nonresidence of the parties, want of personal service on defendant, and the fact that none of her property had been attached, because this was, in substance, a proceeding to set aside a void judgment, or one that had been procured by fraud, which could not be brought in any other jurisdiction, and which invoked the exercise of a power in the court not dependent upon the presence of the parties by whom the fraud was perpetrated; (3) to the third and fourth paragraphs of the plea, as hereinbefore stated, because of the reasons alleged

In this case the court said: "The defendant in the judgment should, on motion to the court, have the error [in the calculation] corrected, if there be one. No ground is afforded a stranger to the record to make such an objection."

And grantees seeking to vacate a judgment cannot avail themselves of the fact that the debt on which the judgment was rendered was usurious. *Black v. Pattison*, 81 Miss. 599. In this case the court said: "The motion to vacate the judgment by confession was properly denied. The court had jurisdiction of the subject-matter and of the parties, who consented for judgment to be given on the note, although it was not due. It was competent for them to do so, and no legal cause of complaint exists because they did so. The objection for usury in the note is not available."

So, where a judgment was rendered by confession in open court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot, at the instance of one not a party to the judgment, be invoked to set aside or show the judgment a nullity. *Cloud v. El Dorado County*, 12 Cal. 128, 78 Am. Dec. 526. In this case the court said it was wholly immaterial whether there were errors or not, or how many or how gross; the jurisdiction having attached, the judgment could not be collaterally attacked by a stranger.

But in *Bernard v. Douglas*, 10 Iowa, 370, it was held that junior judgment creditors were entitled to maintain a motion to set aside a judgment by confession, where the statement of facts did not comply with the statute in showing out of what the indebtedness arose, and it did not appear that the amount for which the judgment was confessed was justly due or to become due; *Following Chappel v. Chappel*, 12 N. Y. 222, 64 Am. Dec. 496; *Dunham v. Waterman*, 17 N. Y. 15, 72 Am. Dec. 408.

And under Mo. Rev. Code 1855, p. 1283, art. 12, § 24, providing that where a judgment by confession is rendered, under a power of attorney from the debtor, the affidavit must be made by the plaintiff; other judgment creditors are entitled to have the same set aside on motion where the attorney in fact, or agent of the plaintiff in the confessed judgment, made the required affidavit. *Bryant v. Harding*, 29 Mo. 347.

In *How v. Dorschelmer*, 31 Mo. 349, it was said that a confession of judgment which sets out a promissory note as the consideration, and not a statement of facts out of which the indebtedness arose, is subject to be set aside by other judgment creditors of the judgment

debtor who show that they are prejudiced thereby.

Anyone interested can move to set aside a judgment that is null and void for defect of substance, as where a judgment is confessed by one party for the firm. *Mills v. Dickson*, 6 Rich. L. 487. In this case the court said that no one not a party to the judgment can impeach upon mere irregularity.

See *Cassem v. Brown*, 74 Ill. App. 346, *supra*, holding the reverse.

A judgment will be set aside where the defendant was dead at the time of entering the confession. *Milnor v. Milnor*, 9 N. J. L. 93; *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788; *Taylor v. Gooch*, 110 N. C. 387, 15 S. E. 2.

In New York it was early held, under the act of 1818, that a judgment entered on confession on a defective statement was constructively fraudulent as to creditors, and the subsequent sections of the Code of Procedure and Code of Civil Procedure defining the statement were intended to take the place of that act. Some of the cases refer to the question of fraud, and others do not. The cases cited here do not include those where the debtor actually intended to defraud his creditors.

A judgment on confession may be set aside on motion of judgment creditors on account of a defective statement. *Bonnell v. Henry*, 13 How. Pr. 142; *Winnebrenner v. Edgerton*, 30 Barb. 185, 8 Abb. Pr. 419, 17 How. Pr. 363.

And it may be set aside by suit in equity. *Dunham v. Waterman*, 17 N. Y. 9, 72 Am. Dec. 406, 6 Abb. Pr. 357.

In *Wood v. Mitchell*, 53 Hun, 451, 6 N. Y. Supp. 232, it was held that one judgment creditor could have a judgment of another creditor set aside where a person confessed a judgment in favor of an infant for liability on a tort, as upon contract, and this judgment would be in the way of other creditors pursuing their remedies, which judgment the plaintiff could repudiate upon attaining his majority.

The supreme court may set aside a judgment, entered therein without action, for a defect in the statement upon which it is entered, upon the application of a junior judgment creditor. *Chappel v. Chappel*, 12 N. Y. 215, 64 Am. Dec. 496. In this case the court said: "Had the plaintiff in the judgment by confession shown by satisfactory evidence that the debt for which this judgment had been entered up was really due him and originated out of a bona fide transaction, that the form of the confession was defective on account of a misapprehension of the practice and the requirements of the statute, it might have been proper for the supreme court, in the exercise of its discretion, to have

in the motion to strike out. After this the complaint was amended by striking out the prayer for relief by way of damages. The court overruled the demurrer on the grounds (1) that it had acquired no jurisdiction over the defendant; (2) that the plaintiffs had no standing in court, because they were not parties to the action for divorce, and were not legally prejudiced by the judgment therein. The reasons of appeal relate to the action of the court in denying the motion to strike out, and in overruling the demurrer.

Messrs. Bill & Tuttle and Robert C. Dickenson, for appellants:

The general power of a court to vacate and annul one of its own decrees when void for any reason, or when procured by fraud, is everywhere abundantly recognized.

permitted an amendment, thus preserving its lien and priority." It was further held that Code Proc. § 883, is to be construed as the act of 1818, in order to prevent fraud.

In *Lawless v. Hackett*, 16 Johns. 149, holding that a judgment confessed on a defective statement should be set aside on motion of a judgment creditor, it was further held that, under N. Y. act April 21, 1818 (Sess. 41, chap. 269, § 8), providing for the statement on confession, the object of the act was to prevent fraud. It was also held that the specification could be amended, but not to interfere with the rights of any judgment creditors which might have attached in the meantime.

In *Flour City Nat. Bank v. Doty*, 11 N. Y. Civ. Proc. Rep. 141, an action to set aside a judgment confessed by a debtor for defective statement in not complying with N. Y. Code Civ. Proc. § 1274, providing for statement, it was held that it should be set aside, and that where the statement is defective the judgment is fraudulent as to creditors.

In *National Park Bank v. Salomon*, 17 N. Y. Civ. Proc. Rep. 8, 5 N. Y. Supp. 632, on a motion by a creditor to set aside a judgment on confession for defective statement, it was held that the supreme court may amend a confession of judgment notwithstanding the fact of such amendment will prejudice judgment creditors.

And such a judgment may be set aside at the instance of purchasers under mortgage foreclosure. *Marks v. Reynolds*, 12 Abb. Pr. 403, note, 20 How. Pr. 338.

In *Shufelt v. Shufelt*, 9 Paige, 137, 37 Am. Dec. 381, it was held that a subsequent mortgagee (a father of mortgagor) could not impeach the consideration of a prior judgment voluntarily confessed by his son to an administrator.

In *James v. Johnson*, 6 Johns. Ch. 417, it was held that mortgage creditors are bona fide purchasers, within the meaning of the act of the 21st of April, 1818 (Sess. 41, chap. 259), relative to judgments entered by confession on warrants of attorney, which declares such judgments fraudulent and void, as against "other bona fide judgment creditors" and "every bona fide purchaser," where a particular specification of the consideration of the debt is not filed. But this case was reversed in *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475.

In *Schooncraft v. Thompson*, 7 How. Pr. 446, a judgment on confession was set aside at the instance of a junior judgment creditor for defective statement, but in 9 How. Pr. 61, this was reversed on the ground that the statement was not defective.

A judgment entered upon confession will not 54 L. R. A.

Freeman v. Howe, 24 How. 460, 16 L. ed. 752; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095; *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Whitcomb v. Whitcomb*, 46 Iowa, 437.

This power is inherent in courts, is necessary to their proper protection, and is their only safeguard against injustice and deceit, and has always been exercised by them when fraud or imposition has been satisfactorily brought to their notice.

Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; *Nealis v. Dicks*, 72 Ind. 374; *Barker v. Todd*, 15 Fed. 265; *Mechanics' Nat. Bank v. Burnet Mfg. Co.* 33 N. J. Eq. 493.

The exercise of this right is not dependent upon the residence or presence of the parties in the original suit; otherwise it would be ineffectual, for all that would be

be set aside at the instance of another judgment creditor on the ground that it is excessive on account of including interest, where it appears from the evidence taken on the trial that the note did, by its terms, draw interest from its date. *Rothchild v. Mannevoitch*, 29 App. Div. 580, 51 N. Y. Supp. 258.

In *Simpson v. Burch*, 4 Hun. 315, where a junior creditor moved to vacate a judgment and execution in attachment on the ground of the want of jurisdiction of the defendant, it was held that under Code Proc. § 139, providing that from the time of the service of the summons in a civil action or the allowance of a personal summons the court shall have acquired jurisdiction, the omission to serve a summons personally or by publication within thirty days was an irregularity which entitled the defendant to avoid all proceedings after the issuing of the attachment. But such omission did not render the proceedings void as regards third persons. In this case the court said: "The defendant undoubtedly might waive the effect of such omissions, and that is the test whether the defect shown is a nullity or a mere irregularity. Upon this ground we think the case of *Gere v. Gundlach*, 57 Barb. 13, was rightly decided."

In *Barron v. South Brooklyn Saw Mill Co.* 18 Abb. N. C. 352, it was said: "It is decided in *Gere v. Gundlach*, 57 Barb. 13, and *Simpson v. Burch*, 4 Hun. 315, that a noncompliance with this proviso that publication must be commenced in thirty days is a mere irregularity, and that a third person cannot take advantage of it."

III. Matters of administration, probate, heirs, guardian.

The administratrix of a purchaser under partition may have a judgment in foreclosure of a parol agreement to make a mortgage set aside. This is under N. Y. Code Civ. Proc. § 724, authorizing relief from a judgment taken through mistake, inadvertence, surprise, or excusable neglect. *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842. In this case the court said that in consequence of filing a notice of *lis pendens* the first judgment bound these defendants, and persons thus situated could not only claim to be made parties, but could also move the court in reference to any judgment rendered therein affecting their rights. "The plaintiff had no written stipulation giving or agreeing to give him a lien upon real estate. If he had any agreement for a lien upon this real estate, it all rested in parol, and there was no part per-

necessary to enable the offending party to retain the benefit of his fraud and injury would be to remain absent from the state whose court of justice he had wronged.

State ex rel. Phelan v. Engelmann, 86 Mo. 551; *Koith v. McCaffrey*, 145 Mass. 18, 12 N. E. 419; *McIntyre v. McIntyre*, 9 Misc. 252, 30 N. Y. Supp. 200; *Olmstead v. Olmstead*, 41 Minn. 297, 43 N. W. 67; *Young v. Young*, 17 Minn. 181, Gil. 153; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. Dec. 608; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393.

A decree of divorce will be set aside upon clear proof that it was obtained by fraud and collusion, notwithstanding the wife, in whose favor it was granted, has remarried.

McIntyre v. McIntyre, 9 Misc. 252, 30 N. Y. Supp. 200; *Dringer v. Erie R. Co.* 42 N. J. Eq. 573, 8 Atl. 811; *Allen v. Maclellan*,

and did not appear, may have a judgment by default against them vacated under Minn. Gen. Stat. 1878, chap. 75, § 8, authorizing the persons proceeded against as unknown heirs to be allowed to defend at any time within one year after notice of the entry of judgment. *Boeing v. McKinley*, 44 Minn. 392, 46 N. W. 776.

formance and no ground whatever authorizing the maintenance of the action."

An administrator seeking to reverse a judgment to which he was not a party must aver, in his petition for a writ of error, that he has been duly appointed, and that the property in controversy would be assets in his hands. *Thomas v. Jones*, 10 Tex. 52.

And relief was granted to an administrator where judgment on confession was taken against the decedent after death. *Wood v. Hopkins*, 3 N. J. L. 689.

Any lienor or judgment creditor, or any general creditor of an estate of a decedent, may maintain a motion to set aside a judgment rendered against an administrator, where the petition does not aver presentation of the claim, and contains counsel fees contrary to Wyo. Stats. 1890-91, chap. 14, § 9, chap. 70, providing that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, but to enforce a lien no counsel fees shall be recovered unless such claims are so presented. *O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525.

But where an administrator appealed from the probate court disallowing his claims, and creditors under an appearance on appeal subsequently consented to a decree of reversal, other creditors who stood by and knew of the proceeding cannot maintain a petition to set aside the decree where there is no showing of fraud. *Pierce v. East Greenwich Probate Ct.* 19 R. I. 472, 34 Atl. 992. In this case the court said that if the petitioner was a party to the appeal by reason of being a creditor of the estate, he was estopped; and if he was not a party, he had no standing to disturb the action taken by all who were parties to the appeal.

Creditors of decedent cannot have a decree dismissing a bill filed by the executors set aside in order to introduce additional evidence, where such creditors had notice of the proceedings, and did not apply to be made parties. *Koons v. Koons*, 6 Kulp, 317.

An heir who was not a party in a proceeding to probate a will wherein it was adjudged that the writing was not the will of the testator is entitled to maintain a bill of review, and he may have a review, rehearing, and reversal of the decision, though it may be that of the appellate court. *Singleton v. Singleton*, 8 B. Mon. 340.

And relief was granted to an heir where a judgment was taken after the defendant's death. *Blodgett v. Blodgett*, 42 How. Pr. 19.

And a grantee of "unknown heirs" of the deceased person, who were sued by publication 54 L. R. A.

12 Pa. 328, 51 Am. Dec. 608; *Willman v. Willman*, 57 Ind. 500.

Fraud in procuring said divorce may consist in taking up a fictitious residence for the purpose of getting jurisdiction, concealing the commencement of the suit from the defendant, and falsifying testimony.

Whitcomb v. Whitcomb, 46 Iowa, 437; 2 Bishop, Marr. Div. & Sep. § 1568, p. 1568.

This is in the nature of an application to correct the record and prevent wrong and injustice from the effect of the judgment as it now stands. In this respect it only invokes the exercise of the power of the court for which there are precedents in analogous cases.

Stickney v. Davis, 17 Pick. 169; *Oapen v. Staughton*, 16 Gray, 364; *Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393; *Schouler*,

and did not appear, may have a judgment by default against them vacated under Minn. Gen. Stat. 1878, chap. 75, § 8, authorizing the persons proceeded against as unknown heirs to be allowed to defend at any time within one year after notice of the entry of judgment. *Boeing v. McKinley*, 44 Minn. 392, 46 N. W. 776.

But after judgment in an action wherein A. B. was defendant, and who was represented to be the only heir of C. D., through whom he derived title, another party claiming to be the only heir cannot have the judgment set aside and annulled, as his rights are in no manner affected by the judgment. *McGhee v. Romatka*, 18 Tex. Civ. App. 436, 44 S. W. 700.

And relief was denied devisee not in privity where the decree was taken after a party died. *Slingsby v. Hale*, 1 Ch. Cas. 122.

Under Minn. Gen. Stat. 1894, § 5434, providing that a judgment obtained by means of perjury or any fraudulent act or practice of the prevailing party may be set aside, an heir cannot set aside a judgment obtained in the probate court to sell lands to pay debts, on the ground that the claims were not presented in time, and were not debts due by the estate, where it is not shown but that these heirs appeared in that action. *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148.

A guardian seeking to reverse a judgment to which neither he nor his *cestui que trust* are parties must show his right to have it reversed by proper averments. *Cochrane v. Day*, 27 Tex. 585.

IV. Assignment for creditors.

The assignee for creditors has no right to have two judgments against his assignor set aside on the ground that they were taken upon the same specialty, as no one but the defendant in an execution can complain of a judgment for being irregular. The judgments mentioned above are not irregular. Creditors complaining of them cannot be relieved by motion to set them aside, but have another appropriate remedy. *Jacobs v. Burgwyn*, 63 N. C. 196.

So, an assignee for creditors cannot have a judgment on confession set aside on the ground of insufficiency of statement, as he has no standing in court in such a case. *Beekman v. Kirk*, 15 How. Pr. 228.

And a purchaser of claims against an insolvent after the latter's discharge cannot maintain an action to set aside the decree of discharge. Such an assignee is not within Cal. act 1880, § 53, providing that any creditor whose debt was provable may, after the discharge, set it aside after two years on the

Husb. & W. 1st ed. p. 575; *Freeman v. Howe*, 24 How. 460, 16 L. ed. 752.

A judgment obtained by fraud can be set aside upon the motion of persons to whom it is prejudicial.

1 *Freeman*, Judgm. 4th ed. § 99; *Edson v. Edson*, 108 Mass. 596, 11 Am. Rep. 393; *Parker v. Dee*, 3 Swanst. 529; *Kemp v. Squire*, 1 Ves. Sr. 205; *Weiss v. Guérineau*, 109 Ind. 438, 9 N. E. 399; *United Lines Teleg. Co. v. Stevens*, 67 Md. 156, 8 Atl. 908; *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386.

Messrs. Tweedy, Scott, & Whittlesey, for appellee:

The parties to the action are all nonresidents. No personal service has ever been made upon defendant, and no property belonging to her has been attached. For these

ground of fraud. *Sanborn v. Doe*, 92 Cal. 152, 28 Pac. 105.

The general assignee for the benefit of creditors has not such a standing in court as entitles him to question the validity of the judgment confessed by his assignor, which is insufficient in not stating what amount remained due upon the bond. It is only a judgment creditor, or one claiming under him, that is authorized to invoke the summary exercise of the equitable jurisdiction of the court to set aside an illegal or fraudulent judgment. A creditor at large cannot be heard. *Beekman v. Kirk*, 15 How. Pr. 228.

But in *Mills v. Dickson*, 6 Rich. L. 487, it was held that an assignee for creditors may have a judgment confessed by one partner for the firm set aside.

V. Garnishment.

A claimant of money garnished cannot have the judgment sustaining the garnishment opened up where such judgment is satisfied, although he notified the garnishee before judgment that the fund in his hands belonged to the claimant, but the garnishee admitted the indebtedness in court and allowed the judgment to be taken. A stranger to the record cannot have the judgment opened after it is satisfied. *Shultz v. Hoffman*, 13 Pa. Co. Ct. 90.

A garnishee not a party to the record cannot go before the court and move to set aside a judgment which is not against him. *Merchants' & Mfrs. Nat. Bank v. Halman*, 80 Ga. 624, 5 S. E. 795. In this case the court said: "The Code, § 3587, evidently confines the motion in arrest of a judgment, or a motion to set it aside, to the parties to the record."

VI. Foreclosure of mortgage.

A judgment of foreclosure should not be set aside for the purpose of allowing a person whose rights were not affected by it to come in and be made a party to the action and set up a defense. *Bean v. Fisher*, 14 Wis. 58.

And after a foreclosure sale a third party will not be allowed to file a bill in the nature of a bill of review for the purpose of having the decree reviewed and set aside on the ground that the mortgage debt had been paid before foreclosure. *Ward v. Clark*, 6 Wis. 509. In this case the court said: "From these cases it appears that it is not competent for a person who is a stranger to the record, and not in any sense a party to the suit, to appear therein and make a motion. He must procure a status in court, by petition or bill, as the nature of the case may require, and then he may proceed §4 L. R. A.

reasons the superior court was without jurisdiction of the parties and the action.

O'Sullivan v. Overton, 56 Conn. 102, 14 Atl. 300; *Pennoyer v. Neff*, 95 U. S. 727, 24 L. ed. 570; *Dewey v. Des Moines*, 173 U. S. 203, 43 L. ed. 668, 19 Sup. Ct. Rep. 379.

Neither of the plaintiffs was a party to the divorce suit. They were absolutely strangers to it. They had no rights or interests affected by the judgment of divorce. They cannot directly attack it. Only the defrauded party to the divorce action can do that.

The plaintiffs have no standing in court; no cause of action which the court will consider.

7 Enc. Pl. & Pr. pp. 145-147; *Freeman*, Judgm. 4th ed. § 334; *Black*, Judgm. §§ 317, 320, 930; *Bishop*, Marr. Div. & Sep. §§ 1565, 1569, 1577; *Smith v. Hall*, 69 Conn.

as his interests and the practice of the court may allow."

A terre-tenant who bought subject to the lien of the unpaid balance of a mortgage has no standing after a sci. fa., and after the land has been sold by judicial sale, to have the judgment opened on the ground of usury, where the mortgagee renounces all right to a personal judgment on the bond. *Reap v. Battle*, 155 Pa. 265, 26 Atl. 439. In this case the court said: "The only person who can defend a sci. fa. because of usury included in a mortgage is the mortgagor."

In *Sumner v. Coleman*, 20 Ind. 486, it was said that one who was not a party to an action of foreclosure, and who was a proper, though not a necessary, party, cannot open the judgment, and cannot contest the amount of the judgment unless he shows it to be fraudulent.

VII. Judgments against partners.

In an action against a firm where one of the partners served an offer of judgment without consent of his codefendants, and judgment was taken against all the defendants, another judgment creditor was entitled to have the same set aside, as the offer did not purport to be signed by all the defendants or in their behalf. The signature "D. M. & Co." does not authorize a judgment against all the members. *Bridenbecker v. Mason*, 16 How. Pr. 203. The court said: "Third persons cannot take the objection that the judgment or proceeding is irregular. (2 Chitty, Arch. 1876). But when a judgment is fraudulent or is invalid by reason of some substantial defect, it will be set aside on the application of any party interested in impeaching it." This case follows the New York rule that judgments on confession, and defective statements, are constructively fraudulent. See II., *supra*, Judgments on confession.

And in *Mills v. Dickson*, 6 Rich. L. 487, it was held that a judgment confessed by one partner for the firm would be set aside.

But in *Cassem v. Brown*, 74 Ill. App. 346, the court refused to set aside a judgment confessed by one partner for the firm, on the ground that the moving party must first establish that the claim was unjust.

VIII. Judgments against corporations.

A stranger cannot set aside a judgment after the lapse of twenty years on the grounds that all the necessary parties were not before the court, and that the corporation defendant was dissolved by reason of insolvency. The new

665, 38 Atl. 386; *Michaels v. Post*, 21 Wall. 398, 22 L. ed. 520; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Ruger v. Heckel*, 21 Hun, 489, 85 N. Y. 483; *Baugh v. Baugh*, 37 Mich. 59, 26 Am. Rep. 495; *Webster v. Webster*, 54 Iowa, 153, 6 N. W. 170.

Torrance, J., delivered the opinion of the court:

The appeal in this case involves to some extent the consideration of the power of the superior court over its recorded judgments, and its duty to exercise that power under certain circumstances. Over its recorded judgments it may exercise two powers, separate and distinct in their purpose and object, if not in their nature; namely: (1) the power to correct and amend the record so that it shall speak truth,—shall truly show what the judicial action really was; (2)

trustees, who were alleged to have been necessary parties, may have disclaimed any interest in the absence of any showing in the record as to their being proper parties. The death of a trustee before judgment devolved the trust on the other trustees who were parties. One who was not a stockholder or a creditor cannot urge that the corporation was dissolved. *F. G. Oxley Stave Co. v. Butler County*, 121 Mo. 614, 26 S. W. 387.

And the appointment of receivers, in the absence of an injunction restraining the officers of the corporation from defending an action, did not deprive such officers of the right to continue the defense thereof; and such receivers have no standing to move to set aside an answer which was served and a judgment which was entered, and to move for leave to serve an answer on their own behalf. *Farmers' Loan & T. Co. v. Hoffman House*, 7 Misc. 358, 27 N. Y. Supp. 634. In this case it was further questioned whether the receiver was properly appointed, where no injunction was granted under N. J. act April 7, 1895, § 72, in case of insolvent corporations, authorizing the court of chancery "at the time of ordering the said injunction," or at any time afterwards "during the continuance of said injunction," to appoint a receiver of the corporation.

In *Rogers v. Haines*, 114 Ala. 50, 21 So. 411, it was said that where judgments were rendered prematurely against a corporation the remedy of a receiver subsequently appointed was not plain, adequate, and complete by motion to set aside or by certiorari, but that he could, by bill in equity, enjoin the same.

In *Sharp v. Danville, M. & S. W. R. Co.* 106 N. C. 308, 11 S. E. 530, where judgments were confessed by a corporation and entered at night on the same day that a receiver was appointed for the corporation, and the receiver moved to set them aside for irregularity, it was held that they were regular and valid. The court does not discuss the question as to the right of a receiver to make the motion.

IX. For death of party.

The general rule seems to be that on the application of an heir, administrator, or creditor a judgment taken against a party who was dead at the time of the judgment will be set aside. But it was held that after twenty years an heir not in privity could not set aside a decree against a plaintiff where one of the defendants was dead at the time of the decree.

A judgment rendered against a person who is dead is irregular and voidable, and will be vacated on the application of representatives 54 L. R. A.

the power to set aside, annul, and vacate such judgment. Many of the limitations and conditions under which it will exercise one of these powers may not limit or condition its exercise of the other. It may rightfully exercise its powers merely to amend or correct the record of the judgment so as to make it speak truthfully, under circumstances which would not at all justify it in exercising its power to vacate the judgment. As the record is a history of the court proceedings, the power to make it speak truthfully is one of necessity belonging to every court of record, and may be exercised as well during the term at which the judgment was rendered, on the court's own motion or otherwise, as afterwards; but, when exercised afterwards, it will generally be done only upon notice to the adverse party. *Wilkie v. Hall*, 15 Conn. 32; *Weed v. Weed*, 25

of the deceased, or by any person having acquired an interest in the suit after it is begun, if application is made in due season. *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788; *Doe ex dem. Taylor v. Gooch*, 110 N. C. 387, 15 S. E. 2.

In this latter case the court said that, as a general rule, only the party against whom an irregular judgment is rendered can complain of it. "But it has been held in a proceeding between these same parties (*Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788), that he can make such motion. It would be very strange if he could not, since it is held in that case that he could not set up his rights and enjoin the execution of plaintiff's writ of possession in an independent action."

And a judgment entered upon a bond with a warrant of attorney after the death of the obligor, who was insolvent at the time, will be set aside as irregular on a motion of another creditor. *Milnor v. Milnor*, 9 N. J. L. 93.

And where the facts disclosed authorized the court to assume that the defendant was dead when the plaintiff commenced his action against him, and consequently that the judgment obtained in the action was void, it is an apparent lien or cloud on the real estate of the defendant, which may be set aside on motion, by an heir at law of the defendant, having an interest in such real estate. *Blodget v. Blodget*, 42 How. Pr. 19. In this case the court said that "this court has control of its own judgments, and has not unfrequently vacated them on motion of parties having an interest in a property on which they are a cloud."

And where a judgment and warrant of attorney was entered up after the death of the defendant, his administrator could have the same set aside, on motion, for irregularity. *Wood v. Hopkins*, 8 N. J. L. 689. This was because, if it should turn out that the estate was insolvent, the creditors would stand on the same footing.

A bill was brought by a mortgagor against a mortgagee to have a redemption. It was decreed accordingly, and that if the plaintiff failed to pay the money at a day set the defendant should hold discharged of all equity of redemption. Pending the reference the suit abated by the death of one of the defendants, and no notice was taken of this and the decree was enrolled. Twenty years afterwards a devisee of the mortgagor brought a bill of review on the ground that there was no cause in the court when the account was stated, and that the decree was erroneous. It was held that the plaintiff, being a devisee, was not entitled to a bill of review, being not in privity with the testa-

Conn. 337-342; *Calhoun v. Terry Porter & Co.* 21 Conn. 526-530; *Smith v. Moore*, 38 Conn. 105-109; *Rouse v. Smith*, 51 Conn. 266, 50 Am. Rep. 16. As to the other power,—to vacate or set aside a recorded judgment,—the authorities are agreed that it may be exercised during the term at which the judgment was rendered, substantially at the discretion of the court. "It is a general rule of law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and that they may then be set aside, vacated, modified, or annulled by that court." *Bronson v. Schulten*, 104 U. S. 410-415, 26 L. ed. 797-799. See also to the same effect, *Sturdevant v. Stanton*, 47 Conn. 580; *Wilkie v. Hall*, 15 Conn. 37;

Weed v. Weed, 25 Conn. 342; *Foster v. Redfield*, 50 Vt. 285; *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077. But whether this power can be exercised upon equitable grounds after the term at which the judgment was rendered has ended, and, if so, upon what conditions and under what limitations, are questions upon which the courts in the different states are not in accord with each other. In many of the states a more or less limited control over its judgments, after the expiration of the term at which they are rendered, has been conferred upon the courts by statute, while in others a more or less limited power of this kind is held to be inherent in the court without the aid of legislation. Then, too, the mode of procedure in such cases, and the circumstances under which this exercise of such power can be invoked successfully,

tor, against whom the decree was rendered; and the bill was dismissed. *Slingsby v. Hale*, 1 Ch. Cas. 122.

X. For usury.

A purchaser of land that is subject to a judgment cannot have the same set aside on the ground that it contains usury. *Reap v. Battle*, 155 Pa. 268, 26 Atl. 439; *Black v. Pattison*, 61 Miss. 599.

So, where a party filed a bill for relief from a judgment against him on the ground of usury, but afterwards consented to a decree dismissing his bill, it was held that a subsequent purchaser of the land on which the judgment was a lien could not impeach it on the ground of usury. *French v. Shotwell*, 5 Johns. Ch. 555.

And one creditor is not entitled to have a prior judgment of another creditor against his debtor set aside on the ground that there was usury in the original mortgage debt, where such complaining creditor, when the lien was about to be made, assisted the debtor in endeavoring to pay a part of the debt, and thus to postpone the final execution of the judgment. *Mahan v. Cavender*, 77 Ga. 118. In this case the court said that he could only obtain relief in case the judgment was fraudulent, and in that event he must not have been negligent.

XI. Application by surety or guarantor.

The executor of the surety on a bond of an administrator cannot have a judgment against such administrator set aside where neither the administrator nor his administrator complained of any alleged irregularity in the judgment. *Waiton v. McKesson*, 101 N. C. 428, 7 S. E. 566.

And a surety on an appeal bond is not entitled to maintain a bill in equity to have the judgment declared void on the ground that the cause of action was a gambling contract, under Ill. Crim. Code, § 135, providing that all judgments, etc., given, granted, drawn, or executed contrary to the provisions of this chapter may be set aside and vacated by any court of equity upon bill filed for that purpose by the person so granting, giving, entering into, or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser, or other person interested therein. *West v. Carter*, 129 Ill. 249, 21 N. E. 782. In this case the court said: "In no sense can appellee be said to be a person 'interested,' either in the original contract, or in the judgment rendered thereon by the justice of the peace, within the contemplation of the section of the statute quoted. In respect of this judgment he was a 54 L. R. A.

mere volunteer, who, at the instance of the defendant, voluntarily obligated himself to pay the judgment rendered against his principal by said justice."

"The party aggrieved" does not mean "any party aggrieved" under Minn. Laws 1877, chap. 131 (Gen. Stat. 1878, chap. 66, § 285), authorizing an action to be prosecuted by "the party aggrieved" to set aside a judgment obtained by means of the perjury or fraudulent conduct of the prevailing party. *Stewart v. Duncan*, 40 Minn. 410, 42 N. W. 89. In this case the court said that "this plaintiff was not a party to it, although he was directly interested in the result, as it would affect his liability to the sheriff under his indemnifying bond . . . It would be a liberal construction, rather than a strict one, which should give to the words 'the party aggrieved' as used in this connection a meaning equivalent to 'any person aggrieved.'"

And where the defendant in claim and delivery consented to a judgment for the recovery of property, the sureties on the delivery bond were not entitled after judgment to procure an order making them parties defendant and to have the judgment vacated, where they did not offer to interplead and claim the property as prescribed by N. C. Code, § 331, providing that when property taken by the sheriff shall be claimed by any person other than the plaintiff or the defendant, claimant may interplead upon filing an affidavit of his title and right to the possession. *McDonald v. McBryde*, 117 N. C. 125, 23 S. E. 103. In this case the court said that the judgment could only be set aside by civil action, and not by a motion in the cause.

But in *Hoffman v. Steinau*, 20 N. Y. Week. Dig. 122, it was held that a surety in a replevin bond may be permitted to protect himself where it is equitable to open a judgment obtained against the plaintiff by default, and to prosecute the action in the latter's name.

And a party who pays under a contract of indemnity a Wisconsin judgment obtained on a New York judgment may, after reversal by the Supreme Court of United States of the New York judgment, have the Wisconsin judgment set aside. *Aetna Ins. Co. v. Aldrich*, 38 Wis. 107. In this case the court said: "We conceive it, therefore, quite incorrect to say that they are to be regarded as strangers to the record,—that they are not entitled to complain against the judgment, nor to ask the court to set it aside. Such a view would, or might, lead to great injustice, and certainly would sacrifice the substantial rights of parties upon very technical grounds. The case is not analogous to that of *Packard v. Smith*, 9 Wis. 184; *Drexel's Appeal*, 6 Pa. 272; and *Berry v. Atty.*

very very much in the different jurisdictions. In some the mode of procedure is, in a more or less summary way, by motion supported by affidavits, while in others it must be by bill of review in equity, or by petition for a new trial, or by some other mode of application to the court which rendered the judgment sought to be set aside. For these and other reasons of a similar nature the decisions in one jurisdiction afford but little aid in determining matters of this kind in another. In the case at bar the equitable power of the superior court in Fairfield county is invoked to set aside a judgment rendered six years before. This is the only court to which an application of this nature could be brought, and such court is invested with full power to entertain and grant applications of this kind. *Smith v. Hall*, 71 Conn. 427-432, 42 Atl. 86. The real question in this case is not whether the superior court possesses the power to set aside the judgment of divorce in question upon the grounds alleged in the complaint, but it is whether the court erred in not exercising that power in favor of these plain-

tiffs. The judgment which the plaintiffs seek to open is one of a peculiar character. It establishes the personal status of the parties to it in a particular which was of the highest importance to the parties and to the community. They had been married. It made them single and unmarried. If such a judgment can under any circumstances be reopened at the suit of a stranger, this judgment cannot be reopened at the suit of the plaintiffs. Its consequences, if harmful to them, are of too remote and indirect a character to give them any cause of action. The court is not called upon to exercise this power at the instance of such parties. Courts are instituted to give relief to parties whose rights have been invaded, and to give it at the instance of such parties; and a party whose rights have not been invaded cannot be heard himself to complain if the court refuses to act at his instance in righting the wrongs of another who seeks no redress. The courts are practically unanimous in holding that it is not error to refuse to exercise the power here in question at the instance of a mere stranger,

Gen. 19 L. J. Ch. N. S. 232, 2 Macn. & G. 16, 1 Hall & Tw. 520; and the reason of those decisions does not apply."

See note,—*Enjoining judgments against, or in favor of, sureties*,—to *Michener v. Springfield Engine & Thresher Co.* (Ind.) 31 L. R. A. 59.

XII. Application by party claiming property affected.

In the absence of statutory or Code provisions, it seems the weight of authority is that a grantee, mortgagee, or claimant is not entitled to relief against judgments to which he was not a party.

A judgment *in personam* will not be set aside at the instance of one who was not a party to the record, on the ground that the property standing in the name of the defendant, against whom judgment was rendered, belonged to him. *Gaehring v. Haedrich*, 8 Pa. Super. Ct. 507.

In *Leonard v. Bryant*, 11 Met. 370, where a writ of entry was sued out against the grantor of the deed before it was recorded, and the judgment was erroneous for defective service of summons, it was said that the grantee could not maintain a writ of error to reverse the judgment, but that his remedy was to avoid it by plea and proof.

A judgment in an attachment suit cannot be set aside for irregularity on the motion of a person to whom the property attached had been conveyed by the defendant, after the service of the attachment, but who is a stranger to the record. *People ex rel. Hyde v. Calhoun County Circuit Judges*, 1 Dougl. (Mich.) 417.

And a stranger to a judgment cannot maintain a collateral action to have it declared not a lien on certain property on account of matters preceding its rendition. *Johns v. Pattee*, 55 Iowa, 665, 8 N. W. 668. In this case the court further said that it was rendered in a proceeding at law, and there is some question whether such a judgment can be set aside or modified in an action in equity because of matters which preceded the judgment, under Iowa Code, § 2522, providing that "judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings except for a defense which has arisen or been discovered since the judgment was rendered." 54 L. R. A.

The plaintiff claimed that his vendor procured a fraudulent judgment against himself before he conveyed to plaintiff.

The assignee of a defendant served by publication has no right to appear and demand a retrial upon his own account under Iowa Code, § 2877, providing that when a judgment has been rendered against a defendant served by publication only, and who did not appear, such defendant, or any person representing him or them, may at any time within two years move to have the action retried. *Parsons v. Johnson*, 66 Iowa, 455, 23 N. W. 921.

And under Neb. Code Civ. Proc. § 82, providing for the opening of the judgments obtained on publication within five years, a grantee who held title prior to the execution of a trust deed, and conveyed his interest by quitclaim deed before the foreclosure, cannot have the decree opened with leave to file an answer, as he has no interest in the subject of the suit. *Powell v. McDowell*, 16 Neb. 424, 20 N. W. 271.

And a purchaser will be denied relief from a judgment on confession where it is claimed that there was irregularity in the entry, signing, and docketing. *Packard v. Smith*, 9 Wis. 184.

A subsequent mortgagee of the judgment debtor cannot call in question the validity of that judgment on the ground of illegality of the consideration, where the judgment debtor himself could not file a bill to set aside a judgment voluntarily confessed. *Shufelt v. Shufelt*, 9 Paige, 137, 37 Am. Dec. 381. In this case the court said this "was an indirect purchase by a stranger to the transaction of the privilege of bringing a suit in this court to set aside or overreach this judgment by the use of the testimony of the party against whom the judgment was recovered."

On an application by a party who was not a party to the action, but whose lands were affected by judgments to cancel the same, and who claimed that they had been paid, the motion was refused on the grounds that it was not made by the defendant, nor had the plaintiff any notice of the application, but it was made by a party who had no equities so far as appeared in the case, and there might be other persons who had an interest in sustaining the judgment. *Re Beers*, 5 Robt. 643. In this case the court said: "Before the court can interfere and can-

whose rights are not at all affected by the judgment he seeks to have set aside. *Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 48, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107; *Drevel's Appeal*, 6 Pa. 272; *Robinson v. Stevens*, 63 Vt. 555, 22 Atl. 80; *Smith v. Hall*, 69 Conn. 651-665, 38 Atl. 386; 1 Black, Judgm. §§ 317, 359. This is merely a special application of the wide general principle that courts will act only in behalf of parties who show themselves entitled to such action. They sit to vindicate rights at the instance of parties whose rights have been invaded, and not to vindicate mere abstract principles of justice at the instance of anyone. In the case at bar the complaint, as finally amended, is merely a petition to set aside the judgment of divorce upon equitable grounds; and it shows upon its face, and without the aid of the allegations in the plea in abatement, that the plaintiffs were strangers to the judgment, and that their rights, legal or equitable, were in no way affected by it. There are no facts stated in the complaint which bring the plaintiffs

within any of the recognized exceptions to the general rule that strangers to a judgment are not entitled to have it set aside. The mere fact that the setting aside of the judgment would be an advantage to the plaintiffs is not enough. They must show that some legal or equitable right of theirs was invaded by the judgment, before they can complain of the refusal of the court to act upon their petition to have it set aside. The court below based its judgment in this case upon two grounds, namely: (1) The want of jurisdiction over the defendant; (2) the want of interest in the plaintiffs. Even if the court erred as to the first ground, the second ground is sufficient to justify the judgment. In this view of the case, it becomes unnecessary to decide whether the court erred in denying the motion to strike out, or in overruling the demurrer to the plea in abatement, and about these matters we express no opinion.

There is no error.

The other Judges concur.

cel these judgments the application should be made by some party to the record or having some interest based upon such legal or equitable considerations as the court can recognize. Certainly, a stranger to a judgment cannot with any propriety ask the court to vacate or order it satisfied without furnishing some reason therefor. If this judgment is a lien upon property held by Georgina E. Beers she must by action or motion bring before the court all those who are or may be interested."

A grantee cannot have vacated a judgment on confession given by consent of his grantor before the debt was due, and which contains usury. *Black v. Pattison*, 61 Miss. 599.

And a grantee cannot have a judgment of foreclosure set aside on the ground that it is excessive. *Sumner v. Coleman*, 20 Ind. 486.

And where several persons were sued as members of a joint-stock company, and the suit was discontinued as to B., one of the defendants, and judgment was then taken against all the others, upon which execution was subsequently issued, and the property of one M., who was not a party to the suit, taken to satisfy the same, it was held that M. could not, by a bill in equity against the plaintiff in the judgment, set it aside upon the ground that the discontinuance of the suit as to B. was a discontinuance as to all of the defendants. The judgment cannot be attacked in this collateral manner. *Markley v. Rand*, 12 Cal. 275. In this case the court said that if he is not the real defendant, and the sheriff levies on his property, the sheriff is responsible in an action at law, and there is no need of equitable interference.

A grantee cannot sue to set aside a judgment for land against his grantor and in favor of a person who had possession at the time of the deed, although the judgment was procured by fraud. *Whitney v. Kelley*, 94 Cal. 146, 15 L. R. A. 813, 29 Pac. 624. In this case the court said: "They had neither the title, the possession, nor the right of possession; and, under such circumstances, their conveyance to plaintiff carried nothing but a mere naked right to bring an action to set aside a judgment for a fraud practised upon them. A plaintiff with such a right has no equity, and is not entitled to recognition in a court of equity."

But under Cal. Code Civ. Proc. § 473, providing that the court may, upon such terms as

may be just, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, the grantees of land which is the subject-matter of an action are the legal representatives of the grantor within the meaning of this section, and are entitled, on such terms as may be just, to be relieved from a default taken against him through their mistake, inadvertence, surprise, or excusable neglect. *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703.

So, under Cal. Code Civ. Proc. § 473, a purchaser after the rendition of a judgment by publication against his grantor made without jurisdiction is entitled to have the judgment set aside, as the grantee is the legal representative of the defendant. *People v. Mullan*, 65 Cal. 396, 4 Pac. 848.

And where judgment is taken against defendants in an action to enforce laborers' liens against mining property, the defendants convey the property and appeal, and after a reversal upon appeal another judgment is rendered against the same defendants by default, the grantee of the property may move to set aside the judgment on the grounds of mistake or excusable neglect in failing to plead, under § 473, Cal. Code Civ. Proc. *Malone v. Big Flat Gravel Min. Co.* 93 Cal. 384, 28 Pac. 1063.

But where lands were conveyed by the defendant before an action by the state to foreclose a certificate of purchase, the grantee of the defendant, not having recorded his deed for twelve years from the date of the judgment, during which time part of the lands had been sold to other parties, is not entitled to a motion to set aside and vacate the judgment under § 473, Cal. Code Civ. Proc. on the ground that publication service was void against the defendant where the judgment was not void on its face. The grantee will be left to his remedy by an equitable action to vacate the judgment. *People v. Thomas*, 101 Cal. 571, 36 Pac. 9.

A judgment absolutely void for want of jurisdiction appearing on its face may be set aside on the motion of any person who, although not a party to the action, has an interest in the property upon which it is a cloud. Such a motion is not, strictly speaking, a proceeding in the action, but an application to have the records purged of an unauthorized and illegal

entry. *Mueller v. Reimer*, 46 Minn. 314, 48 N. W. 1120. But in this case it was held that the motion should be denied, as the moving party had a pending action against the purchaser at execution sale, where the same question was at issue.

In an action of ejectment the plaintiff filed a *lis pendens*; the defendant asked affirmative relief and obtained judgment. A grantee of plaintiff taking title after suit moved to set the judgment aside, and to be allowed to prosecute the suit as substituted plaintiff. It was held that under Cal. prac. act, § 68, authorizing the court to relieve a party or his legal representatives from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, that the grantee could only be heard as the plaintiff might have been heard, and the defendants could resist the application on any ground available against the plaintiff. *Corwin v. Bensley*, 43 Cal. 253.

Where no showing was made in court that an action was pending for the possession of mining property for seven and one-half years, and then a substituted copy of summons was filed as a record, and a judgment of default taken quieting title in plaintiffs as against defendants and their successors in interest, it was held that a person who was not a party to the action, but the real party in interest at the time the judgment was obtained, could move to have the same vacated and set aside. This was under S. D. Comp. Laws, § 4881, providing that upon a transfer by a defendant of his interest in the subject of an action the same may proceed in the name of the original parties, or the court may allow the transferee to be substituted. *Brettell v. Deffebach*, 6 S. D. 21, 60 N. W. 167, 173. In this case the court said that, as an officer is prohibited from serving summons when he is a party to the action, the same principle should apply as in proving the substitution of a summons by a private person who is a party; and the question can be raised on motion to vacate and set aside a judgment by default.

And under Utah Comp. Laws 1888, § 3256, providing that the court may, upon such terms as may be just, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, a party who has succeeded to the interest of the defendant may apply to set aside a judgment on the ground of excusable neglect, where the real defendant and his counsel were absent on account of a misunderstanding between counsel, and a judgment was given against the defendant. *Thomas v. Morris*, 8 Utah, 284, 31 Pac. 446.

A judgment may be set aside upon the motion of a person not a party to the suit when such person, after the commencement of the suit, has acquired rights in the subject-matter thereof, for the protection of which it is necessary that he should be made a party and have an opportunity to interpose a defense after the entry of said judgment. *Ladd v. Willett*, 22 N. Y. Week. Dig. 521. This was under a liberal construction of Code Civ. Proc. §§ 723, 724, 1282, providing for vacating a judgment.

XIII. Application by creditors seeking relief.

It seems that creditors may have relief from judgments obtained with intent to defraud their rights. This note is not intended to include that class of cases.

There is some conflict of authority as to the creditor's right to have a judgment set aside or vacated for errors or irregularities that might be available to a party to the record. This is controlled to some extent by the position of 54 L. R. A.

the assailing party, the error complained of, and the view taken by the courts in the state where the relief is sought. In some cases it is controlled by a liberal or strict interpretation of the Code or statute. The facts in the different cases will be found in the appropriate subdivision, but the cases are grouped here in order to obtain a comparative view of all the cases where relief was sought by creditors.

In the following cases it was held that judgment creditors, not parties to the record, may obtain relief on application to set aside, vacate, or annul judgments:

From a judgment on confession on account of defective statement of debt or irregularity. *How v. Dorschelmer*, 31 Mo. 349; *Bryant v. Harding*, 29 Mo. 347; *Wood v. Mitchell*, 53 Hun, 451, 6 N. Y. Supp. 232; *Chappel v. Chappel*, 12 N. Y. 215, 64 Am. Dec. 496; *Bonnell v. Henry*, 13 How. Pr. 142; *Winnebrenner v. Edgerton*, 30 Barb. 185; *Dunham v. Waterman*, 17 N. Y. 9, 72 Am. Dec. 406, 6 Abb. Pr. 357; *Lawless v. Hackett*, 16 Johns. 149; *Flour City Bank v. Doty*, 11 N. Y. Civ. Proc. Rep. 141; *Bernard v. Douglas*, 10 Iowa, 370.

So where the defendant was dead. *Milnor v. Milnor*, 9 N. J. L. 93.

From a judgment against an administrator. *O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525 (demand insufficient).

But it was held in the following cases that creditors were not entitled to relief:

From judgments on confession. *Cassem v. Brown*, 74 Ill. App. 346 (judgment confessed by one partner); *Martin v. Judd*, 60 Ill. 78 (irregularity); *Kellogg v. Keith*, 4 Ill. App. 386 (irregularity); *Adam v. Arnold*, 86 Ill. 185 (excessive); *Walton v. Walton*, 80 N. C. 26 (not excessive); *Uzzie v. Vinson*, 111 N. C. 138, 16 S. E. 6 (affidavit and statement); *Drexel's Appeal*, 6 Pa. 272 (by president of corporation).

And relief was denied in *Gere v. Gundlach*, 57 Barb. 13 (judgment premature); *Simpson v. Burch*, 4 Hun, 315 (question of jurisdiction); *Mahan v. Cavender*, 77 Ga. 118 (usury); *Walton v. Walton*, 80 N. C. 26 (judgment on sale bond was regular); *Pierce v. East Greenwich Probate Ct.* 19 R. I. 472, 34 Atl. 992 (creditor estopped).

XIV. Application by other persons.

The general rule is laid down that strangers cannot have judgments vacated, annulled, or set aside. *Murchison v. White*, 54 Tex. 78; *Smith v. Newbern*, 73 N. C. 303; *Covey v. Wheeler*, 23 Pa. Co. Ct. 467 (judgment confessed by "trustee").

And the same was said to be the rule in *Hardin v. Lee*, 51 Mo. 241; *Walton v. Walton*, 80 N. C. 26; *Cloud v. El Dorado County*, 12 Cal. 128, 73 Am. Dec. 526.

And the same was held where the complaining party had no interest. *Mayes v. Woodall*, 35 Tex. 687.

And where he had not first obtained leave. *Berry v. Atty. Gen.* 19 L. J. Ch. N. S. 232, 2 Macn. & G. 16, 1 Hall & Tw. 520.

The superior court has no power to set aside a judgment once rendered, upon the motion of a stranger to the original cause, and to order such stranger to be made a party thereto, under N. C. Code Civ. Proc. § 133, providing that the judge may, in his discretion, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. *Smith v. Newbern*, 73 N. C. 303.

Where the order for substituted service is not warranted by the statute upon the evidence

produced, and the copy of the summons was delivered in not less than twenty days before judgment, another creditor cannot take advantage of the irregular and void service. *Gere v. Gundlach*, 57 Barb. 13.

A motion by a stranger to set aside a decree does not keep the cause pending, so as to allow other parties to intervene, before such motion is overruled. *Stern v. Willoughby*, 78 Ill. App. 491, Affirmed in 179 Ill. 31, 53 N. E. 1134; *Rosenberg v. Stern*, 77 Ill. App. 248, Affirmed in 177 Ill. 487, 53 N. E. 78.

XV. Summary.

It is difficult to summarize the law in regard to practice in matters of obtaining relief by third parties by motion to set aside, vacate, and annul judgments. The difficulty arises from the difference in the errors complained of and

the status of the complaining party and the local practice under the Code or statute of each state. It may, however, be said, as a general proposition, that a stranger to the record is not, in the absence of a Code provision, entitled to relief by vacating a judgment. The weight of authority follows this rule in matters of divorce, and where the objection is for usury, and where applications for relief were made by sureties and guarantors and grantees and mortgagees, and in matters of assignment for creditors, and foreclosures. Where judgment is taken against a party who is dead at the time of the judgment, it seems the weight of authority is in favor of granting relief. Where objection is made against judgments entered on confession there is a conflict of authority. The rule in New York is in favor of granting relief. I. T.

CALIFORNIA SUPREME COURT.

William M. SMITH, *Appt.*,

v.

CAPITAL GAS COMPANY, *Respt.*

(182 Cal. 209.)

A gas company required by statute to furnish gas to persons within a certain distance from its mains may refuse to do so unless the customer agrees to pay a reasonable rent for a meter, where the value of gas required by him will not amount to one sixth of such reasonable rent, although other consumers are not charged such rent, where it does not appear that any other consumer fails to consume gas enough to pay the meter rent.

(March 13, 1901.)

APPEAL by plaintiff from a judgment of the Superior Court for Sacramento County in favor of defendant in an action brought to recover the statutory penalty for refusal to furnish gas. *Affirmed*.

The facts are stated in the Commissioner's opinion.

Messrs. Shinn & Catlin, for appellant:

The statute expressly required the furnishing of the gas. Similar statutes have been universally sustained.

Moiers v. Metropolitan Gaslight Co. 11 Daly, 119; *Jones v. Rochester Gas & Electric Co.* 7 App. Div. 465, 39 N. Y. Supp. 1105, 158 N. Y. 678, 52 N. E. 1124; *Capital Gas Co. v. Young*, 109 Cal. 144, 29 L. R. A. 463, 41 Pac. 869.

The defendant arbitrarily discriminated against the plaintiff when it demanded that he should furnish a meter or agree to pay meter rent.

A gas company is a corporation of a public nature, and must supply gas under regulations which are uniform and certain.

Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14

L. R. A. 424, 28 Pac. 244; *Bath Gaslight Co. v. Claffy*, 56 N. Y. S. R. 426, 26 N. Y. Supp. 287; *Portland Natural Gas & Oil Co. v. State ex rel. Keen*, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818; *Coy v. Indianapolis Gas Co.* 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17.

It was the duty of the defendant to furnish a meter. Such was its uniform custom and regulation, and such was its primary obligation.

Louisville Gas Co. v. Dulaney, 100 Ky. 405, 36 L. R. A. 125, 38 S. W. 703; *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046; *State, Red Star Line S. S. Co. Prosecutors, v. Jersey City*, 45 N. J. L. 246; *Capital Gas & Electric Light Co. v. Gaines*, 20 Ky. L. Rep. 1464, 49 S. W. 462; *Ohouteau v. St. Louis Gaslight Co.* 47 Mo. App. 328; *Sheffield Waterworks Co. v. Carter*, L. R. 8 Q. B. Div. 632.

On petition for rehearing.

The complaint alleged every fact specified by the section, upon which the liability of the defendant depended.

Plaintiff's position was in no wise exceptional. The court does not find that it was exceptional. The opinion, however, decides that plaintiff should allege and prove that his position was not exceptional. A complaint should contain only facts sufficient to constitute a cause of action. Where a plaintiff counts upon a statutory cause of action, he need allege only the facts which bring him within the statute.

Siemens v. Eisen, 54 Cal. 418; *Munson v. Bowen*, 80 Cal. 572, 22 Pac. 253; *Jaffe v. Lilienthal*, 86 Cal. 91, 24 Pac. 835; *Woodroof v. Hovee*, 88 Cal. 184, 26 Pac. 111.

A corporation engaged in furnishing gas to the inhabitants of a city is a corporation of a public nature. It may be compelled to furnish gas by writ of mandate, and must supply gas under regulations which are uniform and certain.

Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14

NOTE.—For an earlier case in this series as to right of gas company to charge rent for meter, see *Louisville Gas Co. v. Dulaney* (Ky.) 36 L. R. A. 125.

L. R. A. 424, 28 Pac. 244; *Bath Gaslight Co. v. Claffy*, 56 N. Y. S. R. 426, 26 N. Y. Supp. 287; *Portland Natural Gas & Oil Co. v. State ex rel. Keen*, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818; *Coy v. Indianapolis Gas Co.* 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17.

The defendant could easily have made a rate for those who used a minimum quantity of gas, so as to provide for the expenses of meters, etc.

State ex rel. Weise v. Sedalia Gaslight Co. 34 Mo. App. 501.

This the defendant did not choose to do, because it desired to reserve, if possible, the right to discriminate.

By refusing gas to those who patronized the South Yuba Company, and allowing its own customers to retain meters and gas without any charge excepting the regular rate of \$2.50 per thousand feet, the defendant exercised a powerful inducement for custom, and thereby could drive the South Yuba Company out of business in Sacramento.

Messrs. Devlin & Devlin, for respondent:

If the statute requires the gas company to supply a meter, put in service pipes, examine the same, be responsible for damages done by gas escaping, etc., and does not authorize it to collect a fair rent for the use of its appliances and apparatus and for labor in this behalf, then the law is unconstitutional, as it is depriving a person of his property without due process of law and without just compensation.

Railroad Tax Cases, 13 Fed. 722; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The company was not obligated, either directly or indirectly, to furnish a meter.

Ferguson v. Metropolitan Gaslight Co. 37 How. Pr. 189; *Sheffield Waterworks Co. v. Bingham*, L. R. 25 Ch. Div. 443.

The law does not compel any person or corporation engaged in a business to conduct the same at a loss, but such would be the effect if the company was required to furnish meters to those who would not pay it a fair return for the expense which it incurred and the detriment it suffered in the matter.

State ex rel. Weise v. Sedalia Gaslight Co. 34 Mo. App. 501; *Louisville Gas Co. v. Dulaney*, 100 Ky. 405, 36 L. R. A. 125, 38 S. W. 703; *Silkman v. Yonkers Water Comrs.* 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612.

More than two years prior to the filing of the complaint plaintiff caused the premises to be wired for the furnishing of electric light, and suitable fixtures and appliances to be arranged therefor; and during the two years last past the plaintiff has used electric light of a company other than this defendant for the purpose of lighting the said place. The company was justified in refusing to supply gas to the defendant. 54 L. R. A.

Fleming v. Montgomery Light Co. 100 Ala. 657, 13 So. 618.

Smith, C., filed the following opinion:

The suit was brought to recover of the defendant liquidated damages amounting to \$1,300, alleged to be due under the provisions of § 629 of the Civil Code, for refusal to furnish gas to the plaintiff. The judgment was for the defendant, and the plaintiff appeals. The provision of the Code in question is that, "upon the application in writing of the owner or occupant of any building or premises distant not more than 100 feet from any main of the corporation

the corporation must supply gas as required for such building or premises," etc.; and, further, that "if, for the space of ten days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of \$50 as liquidated damages, and \$5 a day as liquidated damages for every day such refusal or neglect continues thereafter." The case as presented by the findings is as follows: The defendant is a corporation engaged in supplying the city of Sacramento with gas, and the plaintiff is an occupant of premises within 100 feet of one of its mains. September 22, 1898, the plaintiff served on the defendant a written notice, which (omitting date, address, and signature) was as follows: "You will please immediately supply me with gas for the premises occupied by me," etc. (describing them). The defendant, in reply, within ten days thereafter "notified plaintiff that it would supply plaintiff with gas for said building and premises if plaintiff would furnish a meter, or agree to pay defendant 50 cents per month as rent for a meter;" and "plaintiff refused to furnish a meter, or to pay said rent to the defendant." The rent demanded was found by the court to be "fair and equitable," representing the monthly cost of the meter to the defendant for care, labor, interest on investment, etc. But it is found that the defendant had no rule requiring payment of rent for meters, nor did it charge its other customers therefor. The defendant, it seems, had, prior to September 8, 1898, been supplying plaintiff with gas; but the plaintiff, during the year preceding that date, had used electrical lights mainly, and almost exclusively, and the total amount of gas used on the premises amounted only to the value of \$1.75; and the defendant on that date had removed the meter, thereby depriving the plaintiff of gas. It is found, in a passage following the statement of the above facts and the written notice, that "said gas" was and is necessary for the plaintiff's use on the premises in question; but, unless this expression be construed as referring to the gas used prior to September 8, 1898, it does not appear how much or what gas was needed.

There can be no doubt, I think, of the right of gas companies ordinarily to charge rent for meters. Civil Code, § 632; *Sheward v. Citizens' Water Co.* 90 Cal. 641, 27 Pac. 439. But the point is made by the appellant that in charging him with such

rent when other consumers were not required to pay it "the defendant arbitrarily discriminated against the plaintiff." But I do not think this is the case. Ordinarily, compensation for the meter is received from the return for the gas consumed. But here the value of the gas consumed during the year preceding the removal of the meter was not equal to a sixth part of the annual expense of the meter. The plaintiff's written demand did not specify, even in a general way, the amount of gas required, or even that he required more gas than he had been in the habit of using (*Andrews v. North River Electric Light & Power Co.* 23 Misc. 512, 51 N. Y. Supp. 872), and the defendant was quite justified in supposing that he required no more (Code Civ. Proc. § 1963; 1 Greenl. Ev. § 41). A "state of mind once proved to exist is presumed to remain unchanged until the contrary appears." 1 Greenl. Ev. § 42. The case, therefore, stands as though the plaintiff's demand had been simply for the restoration of the *status quo*, i. e., for the use of the quantity of gas he had been using. The plaintiff's case was, therefore, altogether exceptional, and, we may assume, unique; for there is neither finding nor allegation that there were any others in the same category, and, if none, then there was no discrimination; and if there were any such, it devolved on the plaintiff to allege and to prove it; for, to render one liable for a penalty, every material fact necessary to bring the case within the statute must be affirmatively shown. *Conly v. Clay*, 90 Hun, 20, 35 N. Y. Supp. 521; *Hardwick v. Vermont Teleph. & Teleg. Co.* 70 Vt. 180, 40 Atl. 169.

The defendant was justified, then, in notifying the plaintiff that he would be charged with rent for the meter if supplied by the company, and the plaintiff's refusal to agree to this was its sufficient justification in refusing to furnish gas. I advise that the judgment be affirmed.

We concur: **Gray, C.; Cooper, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment is affirmed.

Rehearing denied.

J. A. VAN HARLINGEN, Appt.,

v.

J. B. DOYLE, Auditor of Tuolumne County,
Resp't.

(.....Cal.....)

1. That portion of a statute providing for county printing, which requires the

NOTE.—While there do not seem to be any decisions closely similar to the above in respect to the facts involved, the general question of equal privileges and immunities of citizens under the Constitution is considered in a note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579.

supervisors to fix the price and allow the procurement of the needed amount and certification of the bill to the board, is separable from the part which prohibits the employment for the purpose of a paper established less than a stated time, and may be upheld, although the latter part is unconstitutional.

2. A statute prohibiting the letting of public printing to papers which have been established less than a year violates the constitutional provisions that all laws of a general nature shall have a uniform operation, and that no citizen shall be granted privileges which upon the same terms shall not be granted to all citizens.

(August 24, 1901.)

APPEAL by plaintiff from a judgment of the Superior Court for Tuolumne County in favor of defendant in a suit to enjoin the drawing of a warrant to pay a claim for county printing. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. J. B. Curtin, for appellant:

A newspaper when not published one year does not stand upon the "same terms" in relation to the law as does a newspaper which has been published for one year.

To treat one man differently from another man—to deny one man a privilege extended to another man—is not partiality. It may be a just discrimination. To constitute partiality and the invidious discrimination against which the Constitution aims, the denial to another of what is given to one must be made upon substantially the same facts, or, to express the idea differently, the denial must be of the same claim before accorded.

People ex rel. Smith v. Twelfth Dist. Judge, 17 Cal. 556; *Hellman v. Shoulters*, 114 Cal. 147, 44 Pac. 915, 45 Pac. 1057; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 309, 14 L. R. A. 755, 28 Pac. 272, 875; *Fortain v. Smith*, 114 Cal. 497, 46 Pac. 381.

Messrs. F. W. Street and F. P. Otis, for respondent:

The statute is class legislation, and grants special privileges to those who have been engaged in the newspaper business in any county for the period of more than one year.

The classification is not founded upon differences defined by the Constitution, or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation.

Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304; *Lassen County v. Cone*, 72 Cal. 387, 14 Pac. 100; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *State ex rel. Hoadley v. Insurance Comrs.* 37 Fla. 564, 33 L. R. A. 288, 20 So. 772; *Maynard v. Granite State Provident Assn.* 34 C. C. A. 438, 92 Fed. 435.

Chipman, C., filed the following opinion:

Action to restrain defendant, as auditor of Tuolumne county, from drawing a warrant to pay the claim of one Richardson for printing the delinquent tax list for the year 1898 in a newspaper called the "Mother

Lode." The court found that Richardson was the proprietor of the paper on May 27, 1899, and that the tax collector of the county on that day caused the delinquent tax list for the year 1898 to be published in said paper for the period required by law. The list was duly published, and the bill for the work was allowed and ordered paid by the supervisors. The said newspaper was first printed in said county on January 20, 1897, and continued to be printed until September 24, 1898, when the printing was suspended, and was resumed on the 27th day of May, 1899, since which latter date, inclusive, the paper has been published. On May 3, 1899, the supervisors fixed the rate of printing and advertising in said county, in accordance with subd. 21 of § 25 of the county government act, approved April 1, 1897 (Stat. 1897, p. 452, at p. 464). The tax collector offered said delinquent tax list to all the newspapers printed, published, and established for one year prior to the 3d day of May, 1899, in said county, and each and all the proprietors of said newspapers refused to publish said list at the price fixed by said supervisors. Thereupon said tax collector caused the list to be published in said Mother Lode at the rates fixed by the said supervisors. Judgment was given for defendant, from which this appeal is prosecuted.

Appellant contends that the printing of the delinquent tax list by the Mother Lode newspaper was in violation of § 3766, Pol. Code, which, as amended in 1895, provided that "the publication must be made once a week for three successive weeks in some newspaper, or in supplement thereto, published in the county, and the board of supervisors must contract for such publication with the lowest bidder, and after ten days' public notice that such will be let. The bidding must be by sealed proposals." Section 25, subd. 21, of the county government act, requires the board of supervisors of the several counties to advertise for sealed bids for furnishing the county with stationery and various other supplies. Then follows this provision: "The board shall annually fix the price at which the county shall be supplied with job printing and blank books, from a schedule prepared by the clerk of the board, showing all blanks and blank books used in the several offices and departments, and also the price of all county advertising; and each county officer shall procure such blank books, job printing, and advertising required for the proper discharge of his official duties such printing and advertising to be done by such person or newspaper as such officer may designate, at a price no greater than is so fixed, and certify the bill therefor to the board of supervisors.

No supplies, printing, stationery, or books shall be procured of any person or firm whose paper has not been established or whose place of business has not been established in the county for one year or more prior to the time of fixing said prices." Section 11, art. 1, of the Constitution, provides that "all laws of a general nature

shall have a uniform operation." Section 21 of the same article reads as follows: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; *nor shall any citizen, or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.*" The trial court held that the part of § 25 of the county government act stated in italics is unconstitutional. The advertising was let under the other provisions of the act, which, being inconsistent with the section of the Political Code referred to, and later in date, worked its repeal. It was within the power of the legislature to require the supervisors to annually fix the price of certain county supplies and all county advertising, and to allow each officer requiring any advertising or such supplies to procure the same at the prices so fixed, and certify the bill to the board. These provisions of the law are clearly separable from the part claimed to be unconstitutional, and may stand although that part be set aside. After failing to procure the advertising by any of the older established newspapers the supervisors let the printing to the Mother Lode newspaper, in disregard of the requirement above referred to. We are to determine whether the bill for this work is illegal. An act of the legislature is not to be set aside upon any doubtful or uncertain construction to be given the Constitution. But, where its infraction is clear and unmistakable, the duty of the court is plain, and should be fearlessly performed. That the part of the act now drawn in question is violative of the organic law of the state we think can admit of no doubt. It declares that county officers shall not supply the county requirements except through persons who have had established places of business in the county for a fixed period of time. No reason can be suggested why this period of time was not made longer or shorter, and the power which could fix it at one year could name any other period not absurdly or unreasonably long or short. The act manifestly was intended to limit all job printing and advertising and purchases of blank books to persons who had established places of business in the county to the exclusion of all others. Not only must the purchases be made from, and the advertising be done by, persons having established places of business in the county, but such places of business must have been established for one year prior to the time when the prices are fixed by the supervisors. The unfortunate merchant or newspaper proprietor who engages in business in the county the day after the supervisors fix the prices to be paid for supplies or for printing is precluded for one year from competing for the county's patronage. He must contribute to the county's support by paying taxes, and he must perform whatever duties the law devolves upon him as a citizen of the county, but he may not share in the privilege of dealing with the county officers in respect of county

supplies and printing—a privilege which the law accords to the more fortunate merchant or printer who happened to have started in the business one day sooner than he. We think the Constitution was intended to prohibit all such discriminatory legislation. If the legislature may restrict county officers in their purchases for the county to a class of dealers who have had an established business in the county for one year, it may restrict them to still other classes which the legislature may create. Such laws cannot be regarded as general laws, for the reason that they are not uniform in their operation.

Appellant contends that a newspaper which has not been established and published for one year does not stand upon the "same terms" in relation to the law as does the newspaper which has been published for one year; that the term "all citizens" does not necessarily include all persons, but only all citizens who stand in the same relation to the law. As illustrative of the principle relied on, we are cited to *People ex rel. Smith v. Twelfth Dist. Judge*, 17 Cal. 556; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 309, 14 L. R. A. 755, 28 Pac. 272, 875; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; *Fortain v. Smith*, 114 Cal. 497, 46 Pac. 381. In speaking of laws of general nature which must have a uniform operation, the court said in *Hellman v. Shoulters*: "It has been uniformly held that a law is general which applies to all of a class,—the classification being a proper one,—and that the requirement of uniformity is satisfied if it applies to all of the class alike;" citing the case in 17 Cal. 556. But whether the classification in the present case is a proper one, is the very point involved. We do not think the legislature can arbitrarily create the class, and when thus created that the courts are in all such cases bound to accept such classification as a proper one.

It was said in *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383, "that an act, to be general in its scope, need not include all classes of individuals in the state; it answers the constitutional requirement if it relates to, and operates uniformly upon, the whole of any single class." But this statement was commented upon in *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, as erroneously supposed to support the proposition "that a law is not special if it applies equally to all members of any single class defined by the legislature, no matter how arbitrary and senseless the classification may be." And it was said that, "although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." All mer-

chants and publishers of newspapers in a county stand in precisely the same relation to the subject of the law in furnishing supplies and doing the advertising for the county. But the act confers particular privileges upon certain merchants and publishers, and imposes peculiar disabilities and burdensome conditions on other merchants and publishers, all of whom stand in the same relation to the law. It was not within the power of the legislature to evade the operation of the constitutional provisions by creating an arbitrary and unnatural distinction between persons thus related to the law. If it were possible to classify merchants and publishers of newspapers in any case so as to apply one law to one class and another law to another class, it is certain that they cannot be classified upon any such line of demarkation as is attempted in this act. *Fortain v. Smith*, cited by appellant, involved the constitutionality of § 2853, Pol. Code, prohibiting the supervisors from authorizing the establishment of a toll bridge or ferry within 1 mile above or below a regularly established ferry or toll bridge. It was held that the section grants no privileges or immunities which "upon the same terms shall not be granted to all citizens." The court said: "The theory upon which such rights are granted is to promote the public good and convenience, the advancement of commerce, and the more ready intercourse of the people; and a reasonable protection of those who hazard their private means in thus ministering to the public need is in the interest and direction of good government by encouraging enterprise." No such theory or reason can be said to support the legislation in question. On the contrary, the law operates to prevent competition where the highest interests of the people require free and untrammelled business intercourse. It would puzzle the mind to suggest any natural, intrinsic, or constitutional distinction with which a newspaper that has been established thirteen months is clothed, or may be clothed, that a newspaper established eleven months may not possess. We can perceive no possible public good to come from the distinction made by the law before us, while it is easy to suggest much harm that it may do. All the older established newspapers in the county refused to do the work at the prices fixed by the board, which we must assume were fair and reasonable. It is now insisted that the county has no right under the law to have the printing done because the newspaper designated does not stand upon the same terms in relation to the law as the other newspapers. But the only reason why it does not stand upon the same terms results from no natural, intrinsic, or constitutional distinction, but from an arbitrary and unreasonable distinction created by the law itself. It is one of the highest privileges of the citizen that he may engage in legitimate business upon equal terms—"the same terms"—granted to all citizens. He may buy and sell from whom and to whom he pleases. The law may require him to

pay a license for the privilege, and it may regulate his business if the safety of the community requires its regulation. But the law cannot say that he must have conducted an established business for a given period of time before he can sell to a county officer while he may sell without restriction to all other persons. As well might the legislature say that the county shall not employ any citizen of the county to work on the public road unless he has resided within the county one or more years. See *Cooley*, Const. Lim. 4th ed. *393.

The county of Lassen undertook by ordinance to require owners of sheep to pay a license on sheep grazed in that county on which the county and state taxes were paid in another county, but exempting from the license the owner who paid taxes on his sheep in Lassen county. This court held the ordinance to be in violation of § 21, art. 1, Const. *Lassen County v. Cone*, 72 Cal. 387, 14 Pac. 100. There was no question but that the county could pass a license ordinance applicable alike to all owners of sheep, and such an ordinance was upheld in *Ex parte Mirunde*, 73 Cal. 365, 14 Pac. 888; *El Dorado County v. Meiss*, 100 Cal. 268, 34 Pac. 716. But the Lassen county ordinance granted a privilege to the resident owner of sheep which it denied to the non-resident owner. It allowed the resident owner the privilege of grazing sheep in Lassen county free from any license tax, while imposing such tax on the nonresident owner, and it was thus held to have violated the Constitution. Nor does the fact that, in the present case the restriction was limited to dealings with the county officers relieve the act from its discriminating character. That plaintiff was permitted to publish advertisements for all persons save only the county officers, but emphasizes the obnoxious feature of the law. The judgment should be affirmed.

We concur: **Smith, C.; Gray, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment is affirmed.

Rudolph J. TAUSSIG *et al.*, *Respts.*,
v.

BODE & HASLETT, *Appts.*

(.....Cal.....)

1. Although the burden is upon a warehouseman to excuse failure to deliver spirits deposited with him for storage in accordance with the terms of the contract, yet, when he shows a return of the packages

NOTE.—As to duty generally of warehouseman to preserve property in his care, see *Willems v. Hatch* (N. Y.) 17 L. R. A. 193, and note. 54 L. R. A.

stored, and that the contents were lost by leakage, the owner must, in order to hold him liable for the loss, prove that the leakage was caused by his fault.

2. A notice printed plainly on the face of a warehouse receipt, to the effect that loss by leakage shall be at the risk of the owner of the goods, is a part of the contract.
3. A provision in a warehouse receipt, that loss by leakage shall be at the risk of the owner of the goods, exempts the warehouseman from the duty of watching the packages to detect leakage resulting from any cause other than improper handling or storage.
4. Improperly piling casks of spirits in a warehouse in double tiers, so as to prevent convenient inspection to discover leakage, will not render the warehouseman liable for leakage in the absence of any attempt at inspection on the part of the owner of the casks, where the storage contract places the duty of inspection on him.
5. A warehouseman to whom are delivered spirits in defective casks is under no obligation to exercise any care to discover and cure the defect or prevent loss by leakage, where by the storage contract the risk of loss by leakage is placed on the owner of the spirits.

(October 1, 1901.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiffs in an action brought to recover damages for loss of spirits while in defendant's possession for storage. *Reversed.*

The facts are stated in the opinion.

Mr. George T. Wright, for appellant:

The burden of proving the leakage to have been the result of defendant's negligence was upon plaintiffs.

Wilson v. Southern P. R. Co. 62 Cal. 164; *Cooper v. Barton*, 3 Campb. 5, note; *Claflin v. Meyer*, 75 N. Y. 262, 31 Am. Rep. 467; 2 Kent, Com. 587; *Schmidt v. Blood*, 9 Wend. 271, 24 Am. Dec. 143; 28 Am. & Eng. Enc. Law, pp. 648-650.

It was the duty of plaintiffs to supply casks in every way good and sufficient to hold the spirits during the period for which they were to be stored, and no recovery can be had for loss occurring through defective coöperage.

Nelson v. Stevenson, 5 Duer, 539; *Hudson v. Barendale*, 2 Hurlst. & N. 575.

The receipt given by a warehouseman for goods stored with him is at once a receipt and a contract.

4 Am. & Eng. Enc. Law, 2d ed. p. 521.

The receipt being a contract, then the provision therein that all leakage is to be at owner's risk must be binding upon the parties, unless it be such as the law prohibits and refuses to give any effect to as repugnant to sound policy and good morals.

A provision that all leakage shall be at owner's risk is not against sound policy or good morals.

Story, Bailments, 9th ed. § 32; *Schouler*, Bailments & Carriers, 2d ed. § 20; *Mariner v. Smith*, 5 Heisk. 203; 2 Am. & Eng. Enc. Law, p. 51, note 5; *Dimmick v. Milcaukos* & *St. P. R. Co.* 18 Wis. 471; *Steele v. Town-*

send, 37 Ala. 247, 79 Am. Dec. 49; *Lake v. Hurd*, 38 Conn. 536; *Robinson Bros v. Merchants' Despatch Transp. Co.* 45 Iowa, 470; *Adams Exp. Co. v. Sharpless*, 77 Pa. 516; *Strohn v. Detroit & M. R. Co.* 21 Wis. 562, 94 Am. Dec. 504.

Even a common carrier can stipulate, not only against his common-law liability as an insurer, but also against liability for any degree of negligence not gross or wilful.

5 Am. & Eng. Enc. Law, 2d ed. p. 313, note 6; *Kinney v. Central R. Co.* 32 N. J. L. 407, 90 Am. Dec. 675; *Kimball v. Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec. 567; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Illinois C. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Hauckins v. Great Western R. Co.* 17 Mich. 67, 97 Am. Dec. 179; *Baltimore & O. R. Co. v. Brady*, 32 Md. 333.

If a common carrier can stipulate against liability for negligence, a warehouseman certainly can.

The strictness of the rule as to the liability of common carriers is dependent in a large measure upon the circumstance that a carrier has exclusive control of the freight, and the consequent impossibility in many cases of the consignor's being able to prove the method of loss.

Riley v. Horne, 5 Bing. 220.

These goods were piled in a manner customary with the warehouseman, and plaintiffs, being familiar with it and knowing that their goods were to be so piled, cannot be heard to complain of this method of storage.

Kelton v. Taylor, 11 Lea, 264, 47 Am. Rep. 284; *Schouler, Bailments & Carriers*, § 102.

If the plaintiffs proximately caused or contributed to the injury the defendant was not liable under the circumstances of this case unless he was guilty of wilful neglect of duty.

Beach, Contrib. Neg. pp. 33, 43, 45, 76-78, 82; 1 *Shearm. & Redf. Neg.* § 99; 4 Am. & Eng. Enc. Law, pp. 19-21; *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390; *Birge v. Gardiner*, 19 Conn. 511, 50 Am. Dec. 261; *Gay v. Winter*, 34 Cal. 153; *Maumus v. Champion*, 40 Cal. 121; *Robinson v. Western P. R. Co.* 48 Cal. 424; *Flemming v. Western P. R. Co.* 49 Cal. 253; *Hearne v. Southern P. R. Co.* 50 Cal. 482; *Strong v. Sacramento & P. R. Co.* 61 Cal. 326; *Robinson v. Cone*, 22 Vt. 222, 54 Am. Dec. 67.

The question as to whose negligence was last in point of time is, on principle, necessarily of importance only in so far as it aids in determining whose negligence proximately caused the injury.

4 Am. & Eng. Enc. Law, pp. 19-21; *Beach, Contrib. Neg.* § 50, p. 82.

Unless the inference of negligence or its absence is necessarily deducible from undisputed facts and circumstances the question is for the jury.

1 *Shearm. & Redf. Neg.* § 54, p. 65, note 2; *Smith v. Occidental & O. S. S. Co.* 99 Cal. 467, 34 Pac. 84.
54 L. R. A.

Messrs. Reinstein & Eisner and M. S. Eisner, for respondents:

It is not sufficient for the defendant to allege as its excuse defective coöperage. The fact must be proved with reasonable certainty.

Clafin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; *Clark v. Spence*, 10 Watts, 335; *Williamson v. New York, N. H. & H. R. Co.* 24 Jones & S. 508, 4 N. Y. Supp. 834; *Arent v. Squire*, 1 Daly, 347; *Leoncini v. Post*, 37 N. Y. S. R. 255, 13 N. Y. Supp. 825.

The rule that the bailee must account clearly and with reasonable certainty for the loss may sometimes operate hardly on the bailee, but not so often as a contrary rule would work injustice to the bailor.

Cox v. O'Riley, 4 Ind. 368, 58 Am. Dec. 633.

Defendant was bound to exercise such care as good business men, experienced and faithful in caring for similar goods, are accustomed to exercise in the proper discharge of their duties.

Wharton, Neg. 2d ed. § 573; *Arent v. Squire*, 1 Daly, 347; *Ohenowith v. Dickinson*, 8 B. Mon. 156.

The defendant was bound to bestow upon the goods in question that degree of care which their known nature and intrinsic value demanded.

Story, Bailments, 9th ed. §§ 15, 186; *Holtzclaw v. Duff*, 27 Mo. 392; *Hatchett v. Gibson*, 13 Ala. 587; *Boies v. Hartford & N. H. R. Co.* 37 Conn. 272, 9 Am. Rep. 347.

The receipt was signed by defendant alone, and no attempt was made to charge plaintiffs with any knowledge of the clause placing risk of leakage on them, or to bring home to them any acceptance of the condition sought to be imposed.

A mere notice stamped or printed upon a receipt, and not assented to, cannot have the force of a contract.

Brittan v. Barnaby, 21 How. 527, 16 L. ed. 177; *Michigan O. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *Ayres v. Western R. Corp.* 14 Blatchf. 9, Fed. Cas. No. 689; *Ormsby v. Union P. R. Co.* 2 McCrary, 48, 4 Fed. 706; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; Civil Code, § 2176; *Schroeder v. Schweizer Lloyd Transport Versicherung's Gesellschaft*, 66 Cal. 294, 5 Pac. 478; *Pereira v. Central P. R. Co.* 66 Cal. 92, 4 Pac. 988; *Tyler v. Western U. Teleg. Co.* 60 Ill. 431, 14 Am. Rep. 38; *Michigan C. R. Co. v. Hale*, 6 Mich. 244; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Illinois C. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92.

The rule permitting a common carrier to stipulate against liability for negligence, even in the states where it is applied, is subject to certain limitations.

Minnesota Butter & Cheese Co. v. St. Paul Cold-Storage Warehouse Co. 75 Minn. 445, 77 N. W. 977; 5 Am. & Eng. Enc. Law, 2d ed. p. 314; *Hooper v. Wells, F. & Co.* 27

Cal. 11, 85 Am. Dec. 211; *Steinweg v. Erie R. Co.* 43 N. Y. 123, 3 Am. Rep. 673; *Canfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350.

The clause, having been placed there by defendant, must be construed most strongly against it; and since, in its reasonable meaning, it does not include exemption from liability for negligence, defendant cannot justly be exonerated from the consequences of its negligence, even if the law should permit such a stipulation.

Collins v. Burns, 63 N. Y. 1; *Mitchell v. Lancashire & Y. R. Co.* L. R. 10 Q. B. 256; *Merchants' & Miners' Transp. Co. v. Story*, 50 Md. 4, 33 Am. Rep. 293; *Lancaster County Nat. Bank v. Smith*, 62 Pa. 47; *Holtzclaw v. Duff*, 27 Mo. 392; *Story, Bailments*, 9th ed. §§ 15, 186.

The burden of proof is on defendant to account for failure to deliver the full quantity stored. A bailee is as much bound to deliver the full quantity received as to deliver any; and if the loss is one which in the ordinary course would not happen but for want of proper care, it is incumbent on the bailee to prove that he took proper precautions. Failure to furnish such proof subjects him to the inference that the proper precautions were omitted.

J. Russell Mfg. Co. v. New Haven S. B. Co. 50 N. Y. 121.

Defendant was bound to show that it was not at fault.

Jackson v. Sacramento Valley R. Co. 23 Cal. 269; *Wilson v. Southern P. R. Co.* 62 Cal. 164; *Wilson v. California C. R. Co.* 94 Cal. 171, 17 L. R. A. 685, 29 Pac. 861; *Claffin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Coleman v. Livingston*, 4 Jones & S. 32; *Golden v. Romer*, 20 Hun, 438; *Schmidt v. Blood*, 9 Wend. 271, 24 Am. Dec. 143; *Reed v. Crooce*, 13 Daly, 164; *Arent v. Squire*, 1 Daly, 347; *Burnell v. New York C. R. Co.* 45 N. Y. 184, 6 Am. Rep. 61; *Fairfax v. New York C. & H. R. R. Co.* 67 N. Y. 11; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Woodruff v. Painter*, 150 Pa. 91, 16 L. R. A. 451, 24 Atl. 621; *Clark v. Spence*, 10 Watts, 335; *Cow v. O'Riley*, 4 Ind. 368, 58 Am. Dec. 633; *Boies v. Hartford & N. H. R. Co.* 37 Conn. 272, 9 Am. Rep. 347; *Lynch v. Kluber*, 20 Misc. 601, 46 N. Y. Supp. 428; *Lichtenstein v. Jarvis*, 31 App. Div. 33, 52 N. Y. Supp. 608.

Even conceding the barrels to have been defective, there was nothing to show want of ordinary care on plaintiffs' part.

If, the negligence of the plaintiffs being only a remote cause, the defendant might have avoided inflicting the injury by the exercise of ordinary care, the action for damages is maintainable.

Beach, Contrib. Neg. § 25, p. 31; *Thomp. Neg.* § 8, p. 1157; *Fox v. Oakland Consol. Street R. Co.* 118 Cal. 55, 50 Pac. 25; *Esrey v. Southern P. Co.* 103 Cal. 545, 37 Pac. 500; *Everett v. Los Angeles Consol. Electric R. Co.* 115 Cal. 115, 34 L. R. A. 350, 43 Pac. 207, 46 Pac. 889; *Shearm. & Redf.* 54 L. R. A.

Neg. 5th ed. §§ 99, 100; *Northern O. R. Co. v. State use of Price*, 29 Md. 420, 96 Am. Dec. 545; *Crowley v. City R. Co.* 60 Cal. 628.

Beatty, Ch. J., delivered the opinion of the court:

The defendant is proprietor of a bonded warehouse in the city of San Francisco. On the 20th of January, 1896, it received from the plaintiffs, and stored in its warehouse, 64 barrels of spirits. About the 4th of March following, it discovered that some of the barrels were leaking, and immediately notified the plaintiffs, who, upon examination, found that 8 barrels showed excessive outage. One barrel was practically empty, three or four leaking badly, and the others to some extent. The total amount of loss over and above the ordinary allowance for evaporation was 181½ gallons, equal to 225½ proof gallons, of the value of \$434.50. The plaintiffs sue to recover that amount, and charge by the first count of their complaint that the loss was due to leakage caused by the careless, negligent, and improper handling and storage of the barrels by the defendant. In a second count they simply allege a delivery of the 64 barrels to defendant on a contract of storage, and a failure and refusal of the defendant to redeliver on their demand 181½ gallons of the amount stored. The cause was tried by a jury upon evidence relating almost exclusively to the first count, and the instructions requested by the parties and given or refused by the court bore mainly upon the measure of defendant's responsibility for a loss caused by leakage from the barrels during the time they remained on storage. The jury brought in a verdict for the plaintiffs, and the defendant appeals from the judgment and from an order denying a new trial.

Some question is made as to the sufficiency of the evidence to sustain the verdict, and with reference to this point there is a controversy as to the burden of proof; but as to this little need be said. We agree with respondents that in a case of this character proof of the deposit, and of failure of the bailee to redeliver in accordance with the terms of the contract, makes a prima facie case, and that the burden is upon the warehouseman to excuse the failure to redeliver; but we also agree with the appellant that when, as in this instance, he shows a return of the packages stored, and that the contents have been lost by leakage, the burden shifts to the plaintiffs to prove affirmatively that the leakage was caused by the fault of the bailee. This was the principle decided in *Wilson v. Southern P. R. Co.* 62 Cal. 164, and it is entirely reasonable and just. But even in this view there was evidence sufficient to sustain the verdict for plaintiffs if the instructions of the court correctly stated the law. Not that the defendant was shown to have stored or handled the casks improperly, which is one of the things that the plaintiffs undertook to

prove, but only because there was a failure on the part of defendant, according to the rule laid down by the court, to make sufficiently frequent and careful inspection of the casks for the purpose of determining whether they were leaking. There was an effort to prove that the warehouse was improperly constructed, or badly arranged, so that the casks were exposed to drafts, the effect of north winds, etc., causing shrinkage of the staves. But upon this point we think there was a failure of proof, while on the other hand there was very strong evidence that the casks that leaked were faultily constructed; and, besides, the plaintiffs knew, or had the means of knowing, all about the arrangement and situation of the warehouse,—whether, and to what extent it was exposed to drafts or north winds, how casks were ordinarily piled and arranged on the floor, and in what position, with reference to the doors of the warehouse, these 64 casks were paced. It was shown, however, that the casks were piled in a double tier, chine to chine, and two tiers high, with no passageway between, so that one head of each cask was concealed from view as they lay, and so that they could leak at the covered ends without discovery. Under the instructions of the court the jury were at liberty to find that this was actionable negligence on the part of the defendant, and, in view of the extreme weakness of the evidence as to any other fault or negligence of the defendant, we are justified in assuming that the verdict was based wholly upon a finding of negligence in this particular, and, at all events, the verdict cannot be sustained if the jury was erroneously instructed to the prejudice of the defendant in respect to this matter.

Whether it was actionable negligence on the part of the defendant to fail to inspect the casks for the purpose of detecting leakage depends primarily upon the terms, express or implied, of the contract of storage, construed in the light of the circumstances of its execution. The only circumstances material to be considered in connection with the terms of the contract as contained in the warehouse receipt are that the plaintiffs had been storing spirits in the defendant's warehouse for several months before these 64 casks were stored in January, 1896; that the practice was to have the spirits shipped directly to the warehouse; that on the arrival of a car load the plaintiffs were notified, and sent their agent to inspect the goods, and especially to see that the cooperage was all right,—to see, in other words, that the casks were in a condition to be safely stored. Both parties were equally well informed as to the volatile nature of spirits, and the danger of loss from leakage and evaporation. On the arrival of these 64 casks at the warehouse, the plaintiffs were notified, and, in accordance with their usual practice, sent their agent to inspect the cooperage. Both he and the agents of defendant satisfied themselves that the barrels were in good condition, and fit to be stored, and thereupon the

defendant issued its receipt in the following terms:

General Internal Revenue Bonded Warehouse, No. 1.
First District of California.
No. 121. Bode & Haslett, Proprietors.
N. E. Cor. Third and King Streets.

San Francisco, January 20, 1896.
Received on storage from Louis Taussig and C.

Distiller and Brand.	No. of Numbers.	Packages.
Amer. Dist. Co.	124901/904	64 sixty-four bbls. spirits.

Bode & Haslett.
W. A. James.

Nonnegotiable.

Defts. Ex. 1.

This receipt is given in accordance with the California Warehouse Laws, as well as the laws of the United States. Loss or damage by fire, theft, shrinkage, leakage, or natural decay at owner's risk.

Parties are reminded that transfers of merchandise are not complete unless made on the books of the warehouse.

Counsel for the respective parties differ as to the effect of the notice printed on the face of this receipt that loss by leakage was at the owner's risk. Respondents claim: First, that the notice is no part of the contract; and, second, that, even if it is treated as a binding stipulation, it could not exempt the appellant from liability for loss by leakage which, as they contend, might have been discovered and prevented if the casks had been inspected from time to time, or if they had been piled in a single tier, leaving both ends exposed to view. Both of these propositions are controverted by the appellant, and upon their determination the case seems to depend. We think it clear that the notice is a part of the contract. It was printed plainly on the face of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents if they had the opportunity, and their opportunity was ample. The presumption, therefore, is that they did read it. Against this presumption there is no evidence, and none, we think, would have been admissible to show that the respondents had failed to do what their duty required them to do. Assuming, then, that they read the receipt, and, whether they did or not, that they are chargeable with knowledge of its contents, they had fair warning that any loss by leakage was at their risk; or, in other words, that the appellant declined all responsibility for loss by leakage. Their acceptance of the receipt and storage of the goods with knowledge of this condition made it binding upon them as one of the terms of the contract. The cases cited by counsel in which it has been held that notices printed or stamped on bills of lading,

but not signed by the consignors, do not exempt common carriers from their common-law liability, are not in point. They rest upon the peculiar nature of the public duties of common carriers and the public policy of preventing them from limiting their liability by mere notices not expressly assented to by the shippers. The principle of those decisions is very clearly stated by Mr. Justice Davis, delivering the opinion of the Supreme Court of the United States, in *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall., at page 328, 21 L. ed. 302. The case of warehousemen is entirely different. There is no public policy to be infringed by stipulations limiting their liability for loss or deterioration caused by the inherent qualities of the articles stored, or by defects in the vessels containing them. They are not bound to receive articles offered for storage, and may make such terms as they choose to impose as conditions of their contract. In this case we think that it was clearly one of the terms of appellant's contract that it should not be responsible for loss by leakage. This, of course, would not exempt it from liability for leakage due to its fault, but did exempt it from the duty of watching these casks to detect leakage caused by defects in the casks, or resulting from any cause other than improper handling or storage. If prudence required the casks to be watched or inspected from time to time to see whether they were leaking, that duty devolved upon the respondents, not upon the appellant. And there was nothing to prevent the respondents from making such inspection as often as they desired. The warehouse was open to them, but, so far as appears, they never sent any person to look after these goods until they were notified by appellant of the leakage discovered by those in charge of its warehouse. This, it seems to us, is an answer to their complaint as to the manner in which the casks were piled in a double, instead of a single, tier. There is no satisfactory evidence that such mode of piling was either unusual or improper; but, if we assume that it was improper for the reason that it prevented convenient inspection, in the absence of any attempt at inspection by respondent, upon whom the duty rested, the improper piling of the casks was of no consequence. If they had gone to the warehouse, and found themselves unable to make the necessary examination, they could have required the casks to be piled in a single tier, or they could have removed them. But sufficient has been said concerning the case presented by the evidence.

The vital question to be decided is whether the law was correctly given to the jury in the instructions of the court. Generally the instructions given were correct, but with regard to the duty of inspection for the discovery of leakage we think the rule stated by the court was incorrect. One of the instructions was as follows: "The owner of liquids shipped or stored in barrels of

any description is charged with the duty of supplying proper packages, especially where the liquid is volatile, such as spirits; and hard to contain or confine in receptacles; and the warehouseman is not responsible for damages arising from any inherent defect in the barrels delivered to him for storage, nor is he responsible if the negligence of the owner occasioned or contributed to the loss. Therefore, if you shall find that the barrels from which the leakage of the spirits took place were of defective construction, and unsuited for storage of spirits, and that such defect occasioned or contributed to the loss of the spirits, then you will find for the defendant. If the plaintiffs were negligent originally, or the coeprage originally defective, and the leakage resulting was discovered by the defendant, or could, by ordinary care, then the defendant was bound to have been prevented or cured by defendant upon such discovery by the exercise of ordinary care, then the defendant was bound to use such ordinary care in the premises." By the latter part of this instruction the jury were plainly told that, even if the leakage was due to the original negligence of the plaintiffs in storing the spirits in leaky casks, the defendant was nevertheless liable for the loss, if, by the exercise of ordinary care, the defendant could have discovered and cured the defect, or prevented the loss. In another instruction, given at the request of plaintiffs, the jury were told "that, if you find from the evidence that the loss of the spirits for which the plaintiffs claim damages in this action was due to leakage or shrinkage while said spirits were in the defendant's custody as a warehouseman, and if you should further find that the defendant could have prevented said leakage or shrinkage by the exercise of ordinary care, and that the defendant failed to exercise such ordinary care in the premises, and that the plaintiffs were damaged thereby, your verdict should be for the plaintiffs for the amount of damage." And ordinary care was by another instruction defined to be that degree of care which a man of ordinary caution and prudence would manifest in looking to his own interests. In short, by the instructions given and refused the case was left to the jury to be decided upon the proposition that the defendant was responsible for the loss if it had not exercised the same care in watching and guarding against leakage as the owners of the property should themselves have exercised if the goods had been in their own store, and the defendant was allowed no advantage whatever from its stipulation against loss from leakage. This, we think, was error. In view of the contract, it was the duty of respondents, and not the duty of the appellant, to guard against latent defects in the casks, and against the effects of shrinkage. They knew, as well as the defendant, the danger of loss from these causes, and the means of guarding against it. The defendant had declined that risk, and it rested upon them to

take the necessary precautions in view of the danger.

The judgment and order of the Superior Court are reversed.

We concur: Temple, J.; Harrison, J.

McFarland, J., concurring:

I concur in the judgment of reversal. I also concur in the opinion of the Chief Justice, except so far as it might be construed to intimate that the evidence showed any negligence whatever on the part of appellant. In my opinion, the respondents would not have been entitled to recover, under the contract and upon the evidence, if the instructions had been entirely free from error.

Ex parte William McCLAIN.

(.....Cal.....)

A municipal corporation may make the mere possession of a lottery ticket a misdemeanor, where by the Constitution it has power to make and enforce such police and other regulations as are not in conflict with general laws, and the suppression of lotteries is part of the public policy of the state as evidenced by its penal laws.

(September 6, 1901.)

APPPLICATION for a writ of habeas corpus to obtain the discharge of petitioner from custody to which he had been committed for violation of an ordinance forbidding the possession of lottery tickets. Prisoner remanded.

The facts are stated in the opinion.

Mr. N. S. Wirt for petitioner.

Mr. Charles L. Weller for respondent.

Mr. A. S. Newburgh, *amicus curiæ*.

Henshaw, J., delivered the opinion of the court:

By ordinance No. 68 of the city and county of San Francisco, it is made "unlawful for any person to have in his possession any lottery ticket," etc., and upon conviction of a violation of the terms of the ordinance, the defendant may be punished by fine, imprisonment, or both. The petitioner here was convicted of a violation of this ordinance, and seeks his release under this writ, upon the asserted ground that the ordinance in question is unreasonable and void. The United States government refuses the use of its mails to advertising lotteries, transmission of lottery tickets, the announcement of the winning numbers in lotteries,—in short, to the sending of any literature in aid of such gambling schemes; and it makes

NOTE.—For a case in this series as to constitutionality of statute making possession of record of lottery drawings an offense, see *Ford v. State* (Md.) 41 L. R. A. 551.

As to constitutionality of statutes making it criminal to have possession of property capable of being put to criminal use, see *note to State v. Lewis* (Ind.) 20 L. R. A. 52; also *Mon Luck v. Sears* (Or.) 32 L. R. A. 738.

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penal the violation of its laws in any of these respects. The state of California by its penal laws prohibits the setting up of a lottery, and declares it to be a misdemeanor for any person to sell a lottery ticket. There are, then, against all gambling devices of this kind, not only the public policy of the general government and of this state, but also the express mandate of their criminal laws, so that the avowed policy and the expressed intent is to stamp out by penal legislation the traffic in lottery tickets. It is true that the state, while declaring it to be a penal offense to sell a lottery ticket, has not made the purchaser equally culpable. But no one will question the right of the state to declare, if it see fit so to do, that the purchaser of a lottery ticket, equally with the seller, is guilty of a misdemeanor. It may be concluded, therefore, that in a reasonable exercise of its police powers a municipality may pass any ordinance in furtherance of the avowed general policy of the national and state government. In this regard our cities and counties draw their power, not from legislative permission, but from the direct grant of the Constitution itself, which by article 11, § 11, empowers them to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

The matter of this ordinance being, then, clearly one of police regulation, and the power to pass such ordinances being expressly conferred upon a municipality, there is left for consideration the question whether the exercise of that power in this instance be unreasonable or oppressive for the accomplishment of the end in view. Against its validity it is urged that it is unreasonable in making the mere possession, without reference to any ultimate intent of the possessor, an offense; and, as is usual when a law is attacked upon this ground, harrowing instances are cited, as of a blind man to whom might be given a lottery ticket, he not knowing it to be such, or of another into whose pocket might be thrust the damnatory paper, without knowledge upon his part that it was in his possession, and even—so run the argument and citations—the peace officer who arrests a violator of the law, and takes into his own custody the criminatory evidence, is, under the terms of this ordinance, equally guilty. But the answer to all this is the answer that has been made by every court as often as the argument has been pressed to consideration. The matter is discussed in *Ex parte Lorenson*, 128 Cal. 431, 50 L. R. A. 55, 61 Pac. 68, wherein is quoted the language of Mr. Justice Field in *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278, which may well be repeated here: "General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

This kind of legislation is not new to jurisprudence, nor novel upon the statute books of this state; yet it has never been found necessary to overthrow a law otherwise valid because in some supposititious case a person might be charged with its violation who came within the letter, yet not within the spirit, of the enactment. An ordinance of this city and county, for example, prohibits the carrying of a concealed weapon. It is the mere carrying, under the letter of the law, which constitutes the offense, not a carrying with intent to commit some act of violence. Yet this court has found no difficulty in upholding the law. *Ea parte Choney*, 90 Cal. 617, 27 Pac. 436. The citizen who bought a pistol or knife at a gun store, caused it to be wrapped in a parcel, and proceeded to carry it to his home, might be said, under the letter of the law, to have committed a violation of it. Yet he has not violated the spirit of the law, and the law would hold him guiltless. The statute books of this and other states abound in provisions for the protection of fish and game, and among them is commonly found a law making it penal for one within certain designated months "to have in his possession" fish or game of prescribed kinds. In such laws it is not the purpose of the possession, but the fact of possession, which *prima facie* establishes the offense. And so, while in their construction of the game laws courts have differed as to their scope,—some holding that the defendant was exculpated if he showed that the game in his possession was killed without the boundaries of the state, others holding that it applied equally to game so destroyed,—in all cases there has been an agreement by the courts that the fact of possession *prima facie* evidenced a violation of the act. *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. McGuire*, 24 Or. 370, 21 L. R. A. 478, 33 Pac. 666; *Com. v. Wilkinson*, 139 Pa. 304, 21 Atl. 14; *Ea parte Maier*, 103 Cal. 476, 37 Pac. 402; *State v. Judy*, 7 Mo. App. 524;

Bellovs v. Elmendorf, 7 Lana. 462; *People v. Fishbough*, 134 N. Y. 393, 31 N. E. 983. The design of the ordinance is to stamp out lotteries and the traffic in lottery tickets. For, if there were no buyers of lottery tickets, there would be no sellers of them; and while, as has been said above, by the state law only the seller is made culpable, it is clearly within the power and province of the municipality, in its endeavor to eradicate the evil, to hold the purchaser or possessor also culpable.

In the case of *Wong Hane* [108 Cal. 680, 41 Pac. 693] the attention of the court was directed more particularly to the requirements of the ordinance which seemed to exact from the defendant proof of his innocence. If a variance shall be thought to exist between the views there expressed and those here announced, it need but be said that we are satisfied that the present views enunciate a sound principle of statutory construction.

For the reasons above given, the writ is discharged, and the prisoner remanded.

We concur: Beatty, Ch. J.; McFarland, J.

Garoutte, J., concurring:

I concur in the judgment, but deem the language of Justice Field, cited in the main opinion, entirely too general to serve as authority in support of the conclusion here declared. Neither am I at all disposed to agree to the reasoning contained in the opinion of the court promulgated in *Ea parte Lorenzen*. At the same time I see no reason why the law-making power may not declare that the possession of a lottery ticket by a person shall constitute a misdemeanor. The statute clearly means a possession knowingly, and, so construed, there is no legal objection to its validity. *Ford v. State*, 85 Md. 465, 41 L. R. A. 551, 37 Atl. 172; *Ea parte Mon Luck*, 29 Or. 421, 32 L. R. A. 738, 44 Pac. 693.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut

v.

George YANZ, *Appt.*

(.....Conn.....)

1. Evidence of the use, by the wife of accused, of an endearing expression in regard to one whom her husband had killed for alleged criminal intimacy with her, uttered after she had left the scene of the murder, is not admissible in favor of accused, although she could not be compelled to become a witness in the case.

NOTE.—For belief that person assaulted has committed adultery with wife to justify assault by husband, see, in this series, *Drysdale v. State* (Ga.) 6 L. R. A. 424.

For rape of daughter to reduce killing by father to manslaughter, see *State v. Grugin* (Mo.) 42 L. R. A. 774.

54 L. R. A.

2. Manslaughter, and not murder, is, in the absence of actual malice, committed by killing a man while reasonably believing from the circumstances that he is in the act of adultery with assailant's wife, although the assailant is in fact mistaken.

(*Andrews, Ch. J., and Hamersley, J., dissent.*)

(September 27, 1901.)

APPEAL by defendant from a judgment of the Superior Court for New Haven County convicting him of murder. *Reversed.*

Statement by Baldwin, J.:

The defendant upon the trial introduced evidence, mainly for himself as a witness in his own behalf, that on the day in question

he discovered his wife in a piece of woods near his house, with a man, whom he did not recognize; that they were partially reclining on the ground, and that the man had his arms around her; that, thinking the man might be armed, he ran home, and got his rifle; that he returned, loading it as he ran, and found her in the man's arms, lying on her back, with her clothes up, and the man in a position justifying the belief that they were in the act of adultery; that he rushed upon them through the bushes, and in so doing the rifle was accidentally discharged, killing the man. The state claimed and offered evidence tending to prove that he had previously made statements materially different as to the circumstances of the homicide; that the man killed, George Goering, had been on friendly and familiar terms with Yanz, and was well acquainted with Mrs. Yanz; that he had occasionally called upon the defendant at his house; that on this occasion the defendant found him standing in the wood, in conversation with Mrs. Yanz, and, having got his rifle and loaded it, deliberately shot him as he (Goering) was walking away. Immediately after the homicide, Mrs. Yanz, who was greatly excited, was assisted into her house by a neighbor, Mrs. Week, who laid her upon the lounge. This question was put to Mrs. Week on the witness stand, as a witness for the defense: "At the time you took Mrs. Yanz in and placed her upon the lounge, did she say anything concerning George Goering?" Mr. Yanz was not then in the house. The defendant claimed that an answer would show that she used an endearing expression in regard to Goering. This question was excluded. The defendant, through his counsel, claimed that, if the jury should not believe his story that the shooting was accidental or involuntary, then, at the very most, he could only be convicted of manslaughter.

Messrs. William C. Case and Jacob P. Goodhart, for appellant:

The conversation that was offered and excluded occurred immediately after the shooting, and was in explanation of the acts of the parties, and characterizing them.

Norwalk ex rel. Fawcett v. Ireland, 68 Conn. 14, 35 Atl. 804; *Stirling v. Buckingham*, 46 Conn. 464.

What difference can it make whether the husband saw them in the act, or whether he saw them in such a position, and from the surrounding circumstances, that he believed they were committing the act of adultery, and the circumstances were such as to justify that belief? The injured husband's anger must necessarily be aroused to the same pitch, and the effect on his mind will be the same, for in all these cases he is suddenly brought face to face with the convincing evidence produced by his own eyes that his wife has been or is dishonoring him.

Shufflin v. People, 62 N. Y. 232, 20 Am. Rep. 493; *People v. Hurtado*, 63 Cal. 298; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *Chcek v. State*, 35 Ind. 492; *Sawyer v. 54 L. R. A.*

State, 35 Ind. 80; *State v. Holme*, 54 Mo. 153; *Collins v. United States*, 150 U. S. 62, 37 L. ed. 998, 14 Sup. Ct. Rep. 9.

It is sufficient that the defendant is apprised of facts that justify him in the belief that his wife just has committed, or is just about to commit, or is committing, adultery with the deceased.

Pond v. People, 8 Mich. 150; *State v. Scheele*, 57 Conn. 307, 18 Atl. 256; *Jones v. People*, 23 Colo. 276, 47 Pac. 275; *Smith v. State*, 83 Ala. 26, 3 So. 551.

Mr. Alfred N. Wheeler, with **Mr. William H. Williams**, for appellee:

The court correctly charged as to the law of manslaughter.

Manslaughter is the unlawful killing of another without malice, express or implied. The difference, then, between murder and manslaughter, is that in murder there is present always what in law is known as malice aforethought, while in manslaughter there is no such malice.

1 Wharton, *Crim. Law*, § 304.

Whether a homicide committed by a man smarting under the sense of dishonor is murder or manslaughter depends upon the question whether the killing was in the first transport of passion or not.

The killing of the adulterer deliberately and upon revenge is murder, and evidence of the adultery is only admissible when the time of the husband's discovery of it is brought so near to the homicide as not to allow space for cooling.

1 Wharton, *Crim. Law*, § 459.

If the husband is not actually witnessing the wife's adultery, but knows it is transpiring, and in an overpowering passion, no time for cooling having elapsed, he kills the wrongdoer, the offense is reduced to manslaughter.

2 Bishop, *Crim. Law*, § 708; 3 Russell, *Crimes*, International ed. pp. 49-54; 1 Archbold, *Crim. Pr. & Pl.* 8th ed. p. 700; Clark, *Crim. Law*, p. 165.

The sight by a husband of the act of adultery committed by his wife is provocation to him, on the part both of the wife and her paramour; and if he kills either or both he is guilty of manslaughter only. He must see the act, however, for knowledge of his wife's infidelity is not sufficient.

Clark, *Crim. Law*, pp. 169, 170, and notes; *Pearson's Case*, 2 Lewin, C. C. 216; *State v. John*, 30 N. C. (8 Ired. L.) 330, 49 Am. Dec. 396; *State v. Pratt*, *Houst. Crim. Rep.* (Del.) 249; *State v. Avery*, 64 N. C. 608.

The claim that the accused shot the deceased because he observed him in adultery with his wife has no foundation in the evidence in the case, and only originates in the claims of his counsel.

Baldwin, J., delivered the opinion of the court:

There was no error in excluding the question put to Mrs. Week. It called for mere hearsay. The homicide had taken place, and Mrs. Yanz had left the scene of the transaction. Her declarations could not have served to characterize any contemporaneous

act, and therefore could not be claimed as part of the *res gestæ*. That she could not be compelled herself to take the witness stand was no cause for their admission.

The trial court, in its charge to the jury, used this language: "If the accused saw his wife in any such situation as he has described, he had at least a legal right to interfere and separate them, and to carry with him a weapon for defense against any possible attack. And, further, if in pushing his way through the bushes, and under the excitement naturally and ordinarily to be expected under the circumstances, the rifle was accidentally discharged, and the man thus met his death, then the homicide was by misadventure, and the verdict should be 'Not guilty.'" "There is one kind of provocation, gentlemen, which is of such a grievous nature that the law concludes it cannot be borne in the first transport of passion. This is where or when a man finds another in the act of adultery with his wife; when, if he kills him in the first transport of passion thereby aroused, he is only guilty of manslaughter. The law does not hold him altogether guiltless of crime. To kill, even in the first transport of passion, when under that highest and strongest provocation, is in law criminal. It is manslaughter, the lowest form of criminal homicide; not murder. The adulterer, under our law, has a right to live; and the injured husband has no legal right to kill him, even in the first transport of passion aroused by finding him in the act. To have the effect of reducing the homicide from murder to manslaughter, the husband must find the adulterer in the act of adultery. The finding may be by any such observation of the circumstances and of the situation of the guilty parties as justifies the belief that adultery is being committed. Knowledge that the adultery is at the time being committed is sufficient; but if the husband, merely hearing that the adultery had already been accomplished, or merely observing the situation which leads to the belief that adultery has been accomplished, pursues and kills the offender, it will be murder. The witnessing of a passing fact is regarded as having a greater tendency to excite a transport of passion than the mere hearing or the mere belief that it has been accomplished. If, in fact, no adultery was going on, and the husband is mistaken as to the fact, though the circumstances were such as to justify a belief, even, of adultery, the offense would not be reduced to manslaughter. The husband must judge at his peril that the jury may find that he was mistaken, and so find him guilty of murder instead of manslaughter." There are inconsistent expressions in these instructions, but it is to be presumed that those used last were accepted by the jury as controlling, and they were the least favorable to the accused. In case, then, they believed so much of the defendant's testimony as described the circumstances in which he found his wife and Goering together, and the effect which they produced, and were reasonably calculated to

produce, upon his mind, but disbelieved his statement that the gun was accidentally discharged, the charge gave them to understand that, if the act of adultery was not in fact committed, the killing was murder. The law justifies a jury in calling it manslaughter when, on finding his wife in the act of adultery, a man, in the first transport of passion, kills her paramour. This is because from a sudden act of this kind, committed under the natural excitement of feeling induced by so gross an outrage, malice, which is a necessary ingredient of the crime of murder, cannot fairly be implied. The excitement is the effect of a belief, from ocular evidence, of the actual commission of adultery. It is the belief, so reasonably formed, that excites the uncontrollable passion. Such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act in fact committed.

The crime of murder in the second degree, under our statute, rests upon implied malice. It is not sufficient to establish merely a criminal intent followed by a homicide. Malice is not to be implied if the fatal act were the sudden result of what the law deems either a sufficient provocation or an uncontrollable passion naturally excited by the circumstances of the occasion. *State v. Johnson*, 41 Conn. 584, 587, 588. The law deems a husband's passion, excited by surprising his wife in the act of adultery, so far uncontrollable, from the frailty of human nature, that, if he kill her paramour on the impulse of the moment, and no actual malice is disclosed, none ought to be implied. He is not justified; but he is not a murderer. The reason of this rule of law being the existence of an uncontrollable passion, naturally induced, it must logically follow that it suffices if such a passion has been naturally induced in the mind of the slayer by the sight of his wife in the embrace of the man whom he killed, and a reasonable belief of her guilt, formed under circumstances such as those to which the accused testified in the present case. If the jury believed this testimony, or so much of it as showed a state of facts which, in their opinion, justified and produced a reasonable belief on the part of the accused that adultery was being committed when the shot was fired, then, there having been no proof of actual malice, although they may also have believed that it was fired intentionally, the natural excitement of passion and want of premeditation make the offense manslaughter. *Morris v. Platt*, 32 Conn. 75, 83. There is error.

The judgment is set aside, and a new trial is ordered.

Torrance and Hall, JJ., concur. Andrews, Ch. J., and Hamersley, J., dissent.

Hamersley, J., dissenting:

The particular passage of the charge claimed to be erroneous is this: "If in fact no adultery was going on, and the husband

is mistaken as to the fact, though the circumstances were such as to justify a belief, even, of adultery, the offense would not be reduced to manslaughter." The statement is correct. The particular form of manslaughter the court was called upon to explain was this: An intentional killing in a transport of passion induced by an immediate wrong done to the killer by the person killed, which the law deems to be of such nature that the ordinary man is unable, under the first sting of its infliction, to control a natural impulse to punish the offender. Such an injury, if unprovoked, constitutes a provocation which may render the immediate killing of the offender, in the transport of sudden anger caused by the injury received, manslaughter, and not murder. It is a principle common to most systems of jurisprudence, arising from essential conditions of life, that the punishment for unjustifiable, intentional killing should be less severe when the fatal blow is impelled by a transient rage, reasonably induced by and immediately following a wrongful act done by the person killed to the slayer. Such wrongful act constitutes legal provocation, which demands the milder punishment; that is, under our law reduces murder to manslaughter. It should, however, be remembered that to call for the milder punishment the killing must be in fact the result of a sudden rage, difficult for the ordinary man to control, directly induced by a grievous injury. If in fact it is the result of the cruel spirit of revenge that must have life for a wrong, it is murder, no matter what the provocation may be. In drawing the line between the crimes of murder and manslaughter, the law repels the notion that killing in revenge can be less than murder. The cases in which particular facts have been held to show legal provocation point to a principle, common to all, by which each is determined, and suggests its foundation, namely, when the mind of the slayer is not possessed by that conscious cruelty indicated by voluntary killing, but by a sudden transient rage, being the natural product of an injury then done to him by the person killed, the offense may be manslaughter. Mere rage is insufficient. It must arise directly from an injury then received, which must be as real as that caused by a severe battery. Mere insult is insufficient in law to produce this rage, unless it involve some grievous injury; not a fanciful one, such as may result from mocking words or gestures, but a substantial injury, such as may be caused in some conditions of life by an unpunished personal affront, or such as may be suffered by a husband or father in the degradation of his wife or child. It is the combination of adequate insult and injury received, of sudden and uncontrollable transient rage thereby naturally produced, and of unlawful killing directly resulting from that rage, which marks such killing as manslaughter. The essence of the common law, as affecting the distinction between murder and manslaughter (excluding some arbitrary tests), is this: Murder implies the presence as

dominating a voluntary act causing death of an inhuman or unnaturally cruel state of mind; manslaughter implies its absence. It is thus stated by Lord Holt in 1707: "He that doth a cruel act voluntarily doth it of malice prepensed." *Reg. v. Mawgridge*, 1 Kelyng, 119 *et seq.* Sir J. F. Stephen characterizes this definition of malice aforethought as correct and happy, and with the insertion of the words "or cruelly reckless" as solving nearly all questions as to the distinction between murder and manslaughter. 1 Stephen, *History Crim. Law Eng.* pp. 70, 73. Russell thus explains what may be involved in a cruel act: "Violent acts of resentment bearing no proportion to provocation or insult are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often make malice." 1 Russell, *Crimes*. Intentional lawful killing is necessarily a cruel act, which implies murder; but when the person killed is himself the aggressor through giving a provocation adequate to produce a sudden anger and impulse to punish the wrong, sufficient to dominate the will of the killer, the inherent cruelty of the act is so far modified as to make the offense manslaughter. Provocation, therefore, is legally effective, because for the moment it prevents, subdues, or excludes from the mind of the criminal actor that unnatural cruelty which is the earmark of murder through the controlling presence of natural rage immediately induced by an adequate injury. The essential test of an adequate injury is its inherent and judicially known capacity, under existing social conditions, to cause such rage, as a rule, when inflicted on the ordinary man. The conditions to which this part of the charge applied were these: (1) An admittedly intentional, unlawful killing; (2) in a transport of rage; (3) induced by an injury and insult done to the defendant by adultery committed with his wife in his presence. To make the offense manslaughter, the injury must have been done. Intentional unlawful killing in a rage is murder, and not manslaughter. Anger thirsting for the blood of an enemy is in itself an earmark of murder, no less than revenge or brutal ferocity; but when it is provoked by the wrongful act of the person slain, who thus brings upon himself the fatal blow, given in the first outbreak of rage, caused by himself, the offense is manslaughter; not only because the voluntary act is, in a way, compelled by an ungovernable rage, but also because the victim is the aggressor; and his wrong, although it cannot justify, may modify, the nature of the homicide thus induced. The court therefore correctly told the jury that, to make the offense manslaughter, the injury claimed as a provocation must have in fact been done. Our law of homicide recognizes no provocation as legally competent to so modify the cruelty of intentional, unlawful killing as to reduce the offense to manslaughter, except the provocation involved in an actual and adequate injury and insult. A different rule of provocation applies when

the killing is not intentional; as where it results from the use of force, not intended, and not naturally adapted, to cause death. But where the killing is both intentional and unlawful, the only legal provocation is that given by an actual injury and insult.

The decision of the majority of the court is based on the assertion that the intentional unlawful killing of an innocent person who has done the slayer no wrong may be manslaughter; or, in other words, an actual injury done to the slayer is not essential in order to reduce such killing from murder to manslaughter. I find no authority in our law for this assertion. During the three centuries in which the distinction between the crime of murder and that of manslaughter has been developed and established, there is, so far as I have been able to discover, no *dictum*, or jurist, or decision of court which has failed to recognize the necessity of an actual injury and insult given by the killed and suffered by the killer as necessary to the reduction of intentional unlawful killing from murder to manslaughter. It seems to me unquestionable that the decision involves a clean-cut and radical change of existing law. I think such a change would be unwise, and inconsistent with the considerations of public policy that underlie our law of homicide. It is, however, unnecessary to discuss the wisdom of the change, for it is one within the province of the legislature, and not of the court, to make. The only authority cited in the opinion of Judge Baldwin as supporting its position that a belief in an injury may be equivalent in effect in this case to an actual injury, is the case of *Morris v. Platt*, 32 Conn. 75, 85. If the court may properly change the law heretofore clearly established so that an honest belief in an imaginary injury can make manslaughter of murder, then there is no need for the citation of authority. Its *ipse dixit* is sufficient. But as the law stands the case cited is wholly irrelevant. In *Morris v. Platt* the court was dealing with a homicide claimed to have been committed in the exercise of the right of self-defense, and correctly stated the law applicable to such a case, namely, killing in self-defense is not a crime. The right of self-defense includes the right of protection against a reasonably apprehended danger, otherwise the right of self-defense would in most cases be an impotent right. A well-grounded apprehension of danger, as well as a certainly existing danger, may justify a killing in self-defense. The lawfulness of the act is determined, not by the fact of an actually existing danger, but by the fact of an honest, reasonable, and well-grounded belief in its existence. In this case the court is dealing with an admittedly intentional and unlawful killing. The crime is murder unless the person so intentionally killed had himself given a provocation consisting in an actual grievous injury and insult. There is no analogy between the two cases. The principle governing the former case, that the right of self-defense justifies killing done to prevent a reasonably apprehended dan-

ger, is well settled. The principle governing this case, that intentional unlawful killing is murder unless provoked by an adequate injury and insult, is equally well settled. The argument of the opinion seems to be this: A reasonable belief in an existing danger may justify killing in self-defense, and in such case the reasonable belief is equivalent to the fact of existing danger; *ergo*, a reasonable belief in a nonexistent injury is equivalent to the actual injury essential to reduce the crime of intentional unlawful killing from murder to manslaughter. Such logic is not convincing. It is plain that, unless the alteration in the law announced in the majority opinion is justifiable, the error imputed to the charge cannot be sustained. That alteration provides that intentional, unlawful killing, done in anger reasonably aroused, may be manslaughter, although the killer has received no injury, and the person killed is innocent of any wrong. Such alteration seems to me plainly unjustifiable. If there is any mistake in the particular passage of the charge, it is the statement of a general rule not material in the state of evidence before the jury. The only question in respect to the alleged injury claimed as a provocation was the truth or falsity of the testimony describing the positions of the defendant's wife and the deceased just prior to the firing of the fatal shot. The defendant testified that he discovered his wife upon the ground, lying on her back, with her clothes up, and the man in the position detailed, and which the finding says justified the belief that they were engaged in the act of adultery. There was no qualifying evidence. If the testimony was credible, adultery had been committed, and the injury alleged had been given. There was, therefore, no occasion to state the rule of law applicable to a state of facts which might justify a reasonable belief that adultery had been committed, and also show that in fact it had not been. The court might properly have omitted reference to a rule not applicable to the state of fact as claimed; or, possibly, if the reference were made, might properly have added that, if the conduct of the deceased with the prisoner's wife did not satisfy the jury that adultery had been committed, yet the conduct detailed was in itself a grievous injury and insult and legal provocation. That such conduct is a legal provocation seems to me demonstrable, but such question is not now involved, and no claim in respect to it is made. If it were a mistake to state the rule of law governing a case where there was a reasonable belief in adultery which was in fact unfounded, the mistake was harmless, and would not be less harmless if the qualification suggested had been made. The record shows with certainty that the only question before the jury as to this part of the case was the credibility of the defendant's testimony as to the fact of adultery. If credible, adultery had been committed, and the offense was manslaughter. Upon this question the charge of the court is clear, full, and impartial. It could not have

been misunderstood, and could not have been affected by the statement in the general definition of legal provocation as to the necessity of proving the fact of adultery. Neither court nor counsel contemplated the contingency of the jury finding as a fact the circumstances under which the parties were claimed to have been discovered, and also finding that no adultery had been committed. There was no such contingency. It involved an absurdity approaching grotesqueness, and yet a new trial cannot be lawfully granted without gravely assuming the probability of the verdict having been influenced by such an absurdity. A mistake, or even an error, in the passage of the

charge objected to, would relate to a state of facts not before the jury, was rendered harmless by those portions of the charge directly dealing with the evidence, and could not have affected the conclusion of the jury. The defendant has had a fair trial. The charge of the court is correct in law, full and impartial in its review of the evidence and presentation of all claims made by the parties; and, even if the passage objected to might properly have been omitted or qualified, there is no ground for a new trial. *State v. Griswold*, 73 Conn. 95, 100, 46 Atl. 829. I think there is no error, and that a new trial should be denied.

IDAHO SUPREME COURT.

W. A. SIFERS, *Respt.*,

v.

O. P. JOHNSON, *Appt.*

(.....Idaho.....)

*A statute making it unlawful to herd or graze sheep within 2 miles of an inhabited dwelling, and making the owner of sheep so herded or grazed liable for damages to the injured party, is a valid exercise of the police power of the state, and not unconstitutional.

(*Stockslager, J., dissents.*)

(June 21, 1901.)

A PPEAL by defendant from a judgment of the District Court for Blaine County in favor of plaintiff in an action brought to recover the statutory penalty for pasturing sheep within a certain distance of plaintiff's house. *Affirmed.*

The facts are stated in the opinion.

Mr. Guy C. Barnum, for appellant:

The 2-mile limit mentioned in § 1210, Idaho Rev. Stat., does not apply to this case.

The language of said section is: "It is not lawful for any person owning or having charge of sheep to herd the same or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within 2 miles of the dwelling house of the owner or owners of such possessory claim."

A claim is the possession of a settler upon the wild lands of the government of the

United States,—the lands which such a settler holds possession of.

Bouvier, *Law Dict.*; *McGinnis v. Friedman*, 2 Idaho, 301, 17 Pac. 635.

Plaintiff's dwelling house is not that of an owner of a possessory claim.

Mr. L. L. Sullivan, for respondent:

Under the provisions of § 1210, it is made unlawful for any person owning or having charge of sheep to herd them or permit them to be herded on the land or possessory claims of other persons, and the latter part of said section is clearly intended to prevent the grazing or herding of sheep within 2 miles of the dwelling house of the owner of such land, whether he has the title in fee, or is in possession of such land under the public land laws of the United States.

A reasonable police regulation has been established for the protection of the rights of the farmers of the state, and for the preservation of the peace and good order of society.

State v. Harrington, 68 Vt. 622, 34 L. R. A. 100, 35 Atl. 515; *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; 1 Tiedeman, *State & Federal Control of Persons & Property*, p. 1.

Quarles, Ch. J., delivered the opinion of the court:

The plaintiff commenced this action in the justice's court of Soldier precinct, in Blaine county, to recover damages from the defendant by reason of trespass committed by sheep belonging to and under the control of the defendant upon the premises, and within 2 miles of the same. The plaintiff recovered judgment, and the defendant appealed to the district court; and upon a trial in the district court plaintiff recovered a verdict for \$100 damages, upon which a judgment was entered in favor of the plaintiff and against the defendant for the sum of \$100 and costs. Defendant then moved for a new trial, which being denied, he appealed from the order denying a new trial and from the judgment.

It appears from the record that the respondent owns the lands upon which he re-

*Headnote by QUARLES, Ch. J.

NOTE.—For a case in this series as to validity of statute making it unlawful to permit hogs to run at large, see *Haigh v. Bell* (W. Va.) 81 L. R. A. 131.

As to owner's liability for trespassing cattle in general, see note to *Bulpit v. Matthews* (Ill.) 22 L. R. A. 55.

As to validity of statutory regulations as to infected animals, see *Grimes v. Eddy* (Mo.) 26 L. R. A. 638, and note; and *State v. Rasmussen* (Idaho) 52 L. R. A. 78.

sides and which he farms in fee simple; that he has his said lands inclosed, and, at the date of the trespass complained of, had growing crops thereon, same being inclosed with barbed-wire fences; that the sheep of appellant were herded and grazed immediately around the residence and farm of the respondent, and trespassed within his inclosures; that a few of the sheep died,—some within the field of respondent, and some very near to his house,—and were permitted by appellant to there remain. The damage done to respondent was estimated at from \$100 to \$250 by the witnesses, including that within his inclosure, and that to the pasturage without, but within 2 miles of his dwelling. The evidence also shows that appellant had five bands of sheep—about 2,000 in each band—grazing within 2 miles of the dwelling of the respondent, and so destroyed the pasturage that cattle and horses could not exist there; that cows will not graze where sheep have been grazed the same season. The respondent expostulated with appellant about the latter grazing his bands of sheep about and around his dwelling; whereupon appellant said to respondent, in substance, that “when he was in the cattle business the sheep men ran sheep in on his range and destroyed the range, and he had to go out of the cattle business, and now he was in the sheep business, and he didn’t know any way for us to do but to take our medicine.” It appears that the jury took into consideration both the damages that respondent sustained by reason of the sheep trespassing within his fields and those sustained by him by reason of the sheep being grazed within 2 miles of his dwelling.

Sections 1210–1212, Idaho Rev. Stat. are as follows:

“Sec. 1210. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within 2 miles of the dwelling house of the owner or owners of such possessory claims.

“Sec. 1211. The owner or the agents of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained.

“Sec. 1212. When the owner or the agent of such owner of sheep found trespassing upon the land or possessory claims of another, or within 2 miles of the dwelling house of the claimant or occupant of such possessory claim, is unknown to the party injured by such trespass, all sheep so trespassing may be treated as estrays.”

It is contended by appellant that these statutes are unconstitutional and void. Appellant also contends that, if these sections are held valid, they do not apply to

this case, for the reason that the respondent owned the land upon which his dwelling was situated, and the same was not upon a possessory claim. The latter contention is not tenable, as the legislature evidently intended to protect settlers from the injury and annoyance of having sheep herded and grazed around their habitations, whether they possessed the same absolutely and had title thereto, or held only by mere naked possession. The other contention raises the serious question in the case. As we view it, this is purely a question of police power. The police power of the state is very great. Under it many things may be done which at first glance seem to infringe upon natural and civil rights. The protection of health, prevention and suppression of nuisances, controlling the conduct of business which affects others not engaged in the same, the preservation of the public peace, and protection of the public welfare are legitimate subjects calling for the exercise of the police power of the state. Judge Cooley, in his work upon Constitutional Limitations, 6th ed., at page 704, says: “The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks, not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of the rights of others.” The same author, at page 705, quotes from Chief Justice Shaw, in *Com. v. Alger*, 7 Cush. 53, with approval, this language: “We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.” At page 743 the said author says: “The most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous.” In his work upon State and Federal Control of Persons and Property, Mr. Tiedeman, at page 838, says: “In every state the keeping of live stock is under police regulation. . . . The clash of interest between stock raising and farming calls for the interference of the state by the institution of police regulations; and whether the regulations shall subordinate the stock-raising in-

terest to that of farming, or *vice versa*, in the case of an irreconcilable difference, as is the case with respect to the going at large of cattle, is a matter for the legislative discretion, and is not a judicial question. In the exercise of this general power of control over the keeping of live stock, the state or municipal corporation may prohibit altogether the running at large of such animals, and compel the owners to keep them within their own inclosures." Inasmuch as the legislature may prohibit the running at large of live stock, we see no reason why it should be held that it may not prohibit the running at large altogether of certain live stock, nor why certain live stock (for instance, sheep) should not be forbidden to be herded within 2 miles of the dwelling of a settler. We have statutes which, in effect, prohibit hogs from running at large. See §§ 1340 to 1344, inclusive, Rev. Stat. wherein it is provided that the owner or occupant of premises need not fence against hogs; that the owner of hogs that trespass upon the inclosure of others is liable for damages; for the impounding of trespassing hogs, etc. These statutes, like those in question here, were enacted to protect the farmers from annoyance and injury caused by the trespassing of hogs, and to save them expense in fencing against hogs. It is a matter of common knowledge and experience that a fence will keep out cattle and horses that will not sheep or hogs. It is evident that in passing the statutes cited, relative to the running at large of hogs, and the herding and grazing of sheep within 2 miles of dwelling houses, the legislature intended to further the public good and preserve the peace, by preventing those conflicts which would naturally result from the herding of

sheep about the dwellings of settlers. The statutes were intended to promote the public good and avoid danger and injury to the citizen. They were also evidently intended to protect the health of the settlers, and as those questions are of legislative discretion, and not judicial, we are not authorized to hold the statutes unconstitutional.

It is contended by the appellant that every citizen has the right to pasture the public domain, and that, if the statutes in question are held valid, it amounts to taking property without due process of law. There is nothing in this contention. We know of no statute enacted by Congress which grants the citizen the right of pasturage upon the public domain, and counsel for appellant cites no such statute. Citizens graze their stock upon the public domain by sufferance of the general government, and not by virtue of any vested right. When Idaho was admitted into the Union of states, she was not fettered or restricted in the exercise of the police power that attaches to statehood by any provision in the admission act, and it cannot be reasonably contended that, because lands are situated within her borders that belong to the general government, and which private parties are permitted, by sufferance, to pasture, she is limited in the exercise of what would otherwise be legitimate police power. It follows from what has been said that the statutes in question are valid.

Finding no reversible error in the record, *the order denying a new trial and the judgment are affirmed*, with costs of appeal to the respondent.

Sullivan, J., concurs. Stockalager, J., dissents.

INDIANA SUPREME COURT.

INDIANAPOLIS UNION RAILWAY COMPANY, *Appt.*,

v.

John J. HOULIHAN.

(.....Ind.....)

1. The appellate court is not precluded from considering the correctness of the overruling of a demurrer to an amended complaint by the fact that the original and amended complaints as they appear in the transcript are alike, on the theory that the original complaint was erroneously copied where the amended one should appear, where the clerk has certified that the amended complaint was correctly copied, and his duty required the copying of only that paper.
2. That an injury was caused, by the negligent use of an engine by a servant in charge thereof, to another serv-

ant of the same corporation, both being at the time in the line of duty as employees, is sufficient to render the employer liable under a statute imposing liability where injury is caused by the negligence of any person in the service of such corporation who has been given charge of any engine, or where such injury is caused by the negligence of any servant acting in the place of the corporation in that behalf, and the person injured is obeying at the time of such injury the order of some superior having authority to direct, without showing that the negligent servant represented the employer, or that the injured one was obeying the order of a superior.

3. A statute making railroad companies liable to all employees for injuries caused by negligence of any of their servants in charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train, is not unconstitutional as unequal, but is sustainable as an exercise of the police power for the protection of persons

NOTE.—For other cases in this series as to constitutionality of statutes to protect health, safety, and comfort of employees, see *State v. Hoskins* (Minn.) 25 L. R. A. 759, and *note*; *Consolidated Coal & Min. Co. v. Floyd* (Ohio) 54 L. R. A.

25 L. R. A. 848, and *note*; *Durkin v. Kingston Coal Co.* (Pa.) 29 L. R. A. 808; *People v. Smith* (Mich.) 32 L. R. A. 853, and *note*; *Re Morgan* (Colo.) 47 L. R. A. 52; and *Chicago, W. & V. Coal Co. v. People* (Ill.) 48 L. R. A. 554.

exposed to dangerous agencies in the hands of others.

4. One in charge of a locomotive engine is negligent in running it at 20 miles an hour, without warning, past a place where he knows it is the duty of an employee to cross the track to receive the report of a train then passing, and whose view along the track is obstructed by posts and weeds.
5. Where a railway company is by statute made liable for the negligence of its engineer, an averment that its negligence was the cause of an injury will include the negligence of the engineer.
6. The consideration for a release by an injured employee to his employer, expressed as being "in consideration of the employer's agreement to pay physician's and hospital charges" and a specified cash payment to the employee, is contractual, so that it cannot be contradicted by parol.

(June 6, 1901.)

APPEAL by defendant from a judgment of the Circuit Court for Boone County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Reversed.*

The facts are stated in the opinion.

Messrs. S. M. Ralston, C. M. Zlom, and Baker & Daniels, for appellant:

If the amended complaint is construed as counting upon a common-law liability, it is bad, because:

1. The alleged defects in the defendant's railroad track, as respects obstructions to view, etc., along the side of the track, were open to view and necessarily known to the plaintiff.

Hattaway v. Atlanta Steel & Tin-Plate Co. 155 Ind. 507, 58 N. E. 718; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Griffin v. Ohio & M. R. Co.* 124 Ind. 326, 24 N. E. 838; *Swanson v. Lafayette*, 134 Ind. 625, 33 N. E. 1033; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496, 38 N. E. 52.

2. Any negligence of the defendant's engineer, if such be averred, was the negligence of a fellow servant.

New Pittsburgh Coal & Coke Co. v. Peterson, 136 Ind. 398, 35 N. E. 7; *Robertson v. Chicago & E. R. Co.* 146 Ind. 486; 45 N. E. 655; *Hodges v. Standard Wheel Co.* 152 Ind. 680, 62 N. E. 391, 54 N. E. 383; *Thompson v. Citizens' Street R. Co.* 152 Ind. 461, 53 N. E. 462; *Orgeon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125.

If the amended complaint is construed as counting upon a liability under the so-called employers' liability act (3 Burns's Rev. Stat. § 7083) it is bad upon demurrer, because:

1. The only negligence averred against the defendant is the negligence in furnishing "defective ways," and the common-law rule that the servant assumes obvious risks is 54 L. R. A.

equally applicable to a case brought under the provisions of the employers' liability act touching defective ways.

Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685; *Osborne v. London & N. W. R. Co.* L. R. 21 Q. B. Div. 220; *Cunningham v. Lynn & B. Street R. Co.* 170 Mass. 298, 49 N. E. 440; *Donahue v. Washburn & M. Mfg. Co.* 169 Mass. 574, 48 N. E. 842; *Connelly v. Hamilton Woolen Co.* 163 Mass. 156, 39 N. E. 787; *Birmingham R. & Electric Co. v. Allen*, 99 Ala. 359, 20 L. R. A. 457, 13 So. 8; *Bridges v. Tennessee Coal, I. & R. Co.* 109 Ala. 287, 19 So. 495.

The "defective ways" mentioned in the amended complaint made a danger that "was easily apparent, immediately present, and stood out so prominently as to press observation upon the servant of ordinary intelligence, and made such danger a risk of his employment which plaintiff assumed."

Pittsburgh, C. C. & St. L. R. Co. v. Moore, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290; *Indiana, I. & I. R. Co. v. Bundy*, 152 Ind. 590, 53 N. E. 175; *New York, C. & St. L. R. Co. v. Ostrman*, 146 Ind. 452, 45 N. E. 651; *Pennsylvania Co. v. Finney*, 145 Ind. 551, 42 N. E. 816.

2. The specific and particular acts of the defendant's engineer, characterized in the pleading as negligent (in order to bring the case within the provisions of the 4th clause of said § 7083, Burns's Rev. Stat.), are not in law negligent, and were not in fact the proximate cause of plaintiff's injury.

Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 348, 49 N. E. 388; *Williams v. Chicago & A. R. Co.* 135 Ill. 491, 11 L. R. A. 352, 26 N. E. 661; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L. R. A. 710, 6 So. 277; *Port Royal & W. C. R. Co. v. Phinizy*, 83 Ga. 193, 9 S. E. 609; *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L. R. A. 385, 12 S. E. 553; *Schackelford v. Louisville & N. R. Co.* 84 Ky. 43; *Thompson v. Citizens' Street R. Co.* 152 Ind. 461, 53 N. E. 462; *Baltimore & O. S. W. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Evansville & T. H. R. Co. v. Krapp*, 143 Ind. 647, 36 N. E. 901.

3. Because it is necessary, under the 4th clause of § 7083, Burns's Rev. Stat. that a complaint shall contain an allegation which is wanting in the amended complaint here, namely, that at the time of the accident the plaintiff was "obeying or conforming to the order of some superior, at the time of such injury, having authority to direct."

The statute should be interpreted so that it shall stand, if possible. It is possible to so interpret it if the persons in whose favor it was enacted are persons that are subjected to the unusual dangers of railroad operation, namely, all railroad employees who, in the doing of their work, do not control their own actions, but act in conformity with the order of some superior employee who has authority to direct.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Pittsburgh, C. O. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386, 41 N. E. 263; *Atchison T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Whitcomb v. Standard Oil Co.* 153 Ind. 513, 55 N. E. 440.

There is no averment in the complaint that authorizes the inference that plaintiff was acting in an emergency.

It was possible for him, even within the 6 feet between the target pole and the track, to so use his eyes and at the same time so control his body as not to give up his place of safety, and yet ascertain that the engine was coming. His failure so to do was negligence which contributed to his injury.

Cincinnati, I. St. L. & C. R. Co. v. Long, 112 Ind. 168, 13 N. E. 659; *O'Neal v. Chicago & I. Coal R. Co.* 132 Ind. 110, 31 N. E. 669; *Pittsburgh, C. C. & St. L. R. Co. v. Frazer*, 150 Ind. 576, 50 N. E. 576; *Krenzer v. Pittsburg, C. C. & St. L. R. Co.* 151 Ind. 587, 43 N. E. 649, 52 N. E. 220; *Thompson v. Citizens' Street R. Co.* 152 Ind. 461, 53 N. E. 462; *Whitcomb v. Standard Oil Co.* 153 Ind. 513, 55 N. E. 440.

The plaintiff testified, in effect, that he did not see the engine until just at the instant he was struck; that when he stood south of the target pole he could see an object upon the Belt track 10 or 15 feet; that as he stepped toward the track he was watching for whatever might be there, aiming to see that he was clear in crossing the track. Taken together, these facts are conclusive proof that plaintiff was guilty of contributory negligence.

Lake Erie & W. R. Co. v. Stick, 143 Ind. 449, 41 N. E. 365; *Cleveland, C. O. & St. L. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445; *Sutherland v. Cleveland, C. C. & St. L. R. Co.* 148 Ind. 308, 47 N. E. 624; *Wabash Paper Co. v. Webb*, 146 Ind. 303, 45 N. E. 474; *Habbe v. Viele*, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1.

Messrs. A. J. Shelby and T. J. Terhune, with Messrs. Addison O. Harris and Wymond J. Beckett, for appellee:

The consideration stated in the writing consists of two elements: (1) a cash payment of \$25; (2) an agreement to pay "all fees and charges payable to physicians and St. Vincent's Hospital for services and care rendered to said Houlihan on account of said injuries."

The cash payment of \$25 is not contractual; the writing contains no agreement or promise to pay the same.

The mere agreement to pay a sum in cash, without conditions, is never contractual; it is a mere inattentive recital. Money, being the common medium of exchange does not evidence contractual intention.

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Jackson v. Chicago, St. P. & K. O. R. Co. 54 Md. App. 636; 6 Am. & Eng. Enc. Law, 2d ed. p. 755; *Stewart v. Chicago & E. I. R. Co.* 141 Ind. 55, 40 N. E. 67.

Under the circumstances and conditions under which the services were rendered to the appellant for which said fees and charges were made the appellant was bound to pay these fees and charges, or at least appellee was not.

Terre Haute & I. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; *Ohio & M. R. Co. v. Early*, 141 Ind. 73, 28 L. R. A. 546, 40 N. E. 257; *Toledo, St. L. & K. O. R. Co. v. Mylott*, 6 Ind. App. 438, 33 N. E. 135.

Appellant's agreement to pay these fees and charges was an agreement to pay its own debt, which would be no consideration for the release.

6 Am. & Eng. Enc. Law, 2d ed. pp. 693, 750; *Clark v. Waterman*, 7 Vt. 76; *Myers v. Dean*, 11 Misc. 368, 32 N. Y. Supp. 238; *Richmond & D. R. Co. v. Walker*, 92 Ga. 485, 17 S. E. 604; *Clark, Contr.* p. 184; *Bishop, Contr.* § 448; *Beaver v. Fulp*, 136 Ind. 595, 36 N. E. 418.

Without infringing the rule that parol evidence is not admissible to vary or contradict the terms of a written instrument, parol evidence is always admissible to show the nature and qualities of the subject-matter to which the instrument refers.

Greenl. Ev. 14th ed. §§ 277, 282, 286, 295a; 17 Am. & Eng. Enc. Law, p. 452; *Cocke v. Blackburn*, 57 Miss. 689; *Ransdel v. Moore*, 153 Ind. 393, 53 L. R. A. 753, 53 N. E. 707.

Under a plea of no consideration it is always admissible to show by parol that there was no consideration, that there was no legal contract.

Greenl. Ev. 14th ed. § 284; *Cocke v. Blackburn*, 57 Miss. 689; *Meyer v. Casey*, 57 Miss. 615; *Browne, Parol Ev.* ed. 1893, § 29, p. 43; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Stephen, Digest of Ev.* 4th ed. p. 133.

If we concede that the fees and charges constitute a debt, and that they constituted Houlihan's debt, then the appellant's agreement to pay these fees and charges would be a promise to pay the debt of another, and, as the writing was not signed by the appellant, would be unenforceable and void under the statute of frauds.

Baylies, Sureties & Guarantors, p. 70; *Cheesman v. Wiggins*, 122 Ind. 352, 23 N. E. 945.

If the appellant was not bound to pay these fees and charges the contract was unilateral, and hence unenforceable.

Wilkinson v. Heavenrich, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139; *Jordan v. Indianapolis Water Co.* (Ind. App.) 61 N. E. 12.

Baker, J., delivered the opinion of the court:

Judgment for appellee for \$15,000 on account of personal injuries. Appellant assigns that the court erred in overruling (1) its demurrer to the amended complaint, (2)

its motion for judgment on the jury's answers to interrogatories notwithstanding the general verdict, and (3) its motion for a new trial.

1. The amended complaint alleges that appellant operates a railway in and about Indianapolis known as the "Belt Line;" that outside of the city, near the stock yards, the Belt Line crosses the Vandalia Railroad at right angles; that the Belt Line runs north and south, and the stock yards are south of the crossing; that each line has two tracks at the crossing, which are parallel and about 6 feet apart; that on August 8, 1895, appellee was employed by appellant as a telegraph operator at the crossing, and it was his duty to keep an account and take a report of all the cars of other railways that passed in and out at the crossing over appellant's line, and report the same to appellant, and set the targets at the crossing, and appellee had no other duties; that trains coming south into the stock yards ran on the west track of the appellant's line, and trains passing north out of the stockyards ran on the east track; that it was appellee's duty to go from the telegraph office, which was located in the northwest angle of the crossing, and about 3 feet from the west track, over the west track, to receive reports from the outgoing trains on the east track; that some one in charge of the outgoing train would hand the appellee a report of such train while it was in motion, passing north over the crossing; that there was no other way by which appellee could receive such reports, and this fact was well known to appellant and its engineer in charge of the locomotive engine hereinafter mentioned; that on August 8, 1895, appellee was in the discharge of his duties at the crossing; that, without any negligence on his part, he stepped out of the telegraph office, and was in the act of stepping onto and across the west track in order to receive a report from an outbound train which was then passing north on the east track, as was his duty to do; that appellee did not know of the approach of an engine on the west track; that he could not see the engine as it approached the crossing, by reason of posts and high weeds between the telegraph office and the west track, which appellant had negligently permitted to be and grow upon its right of way, completely obstructing appellee's view of the north; that he could not hear the engine approaching the crossing, by reason of the noise of the outbound train; that appellee was in the act of stepping on the west edge of the west track, without any negligence on his part, when an engine owned by appellant, and in charge of appellant's engineer, was negligently run by the engineer against appellee without fault on his part, inflicting permanent injuries; that the engineer negligently failed to stop the engine while approaching the crossing from the north, and negligently failed to give any signal of the engine's approach, although he knew that there was an outbound train running north on the east track over the

crossing, and that appellee would be compelled to cross the west track in discharge of his duty to get the report, but negligently ran the engine at the high and dangerous speed of 20 miles an hour towards and over the crossing, negligently striking appellee as aforesaid and inflicting the injuries as aforesaid, all without fault or negligence of appellee, but by reason of all of appellant's negligence as herein alleged, from which injuries, etc. Wherefore, etc.

Appellee insists that the ruling on the demurrer to this amended complaint cannot be considered, because the transcript contains a copy of the original complaint, which is found to be, word for word, the same as the amended complaint. The argument from this state of the record is that the clerk has erroneously copied the original complaint into the transcript where the amended complaint should have been inserted. But the clerk certifies that the paper copied into the record as the amended complaint is the amended complaint. The presumption is that the clerk has properly performed his official duty. It was his duty to embody the amended complaint in the transcript, and to omit the original complaint. (Rev. Stat. 1881, § 650; Horner's Rev. Stat. 1897, § 650; Burns's Rev. Stat. 1894, § 662). Matter that should have been omitted will not be held to discredit the clerk's certificate of the correctness of the matter which it was his duty to include. The case of *Ellis v. Indianapolis*, 148 Ind. 70, 47 N. E. 218, is not in point.

Appellant contends that the amended complaint is bad at common law, because the facts show that appellee assumed the risks arising from the obstructions to his view and from the negligence of the engineer, who was a fellow servant. Since appellee does not attempt to controvert this contention, it will be passed without consideration, and the sufficiency of the complaint will be determined alone from the employers' liability act (Acts 1893, p. 294; Burns's Rev. Stat. 1894, §§ 7083-7087; Horner's Rev. Stat. 1897, §§ 5206a-5206c). The 1st section of the act provides "that every railroad . . . corporation . . . shall be liable in damages for personal injury suffered by an employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: . . . Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, coemployee or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury having authority to direct." The

amended complaint does not aver that appellee was "obeying or conforming to the order of some superior at the time of such injury having authority to direct," and appellant claims that this omission leaves the pleading fatally deficient. The 4th subdivision of the 1st section of the act is divisible into two parts. A railroad company is liable for damages for personal injury suffered by an employee while in its service (that is, while acting within the scope of his employment), the employee being free from contributory negligence, (1) "where such injury was caused by the negligence of any person in the service of such corporation [that is, acting within the scope of his employment] who has charge of any . . . locomotive engine or train upon a railway," or (2) "where such injury was caused by the negligence of any person, co-employee or fellow servant . . . the said person, coemployee or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury having authority to direct." From the words used, and the structure and scope of the act, we are of opinion that the concluding clauses of the 4th subdivision limit and qualify only the liability expressed in the second part of the 4th subdivision, and that railroad companies are answerable for the negligence of their servants in charge of signals, telegraph offices, switch yards, shops, round houses, locomotive engines, and trains upon their railways, to their employees the same as to strangers. This was the effect given to the 4th subdivision in the case of *Baltimore & O. S. W. R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862, and in *Baltimore & O. S. W. R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044. In *Pittsburgh, C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, the complaint alleged that the plaintiff was a freight brakeman in the defendant's service, and that he was injured through the negligence of the defendant's engineer. The sufficiency of the complaint to exempt the plaintiff from the operation of the common-law rule as to fellow servants, and to state a cause of action under the 4th subdivision of the employers' liability act, was challenged on the ground that there was no allegation that the engineer was performing the duty of the corporation in that behalf, and that the plaintiff was obeying or conforming to the order of some superior having authority to direct. The opinion was written by a member of the court who did not agree with the majority in their construction of the 4th subdivision, and there may be difficulty at some points in distinguishing between what he said for himself and what for the court; but we are of opinion that the decision of the court on this point was wholly expressed in the words "the holding of the court is that in order to make the complaint good under the first part of the subdivision quoted [the 4th subdivision], as to the point in question, it 54 L. R. A.

is only required that it state that the engineer, while in the service of the appellant, in charge of a locomotive engine, negligently injured the appellee, both being at the time in the line of duty as employees of appellant," and that that holding is not departed from in the present case.

Appellant contends, however, that the construction which limits the operation of the qualifying clauses in the second part of the 4th subdivision to the liability expressed in that part of the subdivision, and which holds railroad companies liable to their employees, the same as to strangers, for the negligence of their servants in charge of signals, and so forth, brings the first part of the fourth subdivision into conflict with the equality clauses of the Federal and state Constitutions. The argument, briefly, is this: At common law every employer is protected by the doctrine that every employee assumes, as an incident of his employment, the risk arising from the negligence of his fellow servants. There is no justification of the withdrawal of railroad companies from the general class of employers, except the exercise of the police power for the protection of employees. The only reasonable basis for a classification in the exercise of the police power is the protection of employees who are subject to unusual dangers. A classification that selects for protection only those employees who are subject to unusual dangers by reason of acting in obedience to the orders of some superior having authority to direct is constitutional; but a classification that selects for protection all employees, without regard to the dangers naturally incident to their work, and whether they act on their own initiative, or in obedience to the order of some superior who had authority to direct (as the attorney of the railroad company and its downtown ticket seller, for example), is a classification in name only, is arbitrary, has no relation to the object to be accomplished, discriminates against railroad companies by subjecting them to liability for injuries to a class of employees with respect to whom employers in other businesses are not made liable by the act, and is therefore unconstitutional. Our answer is: It is competent for the legislature, in the exercise of the police power, to take steps for the protection of the lives and limbs of all persons who may be exposed to dangerous agencies in the hands of others. The powerful forces in railroading that are under the direction and control of those in charge of "any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway" were proper to be selected as sources of unusual danger which should be guarded against. The object to be accomplished was to incite railroad companies to use the utmost diligence in the selection and supervision of their servants who are put in charge of these dangerous agencies, so that fewer lives and limbs of those who are entitled to claim the protection of our laws would be sacrificed. The legislature evidently considered that stran-

gers and employees (the attorney and the ticket seller, for example) who were not fellow servants of those in charge of the agencies named were sufficiently protected by the railroad companies' existing liability to them for the negligent operation of those dangerous agencies. The legislature evidently determined to protect all persons who were not already protected from the negligent use of particular instruments. The classification is made on the basis of the peculiar hazards in railroading, relates directly to the object to be accomplished, and applies equally to all employers within the class. To separate railroading from other businesses was not an unconstitutional discrimination, because the dangers (the basis of the classification) do not arise from the same sources; but the claim that a classification not made on the basis of the dangerous agencies employed in the business, but founded on the question whether the employee who was injured without his fault by a fellow servant's negligent use of a dangerous agency was acting at the time on his own initiative in the line of his duty, or under the orders of a superior, is the only constitutional classification, is unwarranted. A train is wrecked through the negligence of the engineer. Two brakemen are injured without fault on their part; one acting at the time in obedience to the conductor's orders; the other acting on his own initiative, within the line of his duty. There should be and there is no constitutional limitation upon the legislature's exercise of the police power by which a law may not be enacted to protect both brakemen equally from the negligence of the engineer. We hold, therefore, that the act is not obnoxious to the objections urged by appellant. Under the employers' liability acts in other states,—Alabama, Colorado, Iowa, Kansas, Massachusetts,—the argument of appellant in reference to the interpretation of the 4th subdivision of § 1 of our statute could not have been advanced; for the corresponding subdivision of their statutes is limited to creating a liability for the negligence of those in charge of signals, engines, etc., in favor of coemployees. And such legislation has been upheld by the state and Federal courts. *Reno, Employers' Liability Acts*, §§ 84, 85; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1101.

It is asserted by appellant that the amended complaint does not charge actionable negligence. The situation was this: Appellee could not hear the engine approaching from the north, on account of the noise of the freight train passing over the crossing from the south. His view to the north was obstructed so that he could not see the approaching engine until he came to the west rail of the west track. It was his duty to cross the west track to get the report from the conductor of the train on the east track. That train was then passing the crossing, and the time had arrived when it was necessary for appellee to cross the west track to get the report. The engineer on

the west track knew that it was appellee's duty to get the report. The obstructions between appellee and the approaching engine, and also the train on the east track, and its position with reference to the crossing, were within the view of the engineer. He gave no signal by bell or whistle of his approach, did not stop or check the speed of his engine, but ran it at 20 miles an hour (about 30 feet a second) upon appellee as he was in the act of stepping on the west edge of the west track. Conceding that the engineer's statutory duties to sound the whistle and ring the bell on approaching a highway crossing, and to stop his engine before crossing an intersecting railroad, do not apply in this case, it does not follow that the engineer owed no duty to appellee. It was his duty to exercise that diligence for appellee's safety which a man of ordinary prudence would have exercised under like circumstances. Ordinary prudence, not to say common humanity, should have restrained the engineer from hurling a missile of many tons weight at a speed of 30 feet a second at a point where he knew his fellow man was about to step in discharge of his duty, without any warning (which the engineer might have given) until it was too late to escape the danger. Appellant suggests that the amended complaint does not show that the negligence charged was the proximate cause of appellee's injury. The averment is that the injuries were inflicted "all without fault or negligence of appellee, but by reason of all of appellant's negligence as herein alleged." Counsel draw a distinction between "appellant's negligence" and the "engineer's negligence." The complaint, they say, charges negligence of appellant in permitting obstructions to view, but that could not be the proximate cause, because the risk from that source was apparent to appellee, and assumed by him. The engineer's negligence, if any, they say, is not alleged to be the proximate cause. But a corporation can only act through agents. Under the employers' liability act, a corporation is made answerable for the negligence of an engineer the same as for that of a road master. The engineer's negligence is therefore included in the averment that the injury was due to "all of appellant's negligence as herein alleged." Appellant has shown no error in the ruling on the demurrer.

2. Under the assignment that the court erred in overruling appellant's motion for judgment on the jury's answers to interrogatories, the first question raised is as to the necessity for appellant's acting at the time of his injury in conformity to the orders of some superior who was present and directing his movements. The answers to interrogatories disclose that appellee was acting upon his own initiative. It was not necessary for appellee to prove that any superior was present and ordering his action. The jury answered that the target pole was 6 feet 2 inches west of the west rail of the west track, and that a person standing against the east side of the target pole could

see an engine coming from the north on the west track when it got within about 20 feet. Appellant contends that these answers overbear the general verdict that the appellee was free from fault. The jury do not find that appellee occupied the position named when the engine was 20 feet or less away. If he was at that point, and the engine was more than 20 feet distant, he could have seen it. Standing at the east side of the target pole, his body may have taken up a foot or more of the 6-foot space between the pole and the track. The pilot beam of the engine may have projected 18 inches or 2 feet over the rail. There may have been less than 3 feet between appellee and the line of danger. He may have listened attentively, and heard nothing of the approaching engine, on account of the noise made by the freight train. He may have looked attentively, and found no engine in sight on the west track. He may have taken one step, and been unable to check himself and retreat in the two thirds of a second which the engine took to cover 20 feet. There is nothing in the answers to the interrogatories to negative these conjectures, which may have been the evidence. On the other hand, the jury were asked, "Could the plaintiff, just before he was injured, as he approached the track where he was injured, have seen the engine which injured him in time to have avoided it, if he had looked vigilantly to the north?" And they answered, "No." Appellant's motion for judgment was properly overruled.

3. Among the grounds for a new trial, it is claimed that the court erred in permitting appellee to contradict the terms of a written contract by parol evidence. Appellee claims that the evidence is not in the record. The case was tried in 1898, and the sufficiency of the bill is therefore to be determined by the act of 1897. The same objections are made to the bill that were considered and held unavailing in *Diesi v. G. H. Hammond Co.* 156 Ind. 583, 60 N. E. 353. Appellant pleaded a release, and appellee replied that he executed the release without consideration. Appellant proved the execution of the following instrument:

The Indianapolis Union Railway Company.

To John J. Houlihan, Dr.:

To amount in compromise of claim for injuries received by him on August 8, 1895, at the Vandalia crossing of the Belt Railroad by his being struck by an engine of said company on said Belt Railroad while he was attempting to cross the track in the discharge of his duties as a telegraph operator in the employ of said company; said amount being in addition to all fees and charges payable to physicians and St. Vincent's Hospital for services and care rendered to said Houlihan on account of such injuries, which amount of fees and charges said company, as a part of said compromise, agrees to pay; and in consideration of the said agreement to pay said fees and charges, and the amount herein mentioned as a cash

payment to him, the said Houlihan, by his signature to the receipt below, does release and discharge the said company from any and all claims, demands, actions, and rights of action that he now has or may hereafter have by reason of said injuries and accident.

\$25.00.

Baker & Daniel, Att'ys.

Approved.

Sept. 25, 1895.

Received of the Indianapolis Union Railway Company twenty-five dollars as payment in full of the above account, in consideration of which I release and discharge said company as above specified.

John J. Houlihan.

Approved. A. A. Zion, Superintendent.

James M. McCrea, President.

After this contract had been proved and introduced in evidence, it was purely a matter of law for the court to determine whether the consideration from appellant to appellee was contractual or not. If the instrument stated a contractual consideration, parol evidence was not admissible to vary or contradict the consideration expressed; but, if the consideration was expressed merely as a recital of a precedent or contemporaneous fact, parol evidence was receivable to prove that the recited fact was untrue, and that the recited consideration was not paid at all, or was paid on a different account. The court held that the consideration from appellant to appellee was not contractual, and permitted appellee to testify that there was no consideration for his execution of the release, and that the \$25 paid him at the time was a gratuity. This was error. *Pickett v. Green*, 120 Ind. 584, 22 N. E. 737; *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *Reisterer v. Carpenter*, 124 Ind. 30, 24 N. E. 371; *Stewart v. Chicago & E. I. R. Co.* 141 Ind. 55, 40 N. E. 67; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802. In *Pickett v. Green* a written contract was executed, by the terms of which Pickett, in consideration of the after-expressed covenants of Green, sold his office furniture and the goodwill of his medical practice to Green; and Green, in consideration of the sale and Pickett's covenants, agreed to pay Pickett \$100. Pickett set up in practice in violation of the contract, and, in answer to Green's complaint for injunction, pleaded that the real consideration for his covenants was Green's undertaking to purchase certain real estate at \$1,400, and that Green had repudiated his agreement. The ruling of the court in sustaining the demurrer to this answer was affirmed. The following extract from *Conant v. National State Bank* indicates the scope of that decision: "In this instance the appellants cannot add to the written contract a stipulation that the sellers of the mill machinery agreed to furnish and place in operation machinery that would manufacture three designated grades of flour, and with a capacity of 100 barrels daily; for the specific and unambiguous provision of the contract is that the sellers agreed to furnish and put in operation 'machinery for a

100 barrel mill,' and the machinery which they agreed to furnish is particularly described and designated. The provisions of the contract are specific, and these specific provisions cannot be supplanted by oral statements. To permit parties to substitute oral statements for written stipulations would render written instruments valueless, and leave to the uncertainty of human memory the terms of contracts." In *Reisterer v. Carpenter* certain personal property was sold by written contract, in which the purchaser agreed to pay therefor by taking up and canceling certain specified debts of the seller. In the absence of any charge of fraud or mutual mistake, the seller was not permitted to show that the consideration for the sale was other than that expressed in the written instrument. On the other hand, the cases of *Stewart v. Chicago & E. I. R. Co.* and *Pennsylvania Co. v. Dolan* are illustrative of the class in which the consideration is not contractual, but is expressed merely as a recital of a fact. In both of these cases the form of the contract was this: "Know all men by these presents, that I, for and in consideration of the sum of [a stated number of] dollars to me paid by the Pennsylvania company, the receipt whereof is hereby acknowledged, do re-

lease and discharge the Pennsylvania company from," etc. In such a contract it is manifest that the railroad company does not agree to pay the sum of money named, or to do anything else for the benefit of the other party. The only contractual covenants are those of the employee, and they are made, not in consideration of the company's covenants to pay or to do something for the employee, but in consideration of a sum of money recited as having been paid. In this case appellee's covenants of release were made "in consideration of appellant's agreement to pay said fees and charges [to the physicians and hospital], and the amount herein mentioned as a cash payment to him." The consideration on each side was the mutual covenants of the other. In the absence of any issue of fraud or mutual mistake, appellee should not have been permitted to deny that the consideration for his release was correctly stated in the contract.

Other questions as to evidence and instructions are presented, but, as they will not necessarily arise on another trial, they are not considered.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

STATE of Indiana, *Appt.*,
v.

Lewis A. HENDRY.

(156 Ind. 392.)

Forgery by alteration of an elevator receipt given by a railroad for grain to be stored and shipped is not committed where the alteration is of a memorandum of the weigher's judgment as to the grade of the grain, indorsed on the back of the receipt to enable a purchaser to fix the price to be paid for the grain, since the memorandum is not part of the receipt, so that its alteration does not change the legal effect of the receipt.

(April 2, 1901.)

NOTE.—*Forgery by making or altering mere memorandum.*

I. Scope.

II. The general rule.

III. Application to particular kinds of memoranda.

- a. In the nature of a promise or order.
- b. In the nature of a receipt or acquittance.
- c. In the nature of certificates or statements of fact.
- d. Falsification of dates and addresses.

IV. Conclusion.

I. Scope.

This note is not intended to include complete contracts, or memoranda amounting to complete contracts. The memoranda designed to be covered in this note consist rather of brief written statements of contracts, acts, or matters embodying something designed to be fixed in the memory, or made to fix the attention, or for the information of others, not intended to operate as a record of the whole contract or mat-

A PPEAL by the state from a judgment of the Circuit Court for Steuben County quashing an indictment charging defendant with forgery. *Affirmed.*

The facts are stated in the opinion.

Messrs. William L. Taylor, Attorney General, *Willis Rhoads*, *Sol A. Wood*, *Thomas R. Marshall*, *William F. McNagny*, and *Philemon H. Clugston*, for appellant:

The memorandum on the back of the receipt was as much a part of it as though it had been in the body of it.

Johnston v. May, 76 Ind. 293; *Cochran v. Nebeker*, 48 Ind. 459; *Heywood v. Perrie*, 10 Pick. 228, 20 Am. Dec. 518; 2 Am. & Eng.

ter, but merely to act as a reminder or suggestion.

II. The general rule.

The question as to what constitutes forgery by making or altering mere memorandum is but part of the more general doctrine as to what constitutes forgery generally, and is based upon the same general principle; and forgery generally has been defined to be the falsely making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.

In accordance with the general definition, the question as to whether or not a memorandum is a subject of forgery turns upon whether upon its face it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. *People v. Krummer*, 4 Park. Crim. Rep. 217, *Sheldon*, 549; *Burden v. State*, 120 Ala. 388, 25 So. 190.

Since a memorandum is not a complete contract, therefore, but a mere minute to aid the

Enc. Law, 2d ed. p. 228; *Sanders v. Bagwell*, 32 S. C. 238, 7 L. R. A. 743, 10 S. E. 946.

Any instrument which comes fairly within the provisions of the statute, which, if genuine, would have some apparent legal efficacy, is a subject of forgery.

Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; *Shannon v. State*, 109 Ind. 407, 10 N. E. 87.

It is not necessary that it should work prejudice to another, nor that it should mislead or deceive him; it is sufficient that it might work prejudice to his rights of person or property, or that it might deceive or mislead him.

State v. Covington, 94 N. C. 913, 55 Am. Rep. 650; *People v. Tomlinson*, 35 Cal. 503.

It is sufficient if it has an apparent legal efficacy, or if, upon the facts, it might be the foundation for a legal liability.

memory, or fix the attention, or convey information with relation to some more extended matter, act, or contract, such writings frequently have no apparent legal efficacy, and, though acted upon as genuine, would not on their face have the effect to defraud anyone, and consequently are not subjects of forgery.

But the general rule that a memorandum or instrument void on its face is not the subject of forgery must be taken with the limitation that, when the instrument does not appear to have any legal validity, or show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then the offense is complete, and an indictment averring the extrinsic facts, disclosing its capacity to deceive and defraud, will be supported. *Rembert v. State*, 53 Ala. 467, 25 Am. Rep. 639.

The fact that a memorandum or paper is incomplete or imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has any vicious capacity, or is of any legal validity, does not render the instrument not the subject of a forgery, but only renders it necessary that the indictment should aver extrinsic facts showing its vicious capacity, and its capability of effecting fraud. *Ibid.*

And it is not essential that the person in whose name it purports to have been made should have had legal capacity to make it, or that the person to whom it is directed should be bound to act upon it if genuine or have a remedy over. *People v. Krummer*, 4 Park. Crim. Rep. 217, Sheldon, 549.

Where the counsel for the defense in a prosecution for the forgery of a memorandum or other instrument objects to the introduction thereof as being inadmissible in evidence because it is not an instrument of such a character as is essential to serve as a basis for a prosecution for forgery, it is the duty of the judge to pass on the objection one way or the other, and he should not remit the matter to the consideration of the jury, as it is the duty of the court to pass upon questions as to the admissibility of evidence, and of the jury to pass upon its force and sufficiency. *State v. Stephen*, 45 La. Ann. 702, 12 So. 883.

III. Application to particular kinds of memoranda.

a. In the nature of a promise or order.

It would seem that a memorandum in the form or nature of a promise to pay, or a direction or order to pay, or to deliver goods, will always be deemed to possess legal efficacy, either 54 L. R. A.

State v. Johnson, 26 Iowa, 407, 96 Am. Dec. 158; *Rudicel v. State*, 111 Ind. 595, 13 N. E. 114.

Legal efficacy within the rules with reference to forgery is declared to mean where by any possibility the instrument might operate to the injury of another.

People v. Rathbun, 21 Wend. 509.

The instrument need not be shown to be a perfect instrument; it is sufficient if it has some legal effect.

Gurmire v. State, 104 Ind. 444, 4 N. E. 54.

Nor need it be an instrument upon which an action can be maintained; it is sufficient if it is one that can be used in evidence, either in a suit against the person whose act it purports to be, or against any other person.

State v. Johnson, 26 Iowa, 407, 96 Am. Dec. 158.

with or without extrinsic averments and evidence, so as to be a subject of forgery, unless it is such that its meaning cannot be ascertained, or unless the extrinsic matter is such that it does not make its meaning clear.

Thus, a paper reading "Due Jacob Finch, 1 dollar on settlement this day. February 7th, 1809. David Knight,"—is a note for the payment of money which is a subject of forgery within the New York statute. *People v. Finch*, 5 Johns. 237.

So, an instrument in words and figures as follows: "Due 8.25, Askew Brothers,"—the indictment for the forgery of which alleges that thereby the defendant meant that \$8.25 were due him from Askew Brothers, who were a partnership composed of certain specified individuals, though incomplete, appears on its face to be one which, if true, would possess some legal validity, and be legally capable of effecting a fraud, and is therefore a subject of forgery. *Rembert v. State*, 53 Ala. 467, 25 Am. Rep. 639.

And an indictment alleging the false making of an instrument in words and figures as follows: "Due 8.50 c. J. D.,"—is sufficient to show a forgery for which a prosecution may be had, where it also contains allegations that the meaning of the instrument was that the sum of \$8.50 was due to the bearer thereof as change from a designated mercantile firm at the store of such firm, as certified to by a clerk in its employment, who had authority to make such certificate in the regular course of business at such store. *Neison v. State*, 32 Ala. 44, 2 So. 463.

And such a memorandum is not subject to objection in a prosecution for forgery thereof, on the ground that it shows on its face that it was made and emitted to answer the purposes of money, and for general circulation, which is an indictable offense under the Alabama statute, and is not prevented from being a subject of forgery thereby, as, though such an emission would be an indictable offense, the making of the paper itself would not be. *Ibid.*

So, a plantation ticket which at the option of the holder calls either for money from the owner of property or for goods at the plantation store belonging to the owner is of such a character as to furnish a proper foundation for a prosecution for forgery, though it does not appear that the accused sought to obtain money thereon. *State v. Stephen*, 45 La. Ann. 702, 12 So. 883.

Likewise, an instrument as follows: "I have bought of Barnhardt Krummer two frocks for \$7. Ask your employers for the money, and let him have it. Mrs. Williams,"—alleged in the

Nor need the instrument be made by one who has authority to make it. It is a subject of forgery although the authority to make it does not exist.

Clinch's Case, 2 East, P. C. 938; *Williams v. State*, 61 Ala. 33; *People v. Krummer*, 4 Park. Crim. Rep. 217.

Although the instrument may be void on its face, and consequently not the subject of forgery *per se*, yet if extrinsic facts exist and are averred, by which the holder thereof might be enabled to defraud another, the offense is complete, and the indictment is good.

Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639; *Powers v. State*, 87 Ind. 97.

Messrs. William G. Oroxton and Frank M. Powers, for appellee:

In determining whether or not a writing is of such a character that a charge of for-

gery can be predicated of it this court will look to the copy of the instrument, and not to the averments of the indictment.

Harding v. State, 54 Ind. 359; *Rollins v. State*, 22 Tex. App. 548, 58 Am. Rep. 659, 3 S. W. 759.

All that is alleged is that it was the custom of the grain dealers to pay according to Miller's grading. "A custom cannot make a contract where there is none."

2 Beach, Modern Law of Contracts, § 755, p. 920.

A mere memorandum upon the back of a written instrument, not being referred to in the body of it, the instrument being complete without the matter indorsed, forms no part of it.

Robinson v. State, 66 Ind. 331; *Current v. Fulton*, 10 Ind. App. 617, 38 N. E. 419; *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77,

indictment to purport to have been made by a mother and addressed to her son, and to have been taken by the payee therein to the son representing that the mother had signed it, upon which he procured \$7 of the son, is an order for the payment of money, which is a subject of forgery within the statute, so that an acquittal on an indictment for forgery on the merits would be a bar to a subsequent indictment for obtaining the money by the false pretense that the instrument was true. *People v. Krummer*, 4 Park. Crim. Rep. 217, Sheldon, 549.

But, an instrument in writing as follows: "Per Bearer 2 11-4 counterpane. T. Davies, E. Twell, 88 Aldgate,"—is not a request for the delivery of property for which an indictment for forgery will lie, under 11 Geo. IV., and 1 Wm. IV., chap. 66, § 10, in the absence of an allegation to explain the terms thereof, as a request under that act must import on its face to be a request. *Rex v. Cullen*, 5 Car. & P. 116, 1 Moody, C. C. 800.

And an instrument as follows: "W. Trim to 2s," is neither a warrant for the payment of money, nor a request for the delivery of goods, within the provisions of that act; and an indictment for forging a warrant for the payment of money and a request for the delivery of goods cannot be supported by proof of the forgery of such an instrument, and by showing that the bearer, on presenting it at a certain shop, would, by the course of dealing between W. Trim and the shopkeeper, be entitled to receive goods to the amount of 2 shillings. *Reg. v. Ellis*, 4 Cox, C. C. 258.

See also *Reg. v. Pulbrook*, 9 Car. & P. 37; *State v. Wingard*, 40 La. Ann. 733, 5 So. 54; *State v. Jefferson*, 39 La. Ann. 831, 1 So. 669; *Daud v. State*, 34 Tex. Crim. Rep. 460, 31 S. W. 376; *Dixon v. State*, 81 Ala. 61, 1 So. 69, *infra*, III. c; *Reg. v. Blenkinsop*, 1 Den. C. C. 276, 2 Car. & K. 531, 2 Cox, C. C. 420, 17 L. J. M. C. N. S. 62; *Reg. v. Epps*, 4 Fost. & F. 81, *infra*, III. d.

b. In the nature of a receipt or acquittance.

A memorandum in the nature of a receipt or acquittance is a subject of forgery when the substance of a receipt or acquittance appears either from the memorandum itself, or from a comparison with it of the instrument purporting to have been satisfied thereby, or from extrinsic evidence or averment. But the receipt must have purported to be the act of the person entitled to receive payment.

Thus, the words "Paid sadler," the word "saddler" beginning with a small s, written upon a bill due to a tradesman named Sadler, which

had been intrusted to a servant for payment, imports a receipt and acquittance for the money on an indictment against the servant for forgery, and not merely a memorandum by the servant of her having paid the bill. *Reg. v. Houseman*, 8 Car. & P. 180.

And the words "Settled. Samuel Hughes," at the foot of a bill of parcels, import a receipt and acquittance; and it is sufficient in an indictment for forging such acquittance to set out the bill of parcels with the word "settled" and the supposed signature at the foot of it, without any averment that the word "settled" imports a receipt or acquittance. *Rex v. Martin*, 7 Car. & P. 549, 1 Moody, C. C. 483.

In *Rex v. Thompson*, 2 Leach, C. L. 632, note, 1 East, 181, note, however, it was held that an indictment charging the forgery of a receipt for money, specifying the amount and setting forth the language thereof as follows: "Settled I. M."—is bad in the absence of an averment that such words purported to be a receipt.

So, an instrument purporting to be an agreement and stamped as such, reciting that an arrangement had been made between the parties thereto in consideration of a stated sum, the receipt of which was thereby acknowledged, and the party paying it was released from all further claim in the matter with respect to which it was paid, is a receipt or an acquittance, under 11 Geo. IV., and 1 Wm. IV., chap. 66, § 10, and is describable as such in an indictment for forgery. *Reg. v. Hill*, 2 Cox, C. C. 246.

And an accusation by a mortgagee against a mortgagor of having obtained possession of the mortgage and falsely and fraudulently written therein "Interest paid to Nov. 30th, 1865," when it had not been so paid, is a charge of forgery and with uttering as genuine a false and forged instrument, which will support an action for slander. *Hotchkiss v. Olmstead*, 37 Ind. 74.

And an instrument as follows: "Augusta, 13th June, 1811. Mr. John Ladd—Bought of Eveleth & Child—2:18 Swedes Iron—\$4.80—The above charged to Geo. Carpenter. By order—Eveleth & Child,"—purports to be an acknowledgment by Eveleth & Child that the goods delivered to Ladd were charged to Carpenter by his order, and this amounts, in law, to an acquittance or discharge which is a subject of forgery. *Com. v. Ladd*, 15 Mass. 526.

So, the writing by a party of his own name on the back of a bill of exchange under the statement "Received for R. A.," is the forging of a receipt within the provisions of 1 Wm. IV. chap. 66. *Rex v. Arscott*, 6 Car. & P. 408.

But, the act of a person against whom judg-

41 Am. Rep. 193; *Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706; *Hess v. State*, 5 Ohio, 9, 22 Am. Dec. 767; *American Nat. Bank v. Bangs*, 42 Mo. 454, 97 Am. Dec. 349; *Horton v. Horton*, 71 Iowa, 448, 32 N. W. 452.

The original receipt remained intact, and the memorandum was merely suggestive of a collateral independent transaction, and had no more effect upon the original instrument than as if written on a separate piece of paper.

Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193.

It is not forgery of the original, to obliterate or erase from a bond or note any receipt or indorsement written thereon; because such indorsement or receipt is an independent obligation or assurance, which in no way affects the qualities of the original instrument alleged to be forged.

ment had been rendered for costs in a criminal prosecution, which judgment entitled another person to a fee as a witness in indorsing on the execution docket a statement that he retained such witness fee as attorney, signing his own name, thereby falsely assuming to act as attorney for such party, does not satisfy the claim of the witness, and has no legal tendency to defraud, and is not, therefore, a forgery. *State v. Corley*, 4 Baxt. 410.

A memorandum stating that one party had paid a sum of money to another, not subscribed by the latter however, or importing any acknowledgment by him of his having received it, is not such a receipt as 2 Geo. II., chap. 25, § 1, makes it capital to forge or utter. *Rex v. Harvey*, Russ. & R. C. C. 227.

And an indorsement in the following terms: "Espy, Heidelbach & Co. Cincinnati, July 16, 1878. Draft wanted for \$910 on New York. Order of A. Henry M. Teller,"—is not a subject of forgery, and the false making thereof is not indictable as forgery, though the indictment averred that the instrument was a receipt issued by Espy, Heidelbach & Co. to the draft clerk in their bank, and that by the rules of the bank the instrument upon its face was a receipt for money, in the absence of an averment showing who the signer was, or showing connection between that signature and Espy, Heidelbach & Co., or how or in what way the instrument would, if genuine, have the operation and effect of a receipt. *Henry v. State*, 35 Ohio St. 128.

Nor is a paper of the following tenor: "Boston, August 15th, 1868. Rec'd of Wm. J. Dale, surgeon general of Mass., my discharge and check No. 6979, for \$100. George P. Gill. Witness, Fred'k P. Cutting,"—an accountable receipt for money, goods, or other property, which is the subject of forgery under Mass. Gen. Stat. chap. 162, § 1, as it does not acknowledge that anything has been received which is to be accounted for. *Com. v. Lawless*, 101 Mass. 82.

And the signature of a witness indorsed on the back of an order upon the treasurer of county stock for the payment of the costs of a prosecution, with the sum allotted to the witness written in figures opposite his name, is merely an authority, and not a receipt or an acquittance, under the statute with relation to forgery. *Queen v. Parker*, 2 Cox, C. C. 274.

An indorsement of a payment upon the back of a bill or note, however, may be a subject of forgery though not signed, when the indorsement was made at the time of the payment, and was intended to take the place of a receipt and to save the necessity of making a separate one. 54 L. R. A.

8 Am. & Eng. Enc. Law, p. 478, note; *Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706.

The indorsement, to be the subject of forgery, must be something which, if genuine, would be of legal efficacy.

2 Bishop, New Crim. Law, § 570a.

An instrument incapable of enforcement on account of its indefiniteness and incompleteness is not the subject of forgery.

Waterman v. People, 67 Ill. 91; *State v. Wheeler*, 19 Minn. 98, Gil. 70; *People v. Shall*, 9 Cow. 778; *Reg. v. Closs*, 7 Cox, C. C. 494.

Jordan, J., delivered the opinion of the court:

Appellee was charged by indictment with the crime of forging, by alteration, a certain receipt, and with having fraudulently and knowingly uttered, published, and passed the

But these facts must be made to appear by allegation and proof.

Thus, the alteration of an indorsement upon a promissory note of the receipt of a designated amount of money thereon without any signature, so as to make it read for a smaller amount, may be forgery though not signed, where the note was present at the time the indorsement was made, and the indorsement was intended as a receipt, as in such case, while a receipt might be demanded, the usual course is for the holder of the note to indorse the payment thereon without signature. *Kegg v. State*, 10 Ohio, 75.

In the above case *Rex v. Harvey*, Russ. & R. C. C. 227, *supra*, was distinguished upon the ground that it is evident from the statement of that case that the writing was upon a separate piece of paper.

But an indorsement on the back of a promissory note acknowledging the receipt of a sum of money without signature forms no part of the note, and the act of the maker thereof in obtaining it from the holder and writing such an indorsement upon its back does not constitute forgery. *State v. Monnier*, 8 Minn. 212, Gil. 182.

And such an indorsement will not, in the absence of allegation and proof to the contrary, be held to be more than a mere memorandum made by him, in a prosecution against him for the forgery thereof or for the fraudulent alteration thereof, and will not be deemed to have been intended as evidence of payment, or as being in any sense a receipt, the alteration of which would be forgery. *State v. Davis*, 58 Iowa, 252, 5 N. W. 149.

In the above case, *Kegg v. State*, 10 Ohio, 75, *supra*, was distinguished upon the ground that in that case a third person owed the defendant a note and made a payment thereon, and, in the presence, and with the concurrence, and by the direction, of the defendant, made the indorsement on the note, for the alteration of which the defendant was prosecuted.

So, an indorsement upon the back of a single bill, as follows: "Received 23rd Oct. 1841 \$500,"—without signature, does not upon its face purport to be a receipt or acquittance; and where it is not averred that it was intended so to operate the erasure thereof by the holder of the bill is not forgery, as such indorsement, so far as appears, is a mere memorandum voluntarily made, perhaps through inadvertence or mistake, in which the obligors had no interest, and the obliteration of which could not in legal contemplation prejudice their rights. *State v. Martin*, 9 Humph. 55.

receipt so forged as genuine. On his motion the court quashed both counts of the indictment and rendered a judgment discharging him. The state appeals, and predicates error upon the ruling of the court in quashing each count of the indictment.

The instrument alleged to have been forged by the accused is what is generally known as an "elevator receipt" for grain, and was given by the Lake Shore & Michigan Southern Railway Company to the appellee for the storage of wheat in its elevator or grain house situated at the town of Angola, Steuben county, Indiana. Counsel for appellant and appellee, in their briefs, have correctly summarized the facts set out in the indictment, which summary is virtually as follows:

"That the Lake Shore & Michigan Southern Railway Company operates a railway

through the town of Angola, Steuben county, Indiana, and also a grain house or elevator in connection therewith at that town. That one Theron Miller was in charge of the grain house, Timothy E. Purinton was agent of the railway company, and Chester Darr was his clerk or assistant. That the method of doing business at the grain elevator, so far as concerned the storage of grain, was: When a seller brought grain for storage in the elevator and shipment over the railway, he informed Miller to whose account, among the dealers at Angola, the wheat was to be stored. Miller weighed the wheat, and gave the seller a slip or check, stating the name of the seller and buyer, the number of pounds of wheat, and with the figures No. 2 or 3 red, as indicating his judgment as to the quality or grade of the wheat. The seller took the slip or check to Purinton, the

Likewise, the separation or erasure of an indorsement by a payee from the back of a note is not forgery within the meaning of the statute. *State v. McLeran*, 1 Alk. (Vt.) 311.

The intentional destruction of an acquittance in whatever way cannot be regarded either as the making of a written instrument, or the alteration of or addition to a written instrument, so as to bring the act within the definition of forgery; and, in the absence of a statute making the act of erasing, rubbing out, and obliterating an acquittance forgery, as is the case in North Carolina, such erasure of an acquittance upon a bond is not forgery. *State v. Thornburg*, 28 N. C. (6 Ired. L.) 79, 44 Am. Dec. 67.

See also *Reg. v. Pries*, 6 Cox, C. C. 165, *infra*, III, c; *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 601; *Rex v. Hope*, 1 Moody, C. C. 414, *infra*, III, d.

c. In the nature of certificates or statements of fact.

STATE v. HENDRY holds an alteration of a memorandum reading "3 red" so as to read "2 red," placed upon the back of a warehouse receipt to indicate to the buyer the opinion of the warehouseman as to the grade of wheat received by him, was not a forgery, since the change in no way affected the legal effect of the warehouse receipt. Like holdings with reference to similar memoranda have been made in a number of other cases, though some of them are based on other reasons.

Thus, a memorandum in writing as follows: "2 hides, \$4. Sitman,"—is evidence on its face of no pecuniary obligation, and its alteration by simply changing the figures could neither increase nor diminish any pecuniary obligation, and therefore that act cannot be considered forgery under the statute; and an allegation in the indictment, that under and by virtue of such writing the defendant was authorized to demand and receive certain moneys of designated persons, does not render it a subject of forgery, as, under the law, the defendant had no right, from the face of the instrument, to demand money or property of such person, or of anyone else. *Howell v. State*, 37 Tex. 591.

So, a writing as follows: "Mr. Holmes, Selma, Ala. Dear Sir:—The value of this chain is \$10.00 (Ten.)."—does not create, discharge, increase, or diminish a money liability, or transfer or incumber property, or release or impair an existing claim to or lien upon property, and is not, therefore, a subject of forgery under the Alabama statute, in the absence of a showing of extrinsic facts, which, taken in connection 54 L. R. A.

with the paper, impart to it a capacity to injure or defraud. *Burden v. State*, 120 Ala. 388, 25 So. 190.

And, an indictment for the false making of an instrument, as follows: "Weighed on Fairbanks Standard Scale Dec. 1, 1888. Load of one load of corn. From Sam Simpson. To Patty & Brockington. On gross 2513 pounds. Off tare 1011 pounds. Fees net 1502 pounds. Net bus Weighed (space for figuring on back),"—purporting to be a certificate of one load of corn weighed, containing no averments showing the facts or reasons why such instrument created a pecuniary obligation, is insufficient to show a forgery, as the writing is so incomplete as to leave an apparent uncertainty in law whether it is valid or not, and the indictment does not show extrinsic facts which will enable the court to see that if it were genuine it would be valid. *King v. State*, 27 Tex. App. 567, 11 S. W. 525.

The rule is different, however, when, though the paper seems to be a mere memorandum of facts, something of the elements of an order or an acquittance is contained in it.

Thus, a paper as follows: "Aug. 3, 39, One 16 in helmet scoop—1 4 quart kettle. Jaa. Hayward,"—amounts to a request for the delivery of goods within the meaning of the statute with relation to forgery, although not addressed to anyone. *Reg. v. Pulbrook*, 9 Car. & P. 37.

And, a paper of the following tenor: "Prime Wingard, 507 1 Cot. T. T. P."—is apparently of some legal efficacy, and an instrument upon which money could be obtained, and is therefore a subject for forgery. *State v. Wingard*, 40 La. Ann. 733, 5 So. 54.

And, an instrument as follows: "By order of R. F. Pries we have this day transferred into the name of Messrs Collman & Stolterfoft, 759 quarters and 4 bushels of wheat ex. August Ferdinand, Captain Richards, a Neustadt. Entered by R. F. Pries, and now lying at our granaries, Bermondsey-Wall. The wheat is insured against risk by fire by us. Brown & Young, Corn Exchange, October 23, 1852,"—purports to be an acknowledgment by the signers that they had goods received from the holder of the instrument for which they were accountable, and is therefore an accountable receipt, for the forging of which an indictment will lie under 11 Geo. IV., and 1 Wm. IV., chap. 66, § 10. *Reg. v. Pries*, 6 Cox, C. C. 165.

So, a paper of the following tenor: "Willy Johns has picked 215 pounds of cotton, Henry Westly, and David Jefferson has picked 852 pounds of cotton. Henry Wooten,"—indicates that it was issued by someone in authority to acknowledge work done by laborers in a

agent of the railway company, or to Darr, who made out the company's receipt, certifying the amount of wheat, red or white, received from the seller, to whose account for transportation to Toledo, Ohio, it had been received, and on the back of the receipt Purinton or Darr, as the case might be, wrote '2 red' or '3 red,' as indicating Miller's judgment as to the grade or quality of the wheat. That the purpose of this designation '2 red' or '3 red' on the back of the receipt was to enable the purchaser to fix the Angola market price of the wheat so stored, and sellers received pay according to this method, in accordance with the grade indorsed on the back of the receipt. That during all the times stated in the indictment this method was adopted and practised by all the grain dealers in Angola, and these methods were also known to appellee. That William C. Patterson was one of the grain buyers at Angola. That on the 21st day of

August, 1897, appellee delivered at the grain elevator 3,550 pounds of wheat for Patterson. That Miller weighed it, and graded it '3 red,' and gave appellee the customary check indicating the weight, grade, and that it was stored to the account of Patterson. That appellee took the check to the railway company's office, where Darr, the clerk, who was working under authority of Purinton, agent of the company, made out the receipt for the company, and wrote on the back '3 red,' to indicate the opinion of Miller as to the grade of the wheat, as was the custom."

The receipt in question upon which the charge of forgery is founded is as follows:

Check No. 71. Not Transferable. No. 429.

The Lake Shore & Michigan Southern Railway Company.

Angola, Ind., Station, August, 21st, 1897.
Received into this company's grain house

manner intended to serve as a basis for the computation of what they have earned, and an acknowledgment of that description is equivalent to an order on a disbursing agent, which, on presentation, entitles the party named, or the bearer, to payment of the realized amount, and is therefore a subject of forgery. *State v. Jefferson*, 39 La. Ann. 331, 1 So. 669.

And an indictment charging the false making of an instrument, as follows: "July 22nd, 1894. This is a correct statement of D. H. Daud's time for work done on section 4 in the month of July: Days' work 14; board due, \$6.50; balance due, \$8.15. F. Thompson, Section Foreman,"—and charging that the same purported to be the obligation of a designated railroad company signed by its agent, and that it was the usage of the company to execute such obligations on which employees were to receive their pay from the proper agent of the company, and explaining the meaning of the expressions therein, so explains the instrument in question as to give it the character of an instrument, which, if true, would authorize the owner thereof to maintain a civil suit for work and labor done for the railroad company, and is therefore a subject of forgery capable of being uttered as a forged instrument. *Daud v. State*, 34 Tex. Crim. Rep. 460, 31 S. W. 376.

Likewise, a written statement by a landlord, who by law was entitled to a lien on cotton raised by a tenant on his premises, that he had nothing to do with the cotton of the tenant, and that the tenant was welcome to do what he pleased with it, is an instrument which, if genuine, would be of apparent legal efficacy as a waiver of his lien and as an authority to encumber or dispose of the entire cotton to which it refers, and is therefore a subject of forgery within the meaning of the Alabama statute prescribing the punishment for the forging or counterfeiting of any instrument purporting to be the act of another by which any right or interest in property is in any way changed or affected. *Dixon v. State*, 81 Ala. 61, 1 So. 69.

But, while such an instrument would be a subject of forgery, under proper averments where it does not indicate any interest whatever on the part of the alleged landlord, and the indictment does not aver that he was the landlord, a conviction for the forgery of such instrument cannot be sustained, and a recital in the indictment as follows: "meaning thereby that W. W. Roberts, the landlord, waived his lien on the patch cotton,"—is not sufficient as an averment that the said Roberts was the land-

lord, the office of such a statement being to give point and direction to ambiguous language, and not to state independent facts. *Ibid.*

And an indictment for the forging of an instrument in these words: "I hereby waive to W. G. Beville all my rights and immunities as landlord over Ed. Jackson's crop of the present year, for all claims I have, or may have, against the said Ed. Jackson or Henry Williams, except one bale of cotton weighing five hundred pounds, that said Ed. Jackson will owe me as land rent, and twenty-five dollars that he will owe me as mule rent for the present year. June 13th, 1888. I holds no claims on Ed. Jackson but the rent, one bale of cotton, and mule rent, 25 dollars. Yours truly, A. M. Lewis,"—is not sufficient, in the absence of anything to show that Lewis had made advances to Jackson—such advances as gave him a lien, under the statute—as, in the absence of anything to show a lien, such a certificate, though forged, could not injure or defraud anyone, and legal forgery could not be predicated on it. *Williams v. State*, 90 Ala. 649, 8 So. 825.

And a paper affirming that certain persons are solvent and able to pay a note upon which their names appear as makers is a mere written expression of opinion, and not such a writing as may be the subject of forgery under Alabama act of 1886, defining the punishment for forging or counterfeiting any letter patent, gift, grant, covenant, bond, writing obligatory, note of any bank established by law, or any bill, order, or acceptance or receipt for payment of money or articles of value, or any instrument in writing whatever to secure the payment or delivery of money or other articles, or the discharge of any debt or demand. *State v. Givens*, 5 Ala. 747.

d. Falsification of dates and addresses.

The foregoing part of this note has dealt with cases in which the alleged forgery consisted in the false making or alteration of the instrument or memorandum itself. A date to an instrument, however, though a complete contract or an address attached to a signature thereto, is but a mere memorandum, and this is susceptible of forgery, or rather the instrument is susceptible of forgery through the alteration of such date or address, and in such case, especially if the instrument is complete, there can be but little difficulty in making the proper showing as to apparent legal efficacy.

Thus, an allegation in an indictment that the defendant had an account against another in

at this station, from L. A. Hendry, of Pleasant township, county of Steuben, state of Indiana, for account of W. C. Patterson, three thousand five hundred and fifty (3,550) pounds of red wheat, to be forwarded to Toledo, Ohio, under and subject to the conditions and stipulations of this receipt, viz.: That said grain upon its arrival at Toledo is to be delivered into the company's grain elevators, and not elsewhere, except by special agreement; and while said grain shall remain in said grain house at said station, and after it shall arrive at Toledo in cars ready for delivery into said elevator, the only liability of this company therefor shall be that of warehouseman. This company shall not be bound to forward said grain until instructed to do so, but reserves the right to forward the same at any time without instruction. No transfer of this grain will be made except upon the surrender of this receipt, and in accordance with the rules of this company. This company shall not be held liable for any delay in the transportation or delivery of said grain, or any injury from heat, dampness, or for deterioration in quality, or by fire, accident, or shrinkage while in possession of the company, unless such delay or injury arises through the negligence of the company. T. E. Purinton, Agent. D.

This load delivered at depot by owner.

I hereby certify that I was the owner

June, 1841, which was settled in full at that time on his books, and signed by both parties, and purporting to be in full of all demands, and that thereafter and after a further indebtedness had been incurred by the defendant to such third person he fraudulently altered the figure "1" into a figure "4," so that it read "Settled in full of all demands. June, 1844," so as to include in the settlement such indebtedness afterwards incurred, sufficiently shows forgery. *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 601.

And where a pay sergeant of artillery obtained from the paymaster a receipt for a sum of money as part of the subsistence of a company for a designated month, and afterwards erased the name of that month and inserted the name of the following month, and procured money from a tradesman on the receipt according to the usual practice, the tradesman sending the receipt to the agent of the regiment, who paid the amount, an indictment describing the instrument as a receipt is good. *Rex v. Hope*, 1 Moody, C. C. 414.

So, procuring an acceptance by a person in his own name upon a bill of exchange, and the addition thereto of the address of another person of the same name, who resided at a different place, making the same payable at a stated place where the latter did business, with the intention that the bill should be taken as drawn on the latter, is a forgery, where no authority to draw had been given. *Reg. v. Blenkinsop*, 1 Den. C. C. 276, 2 Car. & K. 531, 17 L. J. M. C. N. S. 82.

In *Reg. v. Epps*, 4 Post. & F. 81, however, in which a nurseryman and seedsman got his foreman to accept two bills, the acceptances having no addition, description, or address, and then, without the knowledge of the acceptor, added a false address to one and represented that the acceptance was that of a customer, and, with reference to the other acceptance, represented that

of the wheat specified in this receipt, and that I sold said wheat specified in said receipt to the party named in the receipt.

[Signature of Seller] L. A. Hendry.

On the back of this receipt was written the following: "3 red."

"That on the 24th day of March, 1898, appellee altered, forged, and counterfeited this receipt by changing the figure '3' on the back to a figure '2,' for the purpose of defrauding Patterson, and getting the price of No. 2 for the wheat that had been graded No. 3. That Patterson had no knowledge of the kind or quality of the wheat, except as indicated by this writing and figure upon the back of the receipt. That from the 21st day of August, 1897, to the 24th day of March, 1898, there was a difference of 8 cents per bushel between No. 2 and No. 3 red wheat; No. 2 being the higher price."

Counsel for the state contend that the memorandum on the back of the receipt entered into and affected the operation of the latter, because it served to disclose the purchaser of the wheat, the grade thereof, and controlled the price to be paid; that the price of No. 2 red, as shown, was 8 cents higher than No. 3 red; and that, therefore, the alteration or change from "3 red" to "2 red," as made by appellee, compelled the purchaser to pay 8 cents per bushel more for the wheat stored than he would have paid had the memorandum remained as orig-

It was that of a seedsman, there being no such person in fact, it was held that the acceptance to which the false address was added was not a forgery, but that the other acceptance was one.

IV. Conclusion.

A mere memorandum is a subject of forgery or not according to whether or not it is of apparent legal efficacy, and whether or not, either upon its face or through extrinsic averment and proof, it appears that it will have the effect of defrauding those who may act upon it as genuine, or the person in whose name it is forged.

The mere fact that the memorandum appears to be void on its face, however, is not alone sufficient to remove it from the list of subjects of forgery. If extrinsic facts exist by which the holder of the paper might defraud another, the offense is complete, and it is not necessary that the person purporting to have made it should have the legal capacity to do so, or that the other interested party should have been bound to act upon it as genuine, or have a remedy over. It is the duty of the court to pass upon the question of admissibility when an instrument is objected to on a prosecution for forgery as not a subject of forgery.

These rules apply alike to all classes of memoranda, though in case of memoranda in the nature of promises or orders or receipts or acquittances the meaning and application and capacity to defraud appear to be more easily ascertainable, and consequently such memoranda are more frequently held to be subjects of forgery than memoranda consisting of mere statements or recitals. Memoranda consisting of dates and addresses are also subjects of forgery, or, rather, their alteration or falsification may render the instrument to which they were attached a forgery, and in such case the usual rules apply, and their capacity to defraud is usually readily shown. F. H. B.

inally written on the back of the receipt. It is insisted, therefore, that the memorandum in controversy qualified the terms or provisions of the receipt, and that its alteration was material, and, under the law, constituted forgery of that instrument; and that the indictment, under the alleged facts, was sufficient. Counsel for appellee, however, insist that the indictment is bad, and some of the reasons which they assign are the following: "That the acts alleged to have been committed do not amount to or constitute alteration, forgery, or counterfeiting of the receipt. That the '3 red' indorsed upon the back of the receipt was a mere memorandum, independent of the receipt, and of no legal efficacy, the alteration of which could not prejudicially change any liability, because it creates no liability; and that, despite the change of the figure on the back, the receipt remained unchanged. That such a memorandum or writing is not embraced within any class of instruments defined by our statutes as being the subject of forgery. That, assuming the truth of all matters alleged, the indictment discloses merely an attempt to obtain money by a false pretense."

The instrument charged in the indictment to have been altered and changed by appellee is disclosed to be the wheat receipt given by the railroad company to him, and not merely the memorandum indorsed thereon. The accused was not indicted for altering and forging the memorandum, but for altering and forging the receipt by means of the alteration made in the memorandum. The forgery of the receipt, as we have seen, is specifically charged to have been committed by altering or changing the figure "3" into a figure "2" so as to make the memorandum read "2 red," instead of "3 red," as originally written by the agent of the railroad company. The inquiry, therefore, is, Was the indorsement of "3 red" a material part of the receipt, the alteration of which, under the statute of this state defining forgery, would constitute that crime? This statute is embraced in § 2354, Burns's Rev. Stat. 1894 (Horner's Rev. Stat. 1897, § 2206), and, when stripped of such words and phrases as have no material bearing upon this case, may be said to read as follows: "Whoever falsely . . . alters, forges, counterfeits, . . . or causes to be falsely . . . altered, forged, counterfeited, . . . any . . . acquittance or receipt, either for money or property, . . . with intent to defraud any person, body politic, or corporation, or utters or publishes as true any such instrument or matter knowing the same to be false, defaced, altered, forged, counterfeited, falsely printed or photographed, with intent to defraud," etc., "shall be imprisoned," etc. An eminent authority on criminal law defines forgery at common law to be "the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bishop, New Crim. Law, § 523. See also *Garmire* 54 L. R. A.

v. State, 104 Ind. 444, 4 N. E. 54. This definition is not incompatible with our statute which defines the crime of forgery. Unquestionably, the receipt alleged to have been altered and forged is of such a character as, under the statute, would authorize the charge of forgery to be predicated thereon. As the crime in this case is charged to have been committed by means of the alteration of a genuine written instrument, it must, therefore, be clearly made to appear that the alleged alteration of the genuine document was material, and that its legal effect thereby was in some degree varied or changed to the prejudice of some person having or acquiring rights therein; for the law is well settled that forgery cannot be successfully predicated upon an immaterial alteration of a written instrument. *Bitlings v. State*, 56 Ind. 101; *Gillett*, Crim. Law, 2d ed. § 445; 2 Bishop, New Crim. Law, § 573. The instrument denominated "receipt" in the statute pertaining to forgery must be held to include all that which, when connected together, constitutes such written receipt or instrument; and, unless a memorandum or writing indorsed thereon or attached thereto is designed by the parties to import something into such receipt or instrument by which the legal effect of its terms or provisions is in some manner varied or affected, such memorandum cannot be said to be connected with the receipt or instrument so as to form a part thereof, and any change or alteration in the memorandum indorsed thereon or attached thereto under such circumstances would not constitute an alteration or change of the legal effect of the receipt or instrument. Where it expressly appears that the memorandum indorsed on or attached to a written instrument, whatever the character of the latter may be, was made by one party or the other at the time of its execution, and that the same was intended to be aside or separate from the main design or object of the instrument itself, then certainly, under such circumstances, the memorandum cannot be said to enter into or form any part of the instrument upon which it is indorsed or to which it is attached; consequently, any change or alteration thereof would not vary or affect the legal import of the instrument.

The history of the case at bar, as disclosed by the facts averred in the indictment, shows that the method of doing business in respect to the storage of wheat in the elevator of the railroad company at Angola was simply as follows: When the owner of wheat brought such grain for storage in said elevator, it was weighed by one Miller, who, after weighing it, would give to the owner or seller a slip or check, which stated the number of pounds of wheat, name of the seller, and the name of the buyer to whose account the wheat was to be stored, with the figures "No. 2 red" or "No. 3 red," the latter indicating only the judgment of said weigher in respect to the quality or grade of the wheat. The seller or owner would then take this check or slip to the agent of the railroad company, who then

made out and gave to him the railroad company's receipt for the grain delivered for storage, stating in such receipt the number of pounds of wheat, red or white, received, and to whose account for transportation the grain had been received; and providing further as to the duty and liability of the railroad company in the transportation and delivery of such grain; and on the back of such receipt the agent would write "2 red" or "3 red," as the case might be, merely to indicate the judgment of the weigher in regard to the grade of the wheat. The sole purpose of the indorsement of "2 red" or "3 red" upon the receipt was to enable the purchaser to fix the market price at Angola of the wheat so stored. It appears that the receipt in question was issued by the railroad company to appellee, and the memorandum of "3 red" indorsed thereon in accordance with the method above stated, and that the purpose of the indorsement was to indicate the judgment of the weigher in respect to the grade of the wheat. The receipt appears to be complete within itself, aside from the indorsement thereon, and makes no reference whatever to the memorandum in controversy, and the latter makes no reference to the receipt; and, unaided by extrinsic facts, each is apparently independent of the other as much as though the term "3 red" had been written on a separate piece of paper. Standing alone and unexplained, the term may be said to be vague and uncertain in regard to its meaning or purpose, and cannot, as it stands, unexplained, be read into or construed as being a part of the receipt. When the memorandum is viewed or considered in the light of the extrinsic facts set out in the indictment, it becomes evident that the design thereof was to serve a purpose wholly different from the main object of the receipt, which related to the storage and transpor-

tation of the amount of wheat received, while the purpose or object of the term "3 red" related to the price to be paid by Patterson, the purchaser, to appellee, the seller. The memorandum, so indorsed, it appears, might, at the option of such buyer, be accepted by him as evidence of the judgment of the weigher in regard to the grade of the wheat. As a consideration of the facts discloses that a change or alteration of the memorandum would not, under the circumstances, operate to vary or affect the receipt in any degree, consequently any change or alteration thereof cannot be held to be a forgery of the receipt. It would seem that when this memorandum had been exhibited to the buyer by the seller, and the former had accepted it as indicating the grade of the wheat according to the judgment of the weigher, the purpose for which it was designed or intended, as shown by the facts, was accomplished. The alleged alteration of the memorandum, as previously asserted, did not operate to change or vary the legal effect of the receipt; therefore the charge made in the indictment that the receipt was altered and forged by the appellee was not sustained under the facts, and the action of the court in quashing both counts of the indictment was right. Possibly, as insisted, if appellee perpetrated a fraud upon Patterson by means of the false memorandum, he would be amenable to the provisions of the criminal statute relating to false pretenses; but that is not the question presented. Neither is the question as to whether the memorandum itself, when explained by intrinsic facts, is such an instrument or writing upon which forgery might be predicated, presented, or decided, but our decision is confined to the particular facts set out in the indictment.

Judgment affirmed.

GEORGIA SUPREME COURT.

WESTERN & ATLANTIC RAILROAD COMPANY, *Plff. in Err.*,

v.

George D. FERGUSON.

(113 Ga. 708.)

*1. The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordin-

arily prudent person would have reason to apprehend its existence.

2. Failure to exercise ordinary care on the part of the person injured, before the negligence complained of is apparent or should have been reasonably apprehended, will not preclude a recovery, but will authorize the jury to diminish the damages in proportion to the fault attributable to the person injured.

3. The evidence authorized the verdict, and the discretion of the trial judge in refusing a new trial will not be controlled.

*Headnotes by COBB, J.

(July 17, 1901.)

NOTE.—As to concurrent duties of traveler and railroad company at railroad crossing, see note to *Fletcher v. Fitchburg R. Co.* (Mass.) 3 L. R. A. 743.

For some cases in this series as to the doctrine of comparative negligence, see *State, Menger, Prosecutor, v. Lauer* (N. J. L.) 20 L. R. A. 61; *Cicero & P. Street R. Co. v. Melxner* (Ill.) 31 L. R. A. 331; and *Tesch v. Milwaukee Electric R. & Light Co.* (Wis.) 53 L. R. A. 618.

As to last clear chance in negligence cases, 54 L. R. A.

see *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 287; *Pickett v. Wilmington & W. R. Co.* (N. C.) 30 L. R. A. 257; and *Thompson v. Salt Lake Rapid Transit Co.* (Utah) 40 L. R. A. 172.

As to contributory negligence of person at railroad crossing, see *Freeman v. Duluth, S. S. & A. R. Co.* (Mich.) 3 L. R. A. 594; *Feeney v. Long Island R. Co.* (N. Y.) 5 L. R. A. 544; *Dean v. Pennsylvania R. Co.* (Pa.) 6 L. R. A. 143; *Cincinnati, I. St. L. & C. R. Co. v. Howard*

ERROR to the Superior Court for Whitfield County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Payne & Tye, R. J. McCamy, and J. McCamy for plaintiff in error.

Messrs. Hoke Smith and H. C. Peoples, for defendant in error:

Want of ordinary care on the part of the plaintiff, under all the circumstances, at common law, was a question of fact for the jury.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Klots v. Winona & St. P. R. Co.* 68 Minn. 341, 71 N. W. 259; *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Ferguson v. Wisconsin C. R. Co.* 63 Wis. 145, 23 N. W. 123; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 445, 32 L. ed. 479, 9 Sup. Ct. Rep. 118; *Pittsburg, C. O. & St. L. R. Co. v. Lewis*, 18 Ky. L. Rep. 957, 38 S. W. 482; *Wabash R. Co. v. Smith*, 162 Ill. 583, 44 N. E. 856; *Louisville & N. R. Co. v. Krey*, 16 Ky. L. Rep. 797, 29 S. W. 869; *Cleveland, C. & O. R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633.

Failure to look and listen does not constitute negligence as a matter of law, but is a fact to be considered by the jury in connection with the other facts in determining the question of negligence.

Richmond & D. R. Co. v. Howard, 79 Ga. 53, 3 S. E. 426; *Metropolitan Street R. Co. v. Johnson*, 90 Ga. 504, 16 S. E. 49; *Smith v. Savannah, F. & W. R. Co.* 84 Ga. 706, 11 S. E. 455; *Broyles v. Prisook*, 97 Ga. 648, 25 S. E. 389.

There was evidence to show that the defendant was negligent after the exposure of the plaintiff was discovered. This would render it liable independent of the claim of negligence on the part of the plaintiff.

Inland & S. Coasting Co. v. Tolson, 139 U. S. 558, 35 L. ed. 272, 11 Sup. Ct. Rep. 653.

Even want of ordinary care by the plaintiff, unless this lack of care was exercised in a failure to avoid the negligence of the defendant, would not defeat a recovery.

Johnson v. Macon & W. R. Co. 38 Ga. 432; *Americus, P. & L. R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Brunswick & W. R. Co. v. Gibson*, 97 Ga. 497, 25 S. E. 484; *Comer v. Barfield*, 102 Ga. 485, 31 S. E. 89; *Macon & I. Street R. Co. v. Holmes*, 103 Ga. 655, 30 S. E. 563.

(Ind.) 8 L. R. A. 593; *Phillips v. Milwaukee & N. R. Co.* (Wis.) 9 L. R. A. 521; *State use of Dyrenfurth v. Baltimore & O. R. Co.* (Md.) 11 L. R. A. 442; *Louisville & N. R. Co. v. Webb* (Ala.) 11 L. R. A. 674; *Lyman v. Boston & M. R. Co.* (N. H.) 11 L. R. A. 364; *East Tennessee, V. & G. R. Co. v. Markens* (Ga.) 14 L. R. A. 281; *Gratiot v. Missouri P. R. Co.* (Mo.) 16 L. R. A. 189; *Hendrickson v. Great Northern R. Co.* (Minn.) 16 L. R. A. 261; *Butcher v. West Virginia & P. R. Co.* (W. Va.) 18 L. R. A. 519; 54 L. R. A.

Cobb, J., delivered the opinion of the court:

Ferguson sued the railroad company for damages alleged to have resulted from personal injuries received by him on account of the negligent operation of one of the defendant's trains. The plaintiff recovered a verdict, and the defendant's motion for a new trial, based on the general grounds only, having been overruled, it excepted.

The evidence introduced in behalf of the plaintiff made substantially the following case: On October 7, 1899, plaintiff was struck and injured by one of the defendant's trains. On the date named the plaintiff desired to take this train for Atlanta, which was due at Dalton at 7:10 in the morning; plaintiff knowing that the train was due to arrive at that time. A short time before the train was due, plaintiff came out of a barber shop, and started to walk obliquely along a footpath towards the depot to take the train. It was raining slightly, and plaintiff was carrying a raised umbrella over his head. There was a side track along by the side of the defendant's freight depot, between the barber shop and the main track, and extending a few feet beyond the freight depot. It was necessary to cross the main track in order to reach the passenger depot, and plaintiff intended crossing the main track lower down than the end of the side track beyond the freight depot. Walking in an oblique direction, plaintiff's face was in a direction diagonally across the track, and his side was towards a train which would approach from the north. There were some freight cars on the side track. When plaintiff reached a point 10 or 12 feet beyond these cars, from which he could see 150 to 200 feet up the main track, he looked up the track, and saw no train approaching. His watch indicated that it would be four minutes before the train was due, though plaintiff was unable to say whether the engineer had the same time that he had. After looking up the main line, and seeing no train approaching, plaintiff walked casually along towards the main track, at the rate of $2\frac{1}{2}$ to 3 miles an hour, 8 or 10 steps, or about 30 feet, and, without looking further to see if a train was approaching, stepped upon the main track at a place where it was usual and customary for foot passengers to cross, and was struck by the train, which had run 150 to 200 feet while plaintiff walked 30. There was an ordinance of the city of Dalton prohibiting the running of trains at the place where the plaintiff was struck at a greater speed than 4 miles an hour, and the train which struck

Van Auken v. Chicago & W. M. R. Co. (Mich.) 22 L. R. A. 33; *Chicago & N. W. R. Co. v. Prescott* (C. C. App. 8th C.) 23 L. R. A. 654; *Ford v. Chicago, R. I. & P. R. Co.* (Iowa) 24 L. R. A. 657; *Gulf, C. & S. F. R. Co. v. Shleder* (Tex.) 28 L. R. A. 538; *Howe v. Minneapolis, St. P. & S. S. M. R. Co.* (Minn.) 30 L. R. A. 684; *Betts v. Lehigh Valley R. Co.* (Pa.) 45 L. R. A. 261; *Woehrlie v. Minnesota Transfer R. Co.* (Minn.) 52 L. R. A. 348; and *Illinois C. R. Co. v. McLeod* (Miss.) 52 L. R. A. 954.

the plaintiff was running at a speed greatly in excess of that limit. Had the train been run at 4 miles an hour, the plaintiff could have gotten safely across the track before the train reached the point where he was injured. Plaintiff was given no warning of any kind of the approach of the train.

In the case of *Americus, P. & L. R. Co. v. Luckie*, 87 Ga. 7, 13 S. E. 105, Mr. Justice Lumpkin used the following language: "It seems to be the clear meaning of our law that the plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows he could, by ordinary care, after the negligence of the defendant began or was existing, have avoided the consequences to himself of that negligence." This language can convey no other impression than that, in cases of the character referred to, the duty on the part of the plaintiff to use ordinary care for his protection against the consequences of the defendant's negligence does not arise "until after the negligence began or was existing." The ruling in the *Luckie Case* was approved in terms in the case of *Brunswick & W. R. Co. v. Gibson*, 97 Ga. 497, 25 S. E. 484, where Mr. Chief Justice Simmons used the expression above referred to, saying that "the plaintiff in an action against a railroad company for personal injuries cannot recover, even though the company may have been negligent, if, after the negligence of the defendant began or was existing, the person injured could, by ordinary care, have avoided the consequences to himself of that negligence." In the case of *Central R. & Bkg. Co. v. Attaway*, 90 Ga. 661, 16 S. E. 958, the present chief justice used the following language: "The rule which requires one to avoid the consequences of another's negligence does not apply until he sees the danger, or has reason to apprehend it." In the case of *Comer v. Barfield*, 102 Ga. 480, 31 S. E. 90, Mr. Justice Fish says, in substance, that if one who was injured by the negligence of another used proper diligence, as soon as his peril was apparent, to avert the catastrophe, it could not be said that by ordinary care he might have avoided the consequences of the other's negligence. In *Macon & I. S. Street R. Co. v. Holmes*, 103 Ga. 658, 30 S. E. 565, Mr. Justice Lewis says: "A party cannot be charged with the duty of using any degree of care or diligence to avoid the negligence of a wrongdoer until he has reason to apprehend the existence of such negligence. No one can be expected to guard against what he does not see and cannot foretell. The rule, therefore, which requires one to exercise ordinary care and diligence to avoid the consequences of another's negligence necessarily applies to a case where there is opportunity of exercising this diligence after the negligence has begun and has become apparent." From the expressions used and the rulings made in the cases cited,—and there are many others where similar expressions are used and similar rulings made,—the rule of force with reference to the subject under investigation seems to 54 L. R. A.

be well settled, and may be thus stated: The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. In such cases, and in such cases only, does the failure to exercise ordinary care to escape the consequences of negligence entirely defeat a recovery. In other cases (that is, where the person injured by the negligence of another is at fault himself, in that he did not, before the negligence of the other became apparent, or before the time arrived when, as an ordinarily prudent person, it should have appeared to him that there was reason to apprehend its existence, observe that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent person) such fault or failure to exercise due care and diligence at such a time would not entirely preclude a recovery, but would authorize the jury to diminish the damages "in proportion to the amount of default attributable to" the person injured. *Comer v. Barfield*, 102 Ga. 480, 31 S. E. 90; *Macon & I. S. Street R. Co. v. Holmes*, 103 Ga. 658, 30 S. E. 565; *Macon & W. R. Co. v. Johnson*, 38 Ga. 409. In some jurisdictions the mere failure to stop, look, and listen by one who is about to cross a railroad track is negligence *per se*; and this is true notwithstanding that at the place where the person was about to cross there is imposed upon the railroad company, by statute or otherwise, the duty of giving signals as to the approach of trains to such places. In other jurisdictions it is held that the mere failure to stop, look, and listen will not amount to negligence *per se*, but the question whether it is such negligence as will defeat a recovery is one of fact, to be determined by a jury, after taking into consideration all of the circumstances of the case. 2 Am. & Eng. Enc. Law, pp. 429 *et seq.* Even in the jurisdictions last referred to—among them being our own state—the rule is settled that one about to cross a railroad track must use his senses in the way that an ordinarily prudent person would under similar circumstances use them, in order to determine whether it would be safe to cross at that time and place; and this is true notwithstanding the company may be by law required to give signals, slacken speed, or do such other acts as would, if faithfully performed, render improbable, if not impossible, injury to anyone crossing the track. At common law, if the negligence of the plaintiff contributed to the injury, he could not recover. This doctrine referred to usually as that of "contributory negligence" is not the law of this state; but the doctrine referred to often as that of "comparative negligence" is the rule of force here. This rule authorizes a recovery by the plaintiff, although he was at fault, provided he was injured under circumstances where, by the exercise of ordinary care on his part, he could not have avoided the

consequences of the defendant's negligence. See Civil Code, §§ 2322, 3830. If the plaintiff knows of the defendant's negligence, and fails to exercise that degree of care and caution which an ordinarily prudent man would exercise under similar circumstances to prevent an injury which will result from such negligence, it is well settled that he cannot recover. See *Georgia R. & Bkg. Co. v. Neely*, 50 Ga. 544; *Central R. Co. v. Harris*, 76 Ga. 508; *Americus, P. & L. R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Briscoe v. Southern R. Co.* 103 Ga. 224, 227, 28 S. E. 638; *Central R. Co. v. Dorsey*, 106 Ga. 826, 828, 32 S. E. 873; *Hopkins v. Southern R. Co.* 110 Ga. 85, 88, 35 S. E. 307.

If the negligence of the defendant was existing at the time that plaintiff was hurt, and he, in the exercise of that degree of care and caution which an ordinarily prudent person would exercise under similar circumstances, could have discovered the defendant's negligence, and when discovered could, by the exercise of a like degree of care, have avoided the same, then he cannot recover. See *Atlanta & W. P. R. Co. v. Loftin*, 86 Ga. 43, 45, 12 S. E. 186; *Americus, P. & L. R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Brunswick & W. R. Co. v. Gibson*, 97 Ga. 489, 497, 25 S. E. 485; *Cain v. Macon Consol. Street R. Co.* 97 Ga. 298, 22 S. E. 918; *Western & A. R. Co. v. Bradford*, 113 Ga. 276, 38 S. E. 823. If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would have reasonably apprehended that the defendant might be negligent at the time when and place where the injury occurred, and, so apprehending the probability of the existence of such negligence, could have taken steps to have prevented the injury, then the person injured cannot recover, if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended really existed. See *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604, 611; *Smith v. Central R. & Bkg. Co.* 82 Ga. 801, 10 S. E. 111; *Jenkins v. Central R. & Bkg. Co.* 89 Ga. 756, 15 S. E. 655; *Central R. & Bkg. Co. v. Attaque*, 90 Ga. 657, 661, 16 S. E. 956; *Macon & I. S. Street R. Co. v. Holmes*, 103 Ga. 655, 30 S. E. 563; *Lloyd v. City & Suburban R. Co.* 110 Ga. 167, 35 S. E. 170. If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably apprehend the probability, even if not the possibility, of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained; and if he fails to do this, and is injured, he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury. A railroad track is a place of danger, and one who goes

thereon is bound to know that he is going into a place where he is subject to the dangers incident to the operation of trains upon that track. See, in this connection, *Comer v. Shaw*, 98 Ga. 545, 25 S. E. 733; *Lloyd v. City & Suburban R. Co.* 110 Ga. 167, 35 S. E. 170. This is true without regard to the place where the track is,—whether in the country, where pedestrians are not expected to be, or at a public road crossing, or at a street crossing, or at the stations and depots of railroad companies, where persons are expected and invited to be present. No matter where the track is located, any person who goes upon the same is bound to know that he is going upon a place where his presence would be attended with more or less danger. What would or would not amount to negligence in the manner in which a person entered upon a railroad track would depend to a large extent upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight, if not that of hearing, to determine whether at the time and place he was about to cross the same there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend. In *Central R. & Bkg. Co. v. Smith*, 78 Ga. 700, 3 S. E. 399, it was, in effect, held that one is not bound to anticipate negligence when the law commands diligence for his protection at the hands of another, Mr. Chief Justice Bleckley, in the opinion in that case, saying: "If he [the plaintiff] had been on the crossing, or at any place he was by right entitled to be, he would have been warranted in assuming that the whole world would be diligent in respect to him and his safety." We do not understand this rule to mean that it is an act of ordinary prudence for a person to go blindly into a place which may or may not be dangerous, simply because the law has commanded those in charge of such place to do certain things, which, if faithfully performed, would render improbable, if not impossible, injury to anyone at that place. Ordinary care would itself require the use of the senses to ascertain whether there was at the particular time any danger in going into the place. An ordinarily prudent person would necessarily apprehend the possibility of danger, and would always act on such apprehension, and use his senses to determine whether or not it was safe to go into the place at the time that he was seeking to enter the same.

Applying the principles above referred to to the facts of the present case, we find that the plaintiff was about to cross a railroad track at a place where he was entitled to cross; that he knew that it was near the time for a train to approach; that he looked up the track in the direction from which the train was expected, and saw no train approaching; that he could see such a distance along the track that it would be impossible for a train, if running within the

limit of speed prescribed by the ordinance of the city in which the track was located, to reach the place at which the plaintiff intended to cross the track before the plaintiff reached that point; that, acting upon the assumption that the train would approach in the manner prescribed by the ordinance, he walked a very short distance, being occupied only a few moments in doing so, and, without looking again to see if the train was approaching, stepped upon the track, and was struck by a train running at a high rate of speed. While there was a conflict in the evidence on some points, there was evidence from which the jury could find the facts to be as above stated, and we must deal with the case in its most favorable light for the plaintiff. It was the duty of the plaintiff, before he attempted to cross the railroad track, to at least use his senses to determine whether there was any danger in such act. He complied with this duty, and his circumstances were such that if the employees in charge of the train had operated it as they should have done, in conformity to the city ordinance, injury to him at the time and place that he stepped upon the track was an impossibility. After having looked up the track, and being able to see the distance that he said he could see, the plaintiff (there being no evidence showing that he had any reason to anticipate the contrary) had a right to assume that the persons in charge of the train would not violate the city ordinance regulating the rate of speed; and, in acting upon this assumption, it would seem that he was not guilty of negligence when he stepped upon the track. But, even if it cannot be said that he was entirely free from fault, neither can it be said that he failed entirely to exercise the care and prudence which an ordinarily prudent person would exercise for his own protection under similar circumstances.

There was no error of law complained of, and the verdict in the plaintiff's favor has met with the approval of the trial judge, and we cannot say that it is entirely unsupported by evidence. For this reason, we will not interfere with the discretion of the trial judge in refusing to grant a new trial.

Judgment affirmed.

All the Justices concur.

BOARD OF TRUSTEES OF GATE CITY
GUARDS, *Plff. in Err.*,
v.

City of ATLANTA.

(113 Ga. 883.)

*1. Public property within the meaning of that clause of the Constitution

*Headnotes by COBB, J.

NOTE.—As to what is public property within the meaning of an exemption from taxation, see, in this series, *People ex rel. New York v. Brooklyn* (N. Y.) 2 L. R. A. 148, and *note*; *Auditor General v. University of Michigan* 54 L. R. A.

which authorizes the general assembly to exempt from taxation "all public property" embraces only such property as is owned by the state or some political division thereof, and title to which is vested directly in the state or one of its subordinate political divisions, or in some person holding exclusively for the benefit of the state or a subordinate public corporation.

2. It follows from the ruling stated in the preceding note that that portion of the act of the general assembly approved October 18, 1885, and now embodied in Pol. Code, § 1156, which declares that each armory "owned" and occupied by any command of the volunteer military forces of the state "shall be, to all intents and purposes, public property, . . . and as such public property . . . shall be exempt from any taxation, state, county, or municipal," is in violation of the Constitution, and therefore null and void.

(July 19, 1901.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of defendant in an action brought to enjoin the assessment of taxes against property owned by plaintiff in alleged violation of a statutory exemption. *Affirmed.*

The facts are stated in the opinion.

Mr. James F. O'Neill for plaintiff in error.

Messrs. James L. Mayson and W. P. Hill, for defendant in error:

Taxation is the rule, and exemption from taxation the exception.

Mundy v. Van Hoose, 104 Ga. 292, 30 S. E. 783; 1 *Burroughs, Taxn.* § 70; *Cooley, Taxn.* 204; *Athens City Waterworks Co. v. Athens*, 74 Ga. 413.

Exemption, being the exception to the general rule, is not favored; but every exception to be valid must be expressed in clear and unambiguous terms, and when found to exist the enactment by which it is given will not be enlarged by construction, but, on the contrary, will be strictly construed.

Cooley, Taxn. 204, 205; *Atlanta Street R. Co. v. Atlanta*, 66 Ga. 104.

Under the Constitution of this state, no property, except that specifically mentioned therein, can be exempted from taxation.

Athens City Waterworks Co. v. Athens, 74 Ga. 413; *St. Mark's Church v. Brunswick*, 78 Ga. 541, 3 S. E. 561; *Richmond County Academy v. Bohler*, 80 Ga. 159, 7 S. E. 633.

The act declaring armories public property and exempting them from taxation was clearly unconstitutional.

The legislature cannot declare that public property which is not public property.

Mundy v. Van Hoose, 104 Ga. 299, 30 S. E. 783; *Richmond County Academy v. Bohler*, 80 Ga. 159, 7 S. E. 633.

If in point of fact the incorporation authorized by the act is not a corporation for

(Mich.) 10 L. R. A. 376, and *note*; *State ex rel. Realty Co. v. Cooley* (Minn.) 29 L. R. A. 777; *Owensboro v. Com. ex rel. Stone* (Ky.) 44 L. R. A. 202; and *Newport v. Com.* (Ky.) 45 L. R. A. 318.

benevolent purposes, the declaration of the legislature that it is a benevolent corporation does not make it so.

State ex rel. Riehey v. McGrath, 95 Mo. 197, 8 S. W. 425; *Little Rock & Ft. S. R. Co. v. Worthen*, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469; *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938.

The exemption must be express. The mentioning of some excludes others.

Athens City Waterworks Co. v. Athens, 74 Ga. 413; *St. Mark's Church v. Brunswick*, 78 Ga. 541, 3 S. E. 561; *Smith v. Americus*, 89 Ga. 810, 15 S. E. 752; *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143; *Jack v. Weienctt*, 115 Ill. 105, 56 Am. Rep. 129, 3 N. E. 445.

Cobb, J., delivered the opinion of the court:

On October 13, 1885, an act was approved which declared: "Each armory owned and occupied by any command of said volunteer forces shall be, to all intents and purposes, public property—that is to say, the state shall have the right to use the same for public purposes of a military character, to quarter troops therein in times of emergency, to be judged of by the commander-in-chief, and to otherwise use the same for military purposes, such use, however, to be consistent with the occupation of the same by said command holding the legal title thereto, and so as not to oust the said command therefrom, and as such public property, each said armory, and the land upon which it is situated while it is used and occupied as such, shall be exempt from any taxation, state, county, or municipal. The adjutant and inspector general shall see that all such armories are kept in serviceable condition, and shall report on the same to the commander-in-chief in his annual report. All rents or income of any portions of such armories shall be the property of the command owning the same. The state shall not appropriate any money for the repair of such buildings, but all repairs and other expenses incident to preserving and repairing such buildings shall be paid by the command owning the same." Acts 1884-85, p. 84, § 15 (Pol. Code, § 1156). Under the Constitution "the general assembly may, by law, exempt from taxation all public property." Civil Code, § 5884. The general assembly, under the authority thus granted, has declared that "all public property" shall be exempt from taxation. Pol. Code, § 762. In *Mundy v. Van Hoose*, 104 Ga. 299, 30 S. E. 783, Mr. Justice Little says: "Public property, in the sense as used in the provision for rendering property exempt, means property belonging to the state, or the political divisions thereof, such as counties, cities, towns, and the like." Taxation is the rule, and exemption the exception. *Athens City Waterworks Co. v. Athens*, 74 Ga. 413. The general assembly has no authority whatever to exempt from taxation any species of property except those specifically mentioned in the Constitution. Anyone claiming an exemption from taxation must show

an act of the general assembly, passed in pursuance of the Constitution, authorizing the exemption; and in construing such an act every doubt is to be resolved in favor of taxation and against exemption. In the present case an effort is made to enforce an attempt by the general assembly to exempt from taxation the property of a private corporation known as the "Board of Trustees of the Gate City Guards." The exemption from taxation is claimed under that part of the act above referred to which declares that an armory owned and occupied by the volunteer military forces of the state shall be public property to all intents and purposes. It is not pretended that the building in which the armory of the Gate City Guards is located is owned by the state, or any political division thereof, or that the corporation which holds the title to the building holds it exclusively for the benefit of the state, or a subordinate public corporation. It is claimed, however, that a portion of the building is used entirely for purposes which are of a public nature; and that, while the corporation derives an income from the remaining portion of the building, this income, after paying the debts of the corporation incurred in the erection and maintenance of the property, is used exclusively for public purposes in maintaining the military company known as the "Gate City Guards," which is a part of the regular volunteer military forces of the state. That private property is used exclusively for public purposes does not change the nature of the property, or the title thereto, so as to convert it into public property. It is not necessary in the present case to determine who would be the owners of this property in the event it should ever cease to be used for the purposes for which the military company was organized and the property acquired, but it is sufficient to determine, as it can be without difficulty decided, under the facts of the present case, that neither the legal nor equitable title to the property is in the state, or any political division thereof. It is therefore not public property, within the meaning of the clause of the Constitution which declares that the general assembly shall have authority to exempt public property from taxation. Private property cannot be converted into public property by the simple declaration of the general assembly; and especially is this true when the purpose of the declaration is to relieve private property from a burden which the Constitution says in unmistakable terms shall be borne by it for the benefit of the public. The act of 1885 above referred to, which attempted to exempt from taxation armories owned by military companies, is unconstitutional and void, and the court did not err in so treating it, and in holding that the armory owned by the Board of Trustees of the Gate City Guards was subject to taxation at the instance of the authorities of the city of Atlanta.

Judgment affirmed.

All the Justices concur.

J. J. BURCH, *Plff. in Err.*,

v.

PEDIGO *et al.*

(113 Ga. 1157.)

1. When a promissory note for the purchase money of personal property, which contains a reservation of title to the property in the payee until the note is paid, is, by the payee, transferred for value to a third person without recourse, the title reserved for securing the payment of the debt is divested; and if, at the time of such transfer, the title so held was not likewise transferred to the purchaser of the note as a security in his hands, it vests in the maker, and the transferee becomes an ordinary creditor of such maker.
2. An action of trover brought by the transferee in such a case, to recover possession of the property for which the note transferred was originally given, must fail because of a want of title in the transferee.

(July 24, 1901.)

ERROR to the Superior Court for Lincoln County to review a judgment in favor of plaintiffs in an action brought to recover possession of two mules. *Reversed.*

The facts are stated in the opinion.

Messrs. John I. West and Charles A. Ploquet for plaintiff in error.

Messrs. Colley & Sims for defendants in error.

Little, J., delivered the opinion of the court:

An action of bail trover was instituted against Burch in the superior court of Lincoln county to recover possession of two mules. The plaintiffs were Pedigo & Lyons, suing for the use of B. H. Willis, and it appears from an admission of the parties that Burch gave to Pedigo & Lyons a promissory note for the purchase price of the mules, which note contained a reservation of title in Pedigo & Lyons as security for the purchase money of the mules; said reservation being to Pedigo & Lyons or order, until said note was paid. Defendant, by his plea, set up that Willis was not a bona fide holder of the note for value before it became due, but that he held the same for the payee, and took the same after due with full notice, and that the note was given as a balance due on two mules, but that the payees had previously sold to the defendant a horse which failed to come up to a warranty which was made as to her soundness; hence there was a failure of consideration in the purchase of said horse of \$165; that the payees had agreed to refund him that sum, but had never done so, and he pleaded it as a set-off to this action. The note which was given for the mules was dated February 17, 1897, and due March 15, 1897. The transfer to

Willis was written on the note in the following language: "For value received, we hereby transfer to B. H. Willis or order all our right and title to the within note, without any recourse on us. This, the 14th day of March, 1899;" and signed, "Pedigo & Lyons." It was admitted by the defendant that he was in possession of the property sued for. With this admission the plaintiff, having introduced the note referred to, closed. The defendant testified, in substance and in detail, to the facts set up in his plea, which evidence was, on motion of plaintiff's counsel, ruled out as irrelevant. There was no further evidence in the case except that Willis, who is described as the usee, testified that the note did not belong to Pedigo & Lyons, the payees, but was his property, and was transferred to him for value received, without any understanding in relation thereto. He also testified that he knew nothing of any differences between the parties to the note in having a settlement, and that it was not put in his name for the purpose of bringing the suit, and that he knew nothing of the defendant having a claim against the payees until after he had bought the note, and that the mules were worth \$150. It was also shown that the note was duly recorded. Under the evidence the presiding judge directed a verdict for the plaintiff, as follows: "We, the jury, find for the plaintiff the sum of \$161, same being the face of the note, and interest thereon from maturity, and — dollars, cost of suit." A judgment was rendered for the sums named against the defendant and the surety on his bail bond. The defendant made a motion for a new trial on the ground that the verdict was contrary to law and to the evidence. That the trial judge erred in directing a verdict for the plaintiff, and in excluding from the jury the evidence of the defendant, and in refusing to permit defendant's attorney to prove by the usee in the action what amount he paid for the note which was in evidence. The motion was overruled, and the defendant excepted.

It must be borne in mind that the action instituted was that of trover. We think that it is somewhat inconsistent, under the rules governing actions of this character, that one man should sue for the use of another, inasmuch as no one can recover as plaintiff unless he shows three things,—right of possession of the property in himself, wrongful conversion by the defendant, and the value. This court ruled in the case of *Mitchell v. Georgia & A. R. Co.* 111 Ga. 760, 51 L. R. A. 622, 36 S. E. 971, that, "while . . . 'mere possession of a chattel . . . will give a right of action for any interference therewith,' such possession must be in the plaintiff's own right, and not as agent of another;" and in the same case that "a petition brought in the name of a person who had not such a possession, to recover personal property taken from him, cannot be so amended as to proceed in the name of the plaintiff for the use of the real owner." In delivering the opinion in that case, in which very many of the principles applicable to

*Headnote by **LITTLE, J.**

NOTE.—As to rights and liabilities of vendor and purchaser by conditional sale on default of payment, see *Cole v. Hines* (Md.) 32 L. R. A. 455, and note.
54 L. R. A.

the action of trover are contained, Mr. Justice Cobb said: "When, therefore, it appears that the legal right of action is not in the plaintiff, he has no right of action at all, either in his own name or in that of another." However, as no exception was taken to the form of the action by demurrer or otherwise, we will interpose none. Furthermore, it may be remarked, before passing to the main question which we think controls the case, that defendant pleaded a set-off. That such a plea cannot be interposed in an action of trover, see *Harden v. Lang*, 110 Ga. 392, 38 S. E. 100. Again, the trial judge directed a verdict for the plaintiff for the amount of the note given for the balance of the purchase money of the mules. This, we think, was clearly error. Indeed, we do not understand how the note had anything to do with the issues arising in this case, except, perhaps, for the purpose of showing that title to the mules was reserved to the seller. An action of trover is one to recover possession of an article which has been wrongfully taken from the possession of the plaintiff. The verdict ordinarily to be rendered thereon is either for the plaintiff or for the defendant. If a verdict is rendered for the plaintiff, its legal effect is that he shall have the property sued for; but by § 5335 of the Civil Code it is declared that the plaintiff shall have an option of saying whether he will demand a verdict for damages or for the property and its hire, and it is the duty of the court to instruct the jury to render a verdict as he should thus elect (if he should be entitled to recover). While a money verdict may be found for the plaintiff in an action of trover, it but represents the damages he has sustained, and by another rule the amount of such damages may be the highest proved value of the property. In this case it does not appear that any election was made by the plaintiff at the trial. Considering the verdict alone, it was error on the part of the trial judge to instruct the jury to find a given sum of money in favor of the plaintiff.

But the controlling issue which compels a reversal in this case is that neither the plaintiff in the case nor his usee showed title to the property to recover which the suit was instituted to be in either, and this is easily determined from certain undisputed facts which appear in the record. These were: Pedigo & Lyons were the payees of the note given for the balance of the purchase money of the mules. In that note title to the mules was reserved to Pedigo & Lyons or order, until said note was paid. Pedigo & Lyons, for value received, transferred all their right and title to the note, without recourse on them, to Willis or order. The effect of the reservation was, of course, to keep the title in Pedigo & Lyons until the purchase money was paid. But it must be noted that there is no evidence that they gave to Willis any title to the property. The transfer written on the back cannot have this effect, for the matter transferred is the note; and while the transfer

of a note reserving title may, if the transfer is unconditional, carry to the transferee title to the property, which by the terms of the note is reserved to the payee, yet, when that transfer is made by the payee, subject to the condition that the transferee shall have no recourse on the transferrer in the event of nonpayment, then an entirely different rule prevails. Pedigo & Lyons, by virtue of this contract, which it was agreed was in the form of a negotiable instrument, held title to the mules until the note was paid. Such a title is sufficient to sustain an action of trover. It was in their power to transfer alone the debt represented by the note to another. It was also in their power to transfer, not only the debt, but also the title to secure the debt, which they had reserved. But when Pedigo & Lyons sold the note, and received value for it, their debt was paid; and if they sold or transferred the note, without at the time conveying to the purchaser the title to the property which they held as security for its payment, then the purchaser took the debt, the debt of Pedigo & Lyons was paid, and the title which they held as security for that debt, not having been conveyed, vested at once in the maker of the note, because of the fact that Pedigo & Lyons could have no further interest in the property. Their debt, to secure the payment of which only was title in them reserved, having been paid, title was divested. It did not vest in the purchaser of the note because it was not transferred with the note. It therefore vested at once in the maker of the note. In the case of *Farrar v. Brackett*, 86 Ga. 463, 12 S. E. 686, the facts were that Farrar sued Brackett in bail trover for a steam engine and two sawmills. It also appeared that Farrar had purchased from Hill the notes given for one of the mills, but did not receive from Hill a conveyance of the mill, title to which had been reserved as security for the purchase money, but that Hill transferred simply the purchase-money notes to Farrar, without recourse. This court denied Farrar's right to recover in trover, and said: The transfer without recourse of notes given for part of the price of a mill did not place the title to the mill in the person taking the notes, because when the person transferring them received the money thereon he was paid, and the title to the mill passed into the maker of the notes, of whom the purchaser of them was but an ordinary creditor. This ruling clearly denies both to Pedigo & Lyons and to Willis the right of recovery in an action of trover, under the evidence in this case; for the debt to Pedigo & Lyons was paid by the sale of the note to Willis, and the title to the mules, which the former had retained to secure their debt, was extinguished by the payment of their debt. Hence, no further liability on the note could attach to Pedigo & Lyons, because they transferred the note without recourse, and Willis could not recover because he had no title to the mules, inasmuch as the title which Pedigo & Lyons held had never been transferred to him.

Therefore it must be ruled that when Pedigo & Lyons transferred the purchase-money note which contained the reservation of title without recourse, to Willis, not only was the title of Pedigo & Lyons extinguished, but, the debt having been paid, this title vested in the maker of the note.

The verdict was therefore contrary to law, and the judgment overruling the motion for new trial is reversed.

All the Justices concur.

W. S. LYNCH, *Plff. in Err.*,
v.

FLORIDA CENTRAL & PENINSULAR
RAILROAD COMPANY.

(118 Ga. 1105.)

*A railroad company is not liable for damages resulting from an assault and battery inflicted by its station agent and another upon a third person, when it appears that the difficulty which gave rise to the beating arose out of a personal quarrel, and that the agent, so far as related to his participation therein, was acting upon his individual responsibility, and not within the scope of the business of his agency as an employee of the company.

(July 23, 1901.)

ERROR to the Superior Court for Effingham County to review a judgment in favor of defendant in an action brought to recover damages for an assault alleged to have been committed on plaintiff by defendant's agent. *Affirmed.*

The facts are stated in the opinion.

Mr. D. H. Clark for plaintiff in error.

Messrs. Denmark, Adams, & Freeman, for defendant in error:

This case is covered and controlled by the principles laid down in—

Georgia R. & Bkg. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565; *City Electric R. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508; *Georgia R. & Bkg. Co. v. Hopkins*, 108 Ga. 324, 33 S. E. 965.

Little, J., delivered the opinion of the court:

It cannot be denied that the plaintiff was very imprudent in his actions towards the agent of defendant, in refusing to obey his instructions in reference to driving into the cut with his loaded wagon, and it is apparent from the evidence that he drew the difficulty in which he was injured upon himself. The station agent presumably represented

the railroad company in an attempt to enforce against the plaintiff certain regulations in relation to the loading of cars, which the agent claimed existed. It was, as will be seen from the report of the evidence, a reprehensible act on the part of the plaintiff, not only to refuse to conform to such regulations, but also in denying the right of the agent to enforce them. It was not becoming in him to question the authority of the agent to enforce the regulations which the latter said existed. He should have submitted, and made his complaint to the proper and superior authority, and obtained redress in that way.

Two other things are also apparent from the evidence. The first is that the injuries from which the plaintiff really suffered were not by the younger Simmons, who was the company's agent, but by his father, and, also, at the time he received the beating, he had not approached the agent on the business of the company, but to settle a personal grievance. Surely, no one can entertain such a distorted view of the law as to claim that the railroad company was responsible to the plaintiff for a battery inflicted upon him by the elder Simmons, who, so far as the evidence shows, was not connected with the railroad company in any capacity. Nor can it be successfully claimed that if the plaintiff sought the younger Simmons, even on the premises of the railroad company, for the purpose of adjusting a private grievance, although the one so sought was at the time its agent, the company would be held liable for personal injuries inflicted on the plaintiff by such agent, as the result of an unsuccessful effort to adjust their personal differences. The rules of law which control the question of the liability of a master to respond in damages for a tort of this character, committed by its agent on a third person, have been repeatedly considered by this court. In the case of *Christian v. Columbus & R. R. Co.* 79 Ga. 460, 7 S. E. 216, it was ruled that a railroad company was liable in damages for the wrongful homicide of its customer committed by its depot agent in its office while the customer was lawfully there for the transaction of business with such agent pertaining to his agency. When the same case was for the third time before this court, as reported in *Columbus & R. R. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411, the proposition of law announced in the first decision of the case was more fully explained, and this court ruled that "for the wrongful act of an employee of a railroad company resulting in injury to another, committed while engaged in the performance of the company's business in the line of his duty, the company is liable. But if, while so engaged, upon account of some

*Headnote by LITTLE, J.

NOTE.—For cases in this series as to liability of master for servant's tortious injury to third person in absence of any contractual relation, see note to *Ritchie v. Waller* (Conn.) 27 L. R. A. 161; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan* (Ind.) 27 L. R. A. 840; *Texas & P. R. Co. v. Scoville* (C. C. App. 5th C.) 27 L. R. A. 179; *Mayer v. Thompson-Hutchison Bldg.* 54 L. R. A.

Co. (Ala.) 28 L. R. A. 433; *Baltimore Consol. R. Co. v. Pierce* (Md.) 45 L. R. A. 527; *Nelson Business College Co. v. Lloyd* (Ohio) 46 L. R. A. 814; *Pierce v. North Carolina R. Co.* (N. C.) 44 L. R. A. 316; *Galveston, H. & S. A. R. Co. v. Zantsinger* (Tex.) 47 L. R. A. 282; and *Dorsey v. Kansas City, P. & G. R. Co.* (La.) 52 L. R. A. 92.

private feud previously existing or suddenly arising, wholly disconnected with his duties as such employee, and not pertaining to the business then in process of transaction (the company then not owing to the other person the duty of personal protection), he commit injury upon the person of another, the company would not be liable." In delivering the opinion in that case Mr. Justice Atkinson, further elaborating the proposition of law then in question, said: "If, while the employee is engaged about the business of the master, upon some matter or some provocation wholly disconnected with the performance of his duties as a servant, upon some private feud, in an altercation with a third person, he should commit an injury upon such third person, such injury would not fall within the class for which the master is liable, unless it be a case in which, by reason of the relation existing between the person thus injured and the railroad company, the latter owed to the former the special duty of personal protection," etc. Again, in the case of *Georgia R. & Bkg. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565, where the facts brought into consideration the principle of law we are now considering, this court ruled that if the real purpose of the person assaulted, in returning to the station, was not to look after or arrange for checking baggage, or to attend to other legitimate business with the agent, but merely to upbraid him for a real or supposed breach of duty occurring at an earlier hour of the day, and the difficulty thereupon ensued, the two met as ordinary citizens, and the railroad company had no concern in what passed between them. In delivering the opinion in that case Mr. Justice Lumpkin, stated the proposition that if the injured person went to the station to attend to business connected with the railroad company, and conducted himself properly, he was entitled to respectful treatment from the agent, "and if the latter, under these circumstances, unlawfully assaulted and beat him, it was his right to hold the company responsible in damages." And he also there said: "It may, in this connection, be proper to add, however, that, even if Richmond went to the station for the lawful purpose of attending to the business above mentioned, it was nevertheless incumbent upon him to treat the agent with the same respect due him by the agent. Therefore, if, instead of so doing, he without provocation used insulting or opprobrious language to the agent, which naturally enough resulted in a difficulty, the company should not be held responsible." Mr. Justice Lumpkin also said in the case of *City Electric R. Co. v. Shropshire*, 101 Ga. 37, 28 S. E. 508, that "one who voluntarily, and by his own misconduct, places it beyond the power of a master to protect him, surely cannot complain of an omission so to do. Especially is this true where he practically invites the master's servant to disregard and abandon his official duties, and enter into a personal encounter on his own account and upon his individual responsibility." See also, *Georgia R. & Bkg. Co. v. Hopkins*, 108 54 L. R. A.

Ga. 324, 33 S. E. 965. According to the testimony of the plaintiff himself, he repeatedly persisted in driving his wagon within the cut next the side track, which the agent insisted that he must not do, as it was in violation of a rule established by the company. Paying no heed to the repeated remonstrances of the agent, he sought advice from another employee of the railroad company, not shown to have had any connection whatever with the care of the station and ground, and then apparently defied the authority of the agent to compel him to desist from doing what he had been forbidden. Not only so, but he also subsequently left the car in which he was placing his wood, and sought the father of the agent, who was engaged in the same work some hundred yards down the track, for the purpose, as he states, of getting the father to tell his son not to go down there any more to disturb him, telling the father of the treatment which the son had given him. Then, at the request of the father, they both walked up to the warehouse, and the agent was asked by his father whether he had insulted the plaintiff, and, receiving a reply that he had not, the father and the plaintiff became engaged in an altercation in which the agent participated. So that it is evident that plaintiff did not go to the warehouse, at the time, because of any business he had with the plaintiff as agent of the company, but for the purpose of adjusting a personal grievance, and, if it was not adjusted in a manner entirely agreeable to him, he should not attribute the fault to the railroad company. It was purely a personal matter between the three, and, if the plaintiff has any cause to complain, it is against the individuals who inflicted the injuries upon him, and not against the railroad company, who at that time owed him no duty of protection. There was no error in the judgment awarding a nonsuit.

Judgment affirmed.

All the Justices concur.

Leonard HUTCHERSON, *Plff. in Err.*,
v.

E. L. DURDEN.

(113 Ga. 937.)

*An action by a father to recover damages for the seduction of his daughter is barred by the statute of limitations, unless brought within two years from the time the right of action accrued.

(July 20, 1901.)

ERROR to the Superior Court for Emanuel County to review a judgment in favor of defendant in an action brought to

*Headnote by FISH, J.

NOTE.—For an action of seduction considered as an action for wrongs affecting character, see, in this series, *Weeks v. Russell* (Teun.) 3 L. R. A. 212.

recover damages for the seduction of plaintiff's daughter. *Affirmed.*

The facts are stated in the opinion.

Mr. George M. Warren for plaintiff in error.

Mr. Alfred Herrington for defendant in error.

Fish, J., delivered the opinion of the court:

This was a suit brought by a father to recover damages for the seduction of his daughter, who, according to the petition, was unmarried and living with him at the time the cause of action arose. At the trial, "after the plaintiff had closed his evidence, the defendant swore a number of witnesses, and then moved orally to dismiss plaintiff's case upon the ground that the declaration showed upon its face that the case was barred by the statute of limitations. The plaintiff then introduced in evidence the suit as originally brought between the parties for the same subject-matter, filed October 1, 1895, . . . and the order withdrawing the same at October adjourned term, 1896, prior to the filing of the present suit [on the] 22d day of January, 1897 Defendant then renewed his motion to dismiss plaintiff's suit." The court sustained the motion, and the plaintiff excepted.

It is contended here by counsel for the plaintiff in error that the motion to dismiss, being predicated upon a ground that would not have been good in arrest of judgment, should have been made at the appearance term, and could not have been lawfully entertained by the court during the trial of the case. So far as appears from the bill of exceptions or the record, this is the first time that this point has been raised. It does not appear that any objection was made to the court's entertaining and passing upon the motion to dismiss. This court can only determine questions which were raised in the court below. As no objection appears to have been made to the motion to dismiss, the plaintiff will be presumed to have waived any valid objection, if such there were, which might have been made thereto. The only ruling which appears to have been made by the trial court was upon the merits of the motion. Consequently the only question properly before this court for decision is whether or not the plaintiff's cause of action was barred by the statute of limitations when the original suit was brought. The defendant in error contends that, under § 3900 of the Civil Code, it was then barred, as more than two years had elapsed after the right of action accrued. The section cited reads as follows: "Actions for injuries done to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year." Is a suit brought by a father for the seduction of his daughter, within the meaning of this section of the Civil Code, a suit "for injuries done to the person?" A similar question arose in *Johnson v. Bradstreet Co.* 87 Ga. 79, 13 S. E. 250, and the decision therein

rendered is decidedly in point. There the statute under consideration amended § 2967 of the Code of 1882, which provided that no action for a tort should "abate by the death of either party where the wrongdoer received any benefit from the tort complained of," by providing that no action "for homicide, injury to the person, or injury to property shall abate by death," and the question which invoked a construction of the amending statute was whether an action for libel was abated by the death of the plaintiff. The decision was that the action did not abate in consequence of the death of the plaintiff, it being held that the words "injury to the person" were not restricted to mere bodily or physical injuries, but extended "to all injuries to the person." Mr. Justice Lumpkin, who delivered the opinion, said: "Some light is thrown upon the question at issue by reference to the position which the amended section occupies in the Code. Title 8 of part 2 of the Code treats of 'torts, or injuries to persons or property.' Chapter 2 of that article deals with 'injuries to the person.' This chapter is divided into three articles. The first treats of 'physical injuries,' the second of 'injuries to reputation,' and the third of 'other injuries to the person.' According to this classification, it will be seen that injuries to reputation are included in the chapter dealing generally with injuries to the person. The article relating to physical injuries treats only of injuries to the body; that relating to the reputation includes and defines libel and slander; and the remaining article of that chapter deals with still other personal injuries, such as false imprisonment, malicious arrest, and injuries to health. All of the foregoing injuries, as has been shown, are classed under the general subdivision covering injuries to the person. It is more than probable that the legislature, in making this new law a part of the Code, intended that it should harmonize with its surroundings; and in amending this section it was doubtless their deliberate purpose that the words used in the amending act should be construed and understood with reference to the existing arrangement and classification of the law of torts, in which this new law found its place." Now, if we look further into the classification of the law of torts than it was necessary for the learned justice to do in the case which the court then had under consideration, we find that § 4 of art. 3, the title of which article is, "Other Torts to the Person," treats of "indirect injuries to the person," and that under this designation are grouped the section of the Code giving a husband "a right of action against another for abducting or harboring his wife;" the section giving a husband a right of action "for adultery, or criminal conversation with" his wife; the section giving a father, "or to the mother, if the father be dead, or absent permanently, or refuses to sue, a right of action for the seduction of a daughter, unmarried and living with her parent;" and the sections giving "a father, or if the father be

dead a mother," a right of action "against any person who sells or furnishes spirituous liquors to his or her son, under age, for his own use, and without his or her permission," and "a like right of action against any person who shall play and bet at any games of chance with a minor son for money or other thing of value." In our present Civil Code these same sections are found under the subtitle "Indirect Injuries to the Person," and all that appears above in reference to the classification of the law of torts in the Code of 1882 applies to the Civil Code. It is, we think, therefore evident that the meaning of the expression "injuries to the person," as understood by the codifiers, and within the scheme of classification adopted in the Code, was not confined to mere physical or bodily injuries, but embraced all actionable injuries to the individual himself, as distinguished from injuries to his property, and equally evident that in the opinion of the codifiers the seduction of an unmarried daughter, living with her parent, was, relatively to that parent, an indirect injury to the person. In reference to actions for torts our statute of limitations provides: "All actions for trespass upon or damages to realty shall be brought within four years after the right of action accrues." "Actions for injuries to personalty shall be brought within four years after the right of action accrues." "Actions for injuries done to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year." Civil Code, §§ 3898-3900. Here we find that torts to property are divided into torts to realty and torts to personalty, though the time within which suit may be brought is four years in each instance. We find only one section, and, indeed, only one sentence, devoted to the limitation of actions for torts which do not invade property rights. That section fixes the limitation for actions for "injuries done to the person," and provides that suits for such injuries must be brought within two years after the right of action accrues, except in the case of injuries to the reputation, where the limitation on the right to sue is one year. So, if the expression or classification "injuries done to the person" includes only injuries inflicted upon the physical man or bodily organization, then, except as to injuries to the reputation, there seems to be no limitation provided in the Code for suits based upon any of the other torts which do not infringe upon or affect property rights, but each of which, under express provisions of the Code, affords a cause of action to the injured party. It is not reasonable to suppose that our lawmakers intended that there should be no limitation for suits for adultery or criminal conversation with a wife, for actions for abducting or harboring a wife, for suits for selling liquors to a minor son without the consent of his parent, for actions for gambling with a minor son, and for actions for the seduction of a daughter. Unless the actions for injuries which may be brought in

these respective cases come within the meaning of the expression or classification "injuries done to the person," we have been unable to find any limitation in the Code upon the right to sue for such injuries, or any one of them. Surely the failure to provide a special limitation for each of these actions, or to specifically include them all under one general statutory limitation, was not the result of oversight on the part of our legislators and codifiers. Is it not more reasonable to believe that this failure was due to the fact that the makers of our laws believed that actions in these cases were limited by the section which deals with actions "for injuries done to the person," and that they intended that they should be? We think, however, that § 3900 of the Civil Code itself shows that the expression "injuries done to the person," as therein used, includes not only injuries to the physical body, but every other injury, for which an action may be brought, done to the individual, and not to his property. This is shown by the fact that "injuries to the reputation" are specially excepted from the operation of the limitation provided for actions "for injuries done to the person." Why this exception, if "injuries done to the person" include only injuries to the bodily organization? Section 5 of the statute of limitations of March 6, 1856, provided: "All suits for injuries done to the person shall be brought within two years after the right of action accrues, and not after." Section 6 of that act provided: "All suits for injuries done to the character or reputation shall be brought within one year from the time the right of action accrues and not after." It is significant that, when the laws of this state were first codified, these two separate sections of the statute of limitations were merged into, not only one section, but into one sentence, and so merged that the conclusion is irresistible that in the opinion of the codifiers, and of the general assembly which adopted that Code as a body of laws for the state, the expression or classification "injuries done to the person," as used in the statute of limitations, included personal injuries other than injuries to the body, and that it was their intention that it should. Section 3900 of the Civil Code is in the exact language of § 2992 of our first Code, and the same language has been employed in each of the intervening Codes. So, the codifiers of the original Code and the codifiers of each subsequent Code have included "injuries to the reputation" under the general classification "injuries done to the person," and then, by express exception, have provided that the limitation of two years applied generally to all actions "for injuries done to the person" shall not apply to suits for "injuries to the reputation," but that actions for such injuries shall be brought within one year after the right of action accrues. Both the classification and the exception have twice received the sanction and approval of the general assembly, as the Code of 1863 and the Code of 1895 were each adopted by leg-

islative enactment. An injury to the reputation is an injury of an intangible character, of which there is no evidence in or on the bodily organization, and which can only affect the physical man indirectly, through the subtle influence of the mind over the bodily processes and the physical health. That such an injury as this was classed by our lawmakers among "injuries done to the person," we think, clearly shows that they intended by "injuries done to the person," all injuries for which an action would lie, done to the individual, as distinguished from injuries done to his property.

Our statute giving a right of action for the seduction of an unmarried daughter living with her parent sweeps away the flimsy fiction of the common law that a suit by a father for the seduction of his daughter can only be based on the relation of master and servant between the two, and must therefore be for the loss of the daughter's services, although when the plaintiff has thus brought his suit he can recover for the real wrong and injury inflicted upon him. In this state "the seduction is the gist of the action," and "no loss of service need be alleged or proved." Civil Code, § 3870. Section 3899 of the Civil Code, which provides the limitation within which suits for injuries to personalty may be brought, cannot, therefore, apply to such an action; for "the gist of the action" is what must be looked to in determining whether it is an action for injuries to personalty, or one "for injuries done to the person." The real gravamen of the action is the shame, mortification, humiliation, and sense of family dishonor and disgrace from which the plaintiff suffers. "The gist of the action" being, not any property right of the parent in the services of his daughter, but the seduction itself, for which, "in well-defined cases, the damages should be exemplary," it is clear that within the intent and meaning of our Code, and under the decision in *Johnson v. Bradstreet Co.* 87 Ga. 79, 13 S. E. 250, the expression "injuries done to the person," as used in our statute of limitations, includes the injuries inflicted upon a father by the seduction of his daughter.

Irrespective of the considerations above presented, there is excellent outside authority for holding that the expression "injuries done to the person," used in a statute, includes the injuries inflicted upon a father by the seduction of his daughter. This will

be seen by reference to the elaborate and able opinion in *Johnson v. Bradstreet Co.* 87 Ga. 79, 13 S. E. 250, where Mr. Justice Lumpkin discusses the meaning of the words "injury to person" in the light of the common law, and subsequently cites the following authorities, which are very much in point in the present case: On page 84, 87 Ga., and page 252, 13 S. E., he says: "Aside from this, the following authorities seem to sustain our judgment in the case before us: In the case of *Oregin v. Brooklyn Crosstown R. Co.* 75 N. Y. 192, 31 Am. Rep. 459, construing the meaning of the words 'actions on the case for injuries to the person of the plaintiff,' found in a New York statute, the court held that these words included actions for slander, libel, assault and battery, and false imprisonment, and that cases of this kind were to be treated as actions for injuries done to the person of the plaintiff. Under § 2157 of the Code of Alabama, actions for injuries to the person or reputation are abated by the death of a party. Construing this section in the case of *Garrison v. Burden*, 40 Ala. 513, it was held that an action to recover damages for the seduction of the plaintiff's wife was an action for injuries to the person, and therefore, under the section cited, abated by the death of the defendant. Judge, J., says: 'Is adultery or criminal conversation with the wife, in legal contemplation, an injury to the person of the husband? Blackstone and Chitty both declare that it is, . . . and upon this point we are not aware there is any conflict of authority.' This case, in effect, rules that injuries to the person are not confined to physical injuries. In the case of *Delamater v. Russell*, 4 How. Pr. 234, it was held that an action for criminal conversation with the plaintiff's wife was an action for injury to the person of the plaintiff. Parker, J., says 'Rights of persons are divided into absolute and relative. Criminal conversation is classed under actions for injuries to the latter. This classification is related by all our elementary writers.'

As it clearly appeared that the original action in the case under consideration was brought more than two years after the right of action accrued, there was no error in sustaining the motion to dismiss the case.

Judgment affirmed.

All the Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Eugenie LAVIGNE, Exrx., etc., of Alexander Lavigne, Deceased,
v.

LIGUE DES PATRIOTES.

Marilda CHASSE, Claimant, Appt.

(178 Mass. 25.)

1. An illegitimate child is not a child
54 L. R. A.

or relative of her father, as those words are used in a statute designating the persons who may be beneficiaries in certificates of mutual benefit associations.

2. No relation of dependency exists between an illegitimate child of a married woman and her putative father, so as to entitle her to become a beneficiary in a benefit certificate issued to him, under a statutory provision as to "persons dependent" on him, where he merely boards with her

mother, paying his board when able, and is under no legal obligation to support the child.

(February 27, 1901.)

APPEAL by claimant from a judgment of the Superior Court for Bristol County denying her claim to the proceeds of a benefit fund owing by the defendant society because of the death of Alexander Lavigne, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. L. Elmer Wood, for appellant:

The designation of Miralda Chasse, the illegitimate daughter of Alexander Lavigne, is a valid designation in form and manner.

Anthony v. Massachusetts Ben. Asso. 158 Mass. 322, 33 N. E. 577.

The claimant, in order to recover, must be either a relative of Alexander Lavigne or a person dependent upon him.

Acts 1894, chap. 367, § 8.

The word "relative" in this connection is construed liberally in every jurisdiction, and not strictly as in statutes relating to succession or inheritance, and in the construction of wills.

Bacon, Ben. Soc. 2d ed. § 260a; *Simcoke v. Grand Lodge*, A. O. U. W. 84 Iowa, 383, 15 L. R. A. 114, 51 N. W. 8; *McCarthy v. Supreme Lodge N. E. O. of P.* 153 Mass. 314, 11 L. R. A. 144, 26 N. E. 866; *Supreme Council A. L. of H. v. Perry*, 140 Mass. 580, 5 N. E. 634.

Alexander Lavigne boarded with claimant's mother and paid his board while he was able, and that payment formed part of the support of claimant. She was therefore, to that extent, dependent upon him,—quite as much as though he had contributed the same sum of money directly for the living expenses of the house, himself living there.

McCarthy v. Supreme Lodge N. E. O. of P. 153 Mass. 314, 11 L. R. A. 144, 26 N. E. 866.

Mr. Hugo A. Dubuque, for appellee:

Inasmuch as the by-laws of the defendant society give the mortuary benefits to the "legal beneficiary of a deceased member," we must look to the statutes in force at the time of the designation, to wit, November 2, 1896, to find who the "legal beneficiary" is.

Brierly v. Equitable Aid Union, 170 Mass. 220, 48 N. E. 1090.

If that is so, then the legal beneficiaries in this case must be the "husband, wife, affianced husband, affianced wife, relatives of, or persons dependent upon, such members." Stat. 1894, chap. 367, § 8.

If the claimant is entitled to the benefits in this case, she must come under the term of a "relative" or a "person dependent" upon the deceased.

Supreme Council A. L. of H. v. Perry, 140

NOTE.—There seem to be no precedents on the exact question of insurable interest of or in life of illegitimate child.

On the general question of insurable interest in life of parent or child or other relative by blood, see *note to Life Ins. Clearing Co. v. O'Neill* (C. C. App. 3d C.) 54 L. R. A. 225.

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Mass. 580, 5 N. E. 634; *Brierly v. Equitable Aid Union*, 170 Mass. 218, 48 N. E. 1090.

An illegitimate child does not inherit from his putative father.

Kent v. Barker, 2 Gray, 535. See *Schouler*, Dom. Rel. 4th ed. 1889, §§ 276, 277.

The words "relatives or relations" in a will mean the next of kin who inherit under the statutes of distribution.

Anonymous, 1 P. Wms. 327; *Smith v. Campbell*, 19 Ves. Jr. 400; *Varrell v. Wendell*, 20 N. H. 431; *Rayner v. Mowbray*, 3 Bro. Ch. 234; *Elliot v. Fessenden*, 83 Me. 197, 13 L. R. A. 37, 22 Atl. 115; 2 Jarman, Wills, 6th Am. ed. 1893, *1076.

They do not include even a wife.

Esty v. Clark, 101 Mass. 36, 3 Am. Rep. 320.

Nor a stepchild.

Kimball v. Story, 108 Mass. 382; *Brookfield v. Warren*, 128 Mass. 287.

Only legitimate children can be technically called relatives entitled to be classed as "legal beneficiaries."

Van Voorhis v. Brintnall, 23 Hun, 260.

It would be against public policy and good morals to hold otherwise.

See *Keener v. Grand Lodge*, A. O. U. W. 38 Mo. App. 543; *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892.

Dependency is a fact which must appear. It is not possible, but actual, dependency that is meant by the statute. It is so under the employers' liability acts.

Daly v. New Jersey Steel & I. Co. 155 Mass. 1, 29 N. E. 507; *Hodnett v. Boston & A. R. Co.* 156 Mass. 86, 30 N. E. 224.

The same is true as to benefit societies.

1 *Bacon*, Ben. Soc. 2d ed. 1894, § 508, pp. 512, 513; *Supreme Council A. L. of H. v. Perry*, 140 Mass. 580, 5 N. E. 634; *McCarthy v. Supreme Lodge N. E. O. of P.* 153 Mass. 314, 11 L. R. A. 144, 26 N. E. 866.

The beneficiary must be dependent upon the member in a material degree for support.

McCarthy v. Supreme Lodge N. E. O. of P. 153 Mass. 314, 11 L. R. A. 144, 26 N. E. 866.

A mistress is not considered a dependent.

Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543; *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892.

Nor an affianced wife, as she is termed in our statutes, before Stat. 1890, chap. 341.

Supreme Council A. L. of H. v. Perry, 140 Mass. 580, 5 N. E. 634.

Even a mother who does not live with her son, and who receives no support from him, is not a dependent.

Elsey v. Odd Fellows' Mut. Relief Asso. 142 Mass. 224, 7 N. E. 844.

Nor a sister under similar circumstances.

Smith v. Boston & M. R. Relief Asso. 168 Mass. 213, 46 N. E. 626.

Nor a brother under the term "family."

Supreme Council, C. B. L. v. McGinness, 59 Ohio St. 531, 53 N. E. 54.

Nor a creditor.

Skillings v. Massachusetts Ben. Asso. 146 Mass. 217, 15 N. E. 566.

Nor a wife's niece, where the term used is "family, heirs, or blood relatives."
Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065.

It cannot be claimed that, because the statutes would authorize a prosecution for bastardy against the deceased, he could be compelled by law to support the claimant, and that, therefore, she would be entitled to be supported by him.

Dependency means actual support, not the legal obligation to support.

McCarthy v. Supreme Lodge N. E. O. of P. 153 Mass. 314, 11 L. R. A. 144, 26 N. E. 866; *Elsev v. Odd Fellows' Mut. Relief Asso.* 142 Mass. 224, 7 N. E. 844.

The plaintiff, who has paid the dues of the deceased, would have an equitable lien on the benefits for the amount paid by her.

Tepper v. Supreme Council of R. A. 59 N. J. Eq. 321, 45 Atl. 111.

The designation is invalid in law, and the executrix may sue and recover the mortuary benefits.

Clarke v. Schwarzenberg, 162 Mass. 98, 38 N. E. 17; *Sargent v. Supreme Lodge K. of H.* 158 Mass. 557, 33 N. E. 650; *Shes v. Massachusetts Ben. Asso.* 160 Mass. 289, 35 N. E. 855.

Morton, J., delivered the opinion of the court:

At the time of his death the plaintiff's testator was a member in good standing of the defendant corporation, which is a beneficiary association. The association admits that it has in its hands \$680 as mortuary benefits of the deceased, and is ready to pay it to the plaintiff or the claimant, as the court may decide. There are no other claimants. Marilda Chasse, the claimant, is the illegitimate child of the testator. The plaintiff is the testator's sister, and is executrix of his will, which has been duly proved and allowed. By this will he left to his sister the benefits coming to him from the association. He also made her residuary legatee. Afterwards, by an instrument in writing, he designated said Marilda Chasse as the beneficiary entitled to all mortuary or other benefits coming to him or his beneficiary from the association; describing her in the instrument as his natural child, and alleging that the designation was made in recognition of his moral duty to support her. He never contributed to her support, except in the sense in which he did so by paying his board, when able, to her mother, with whom he boarded. The mother kept other boarders and took in washing. The plaintiff paid his dues to the defendant society, and advanced him money for his board, medical care, and attendance. Without such assistance on her part, his membership in the so-
 54 L. R. A.

ciety during the last year of his life would have lapsed, and he would have lost the sick benefits which he received, and the mortuary benefits at his death, for which this action has been brought. The question is whether the said Marilda Chasse was or could be legally designated as the beneficiary, in accordance with article 28 of the by-laws of the association, that the "widow or other legal beneficiary of the deceased member shall be entitled," etc., and the statutes applicable to such associations.

This association was organized under Stat. 1888, chap. 429. By that statute the beneficiary was limited to "the husband, wife, children, relatives of or persons dependent on such member." The statute has since been extended so as to include affianced husband and affianced wife (Stat. 1890, chap. 341, § 1; Stat. 1894, chap. 367, § 8), and child by legal adoption and parent by legal adoption (Stat. 1898, chap. 474, § 11; Stat. 1899, chap. 442, § 11), but the other beneficiaries remain the same. No one outside of the classes thus named can be a beneficiary. *Brierly v. Equitable Aid Union*, 170 Mass. 218, 48 N. E. 1090; *Supreme Council A. L. of H. v. Perry*, 140 Mass. 580, 5 N. E. 634. Is the claimant a child of, or a relative of, or a person dependent upon, the deceased member, within the meaning of the statute? By "children," as that word is used in the statute, is meant, we think, legitimate children. *Kent v. Barker*, 2 Gray, 535; 2 Jarman, Wills, 6th Am. ed. 1076. The word "relatives" is of broader scope, but manifestly cannot be held to include an illegitimate child. *Esty v. Clark*, 101 Mass. 36, 3 Am. Rep. 320; *Kimball v. Story*, 108 Mass. 382; *Elliot v. Fessenden*, 83 Me. 197, 13 L. R. A. 37, 22 Atl. 115. The attempted designation of the claimant as a beneficiary must be regarded, therefore, as invalid. Neither do we think that, within any fair construction of the words, she can be considered a dependent upon him. He contributed no more to her support than any one of the other boarders whom her mother took, and, as matters stood, he was under no legal obligation to support her. In no just sense can there be said to have been, directly or indirectly, a relation of dependency between the child and its putative father. See *McCarthy v. Supreme Lodge N. E. O. of P.* 153 Mass. 314, 11 L. R. A. 144, 26 N. E. 866; *Elsev v. Odd Fellows' Mut. Relief Asso.* 142 Mass. 224, 7 N. E. 844. The association admits that either the plaintiff or the claimant is entitled to the fund. For reasons which have been given, we think that the claimant is not entitled to it. It follows that the plaintiff is entitled to it.

Judgment affirmed.

TENNESSEE SUPREME COURT.

J. D. CAMPBELL

v.

PROVIDENT SAVINGS & LOAN SOCIETY *et al.*, *Appts.*,John RUHM *et al.*, *Petitioners.*

(.....Tenn.....)

That the fund reached by a general creditors' bill against an insolvent building and loan association is all absorbed by prior claims not secured by mortgage or other fixed lien, so that the one who instigated it will receive nothing, will not prevent the allowance of a reasonable fee to his solicitors out of the fund, since their work was done for the benefit of all the distributees.

(November 24, 1900.)

NOTE.—Allowance of attorneys' fees out of fund for attorneys of creditors who sue in behalf of themselves and other creditors.

I. In general.

II. Suit to have conveyances set aside.

a. In general.

b. From what part of fund allowance made.

III. Suit for administration of decedent's estate.

a. In general.

b. From what part of fund allowance made.

c. Where plaintiff's debt not reached.

IV. Suit for appointment of receiver and to wind up insolvent corporation.

a. In general.

b. From what part of fund allowance made.

c. Where plaintiff's debt not reached.

V. Suit to enforce stockholder's liability.

VI. Proceedings in bankruptcy cases.

a. In general.

b. Amount of fee.

VII. Conclusion.

I. In general.

The attorneys for a creditor who brings a suit in behalf of himself and other creditors will ordinarily be allowed compensation out of the fund realized for creditors generally, if his services prove beneficial to them.

Thus, in *Swedish-American Nat. Bank v. Davis*, 71 Minn. 509, 74 N. W. 287, an allowance of counsel fees was granted to creditors who successfully opposed a fraudulent claim made against an insolvent estate, as a result of which the funds available for creditors generally was largely increased.

And where general creditors file a bill to have a mortgage for the exclusive security of the mortgagees declared a general assignment for the benefit of all the creditors, and a decree is rendered declaring it such, after which the mortgagee is allowed to share with the other creditors in the distribution of the fund, the attorney for the complainants will be allowed compensation out of the entire fund, instead of that remaining after deducting the debt of the mortgagee. *Anniston Loan & T. Co. v. Ward*, 108 Ala. 85, 18 So. 937.

And where a conveyance is intended as a deed of trust for creditors, in which three classes of creditors are preferred, and creditors of the third class bring a suit for themselves and other creditors similarly situated to have the convey-

A PPEAL by defendants from a judgment of the Court of Chancery Appeals reversing a decree of the Chancery Court for Davidson County disallowing a petition for the payment of fees out of a fund belonging to the defendant society, which had been reached by a creditors' bill filed by petitioners' client. *Affirmed.*

The facts are stated in the opinion of the Court of Chancery Appeals, which was delivered by BARTON, J., and was as follows:

The question involved in this case is as to the right of John Ruhm & Son, solicitors and counsel for the original complainant, to have their fees paid out of a fund impounded in the case. The original bill was filed on November 12, 1897, by Ruhm & Son, who are lawyers and practicing solicitors,

and declared a general assignment for creditors, in which they are successful, the fee of plaintiff's attorney will be allowed out of the fund in the hands of the trustee for creditors of the third class, but not out of that part of the fund for the first and second classes, as the suit is not for their interests. *Lochte v. Bium*, 10 Tex. Civ. App. 385, 30 S. W. 925. See also *Fechheimer v. Baum*, 43 Fed. 719, *infra*, IV. a.

And where unsecured creditors of a railroad company instituted proceedings on behalf of themselves and all other creditors of the same class who should come in and contribute to the expenses, to establish a lien on the property of the company in the hands of railroad companies which have purchased and are in possession of the same, in which they were successful, the court allowing all unsecured creditors to prove their claims, after which the defendant railroad companies purchased the claims of the plaintiffs and other unsecured creditors, the attorneys for plaintiffs, who had agreed to conduct the suit for plaintiffs for a specified compensation with the understanding that they might be allowed additional compensation out of the fund, will be allowed such extra compensation as to the demands of unsecured creditors who had made no special contract with them, and will be given a lien upon the property to secure the same, where such lien is authorized by the law of the state by which the rights of the parties are governed. *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387.

And where a creditor of an insolvent corporation, who has made an assignment for creditors, files a bill asking the court to assume jurisdiction of the assignment and require the trustee therein to give bond and to administer and settle the trust created by the assignment, and the trustee admits the necessity of the suit, and submits to the jurisdiction of the court, and executes a bond under its order, and refrains from bringing suit himself for that purpose, the attorney for such creditor is entitled to be allowed fees out of the fund for preparing and filing the bill and taking the necessary and proper orders to accomplish the purposes of the suit, although there was no apparent, immediate, or threatened danger of waste or destruction at the time the bill was filed; but he will not be allowed fees for contesting claims of persons against the estate, as that was primarily the duty of the assignees. *Strong v. Taylor*, 82 Ala. 213, 2 So. 760.

But no allowance for counsel fees will be

for and in the name of James D. Campbell, against the defendant Provident Savings & Loan Society, as a general creditors' bill to wind up the defendant corporation as an insolvent corporation. The bill alleged that the complainant had been a member and stockholder in the defendant association; that, under the rules and regulations of the association, he had given notice to its officers to withdraw, and that under this notice he was entitled to withdraw the value of his stock, the amount of which he set out, and that by reason of the notice he had become a creditor, but that the officers of the association had failed and refused to pay him the amount claimed and due to him, and had failed and refused to take any steps; that he had also applied to the treasurer of the state, and had been informed that the corporation was an insolvent and non-

going corporation. The bill also charged that the corporation was insolvent, had ceased to do business, and its officers and agents neglected and refused to pay its debts. By amendments it was shown that there were certain assets belonging to the corporation, and that certain foreclosure suits had been brought in its behalf against parties who had borrowed from it. It was charged that the bill was filed on behalf of complainant and all other creditors and stockholders of the corporation to wind up the defendant corporation as an insolvent corporation, and it was asked that the bill be allowed to be filed as a general creditors' bill; that all other suits against the corporation be enjoined; that a receiver be appointed to collect all of its assets; and that all of its assets be collected by the receiver to be appointed, and distributed among its

proceeds in favor of a creditor who institutes proceedings under Minn. Gen. Stat. 1894, § 4249, which result in an order directing that creditors be permitted to share in the distribution of the funds of an insolvent estate without filing releases, where nothing was added to the trust fund thereby, either directly or indirectly, and the estate was in no manner benefited by such action. *Merrick v. Bonness*, 66 Minn. 185, 68 N. W. 850; *Swedish-American Nat. Bank v. Davis*, 71 Minn. 509, 74 N. W. 287.

And where certain creditors of an assignor for creditors bring an action solely in their own behalf to secure priority in the distribution of the estate, their attorneys will not be allowed a fee out of the assigned estate, although the court retains the action to settle the rights and equities as between the defendants. *Jaffray v. Steedman*, 38 S. C. 557, 17 S. E. 38.

And where certain creditors intervene in an action in which a receiver has been appointed for a railroad, their attorney will not be allowed a fee either out of the general fund or a fund realized from the property remaining in the receiver's hands at the time of their intervention, where the receiver had obtained possession of all the property before such intervention, and the intervening creditors merely hastened the proceeding that they might realize out of it at an earlier date than they possibly would otherwise have done, and the attorney performed only such duties as diligent counsel would have performed on behalf of their own clients. *Ober & Sons Co. v. Macon Constr. Co.* 100 Ga. 635, 28 S. E. 388.

II. Suit to have conveyance set aside.

a. In general.

Where a creditors' suit is brought to have a conveyance set aside as fraudulent, the fees of plaintiff's counsel will be first paid out of the fund realized, where no rights except those of creditors are involved, and there are no priorities between them.

Thus, in *Rains v. Rainey*, 11 Humph. 261, the court said that of course the creditor collecting a fund by means of a creditors' bill would be entitled to an allowance for all expenses and costs necessarily incurred in doing so.

And in *Bloomington v. Stein*, 42 Ohio St. 168, which was an action by a creditor to have a note and warrant of attorney and judgment rendered thereon declared fraudulent as to creditors and for the appointment of a trustee and the subjection to the payment of debts of the

proceeds of a levy made under the judgment, costs, including counsel fees, were ordered to be first paid out of the fund.

And where a creditor files a bill to set aside as fraudulent a conveyance by a trustee under a will, and to have creditors in whose favor the trustee had confessed judgments declared to have no preference, and to have an assignment for creditors executed by the trustee declared void, in all of which he is successful, his attorney will be allowed a fee out of the funds thus realized. *Weed's Estate*, 163 Pa. 600, 30 Atl. 278.

And where certain creditors of one who had made a cession of his property instituted a suit for the benefit of all the creditors to have the cession annulled as fraudulent, and succeeded in finding property which had been fraudulently omitted from the cession, and they sell all the property for the benefit of the creditors generally, their attorneys will be allowed a fee out of the fund, as the mass of creditors, received the benefit of what was done. *Andrus v. His Creditors*, 45 La. Ann. 1067, 13 So. 635; *McGraw v. Andrus*, 45 La. Ann. 1073, 13 So. 630.

And where a bill is filed in behalf of the complainant and all other creditors of a certain person to impeach a settlement by him and his wife and daughter, in which the complainant is successful, he will be allowed his costs as between solicitor and client as well as between party and party out of the fund realized and made available for the creditors by the diligence and at the risk of the complainant. *Goldsmith v. Russell*, 5 De G. M. & G. 547, 25 L. J. Ch. N. S. 232, 1 Jur. N. S. 985.

And a railroad bondholder, who, in behalf of himself and other bondholders, brings an action to have fraudulent conveyances by the trustee of a trust fund to secure payment of the bonds set aside and the trustee enjoined from selling any more land, and for the appointment of a receiver, by whose efforts a large amount of the trust fund is secured and saved, is entitled to have his counsel fees paid out of the fund. *Internal Improv. Fund Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157.

And where a trustee in insolvency refuses to institute proceedings to set aside a fraudulent conveyance by the insolvent, and one of the creditors brings a suit for that purpose which is successful, the fee of his counsel will be allowed out of the estate. *Re Leiman*, 32 Md. 225, 3 Am. Rep. 132.

And where, on the appointment of a receiver of an insolvent firm, attorneys are employed by the general and unsecured creditors to contest the validity of chattel mortgages given by the

creditors and stockholders according to law. This application was resisted. But the chancellor, by a decree, directed the bill to be filed, and it was sustained as a general creditors' bill. All other suits against the corporation were enjoined, and a receiver was appointed under this bill, and directed to collect all of its assets, and the receiver so appointed did proceed to collect the assets belonging to the corporation; and it is shown by an agreement filed to this record that the receiver had collected some \$2,482.13, which had been disbursed under orders and decrees of the court in this cause. The court proceeded to wind up the defendant corporation as an insolvent corporation in this case, and to disburse the funds collected. An application was made by Ruhm & Son, counsel for the complainant, to be allowed fees out of the funds brought into the case, as coun-

sel for the general creditors. A reference was had to the master, who reported that a reasonable fee to Ruhm & Son would be the sum of \$200. No exception was made as to the amount. But the receiver in the case objected to the fee being allowed to Ruhm & Son on the ground that Campbell, the complainant, in whose name they had filed the bill, was a general creditor, and that the funds collected in the case had all been consumed by creditors who had prior claims. The chancellor sustained the position of the receiver, and disallowed the fees claimed. From this decree Ruhm & Son have appealed and assigned errors.

Besides the facts above stated, the only material facts necessary to be found are that we find that all of the funds which have been brought into this case were brought in under the original bill, and col-

firm before the appointment of the receiver, who did nothing to defeat such mortgages, and the attorneys are successful in their efforts, the fees will be first paid from the sum realized through their efforts. *Ohio Valley Nat. Bank v. Cummings*, 21 Ohio C. C. 782.

And in a creditor's suit to set aside a chattel mortgage as preferential, in which the judgment declares that the mortgage is void as against plaintiff and such other creditors as may contribute to the expenses of the suit, and an appeal is taken on which the judgment is affirmed, the plaintiff is entitled to have the other creditors contribute to the costs of both the trial and the appeal as between solicitor and client as well as between party and party before coming in to share in the fund, and to avoid circuitry such costs will be directed to be paid out of the fund. *Macdonald v. McCall*, 12 Can. Pr. Rep. 9.

But *Morton v. New Orleans & S. R. Co. & I. Asso.* 79 Ala. 624, holds that the attorneys for a judgment creditor of an insolvent railroad company who seek to set aside a deed of trust for the benefit of certain bondholders will not be allowed a fee out of the fund where such deed is held valid and the principal efforts of the attorneys were solely for the benefit of their own clients and detrimental to the bondholders.

In *Strike v. McDonald*, 2 Harr. & G. 191, affirming 1 Bland, Ch. 57, the plaintiffs in a creditors' suit agreed to pay a specified per cent of the amount recovered to their attorneys, and after other creditors appeared the attorneys made a petition to the court showing the amount recovered, and the court awarded them their fees accordingly out of the fund. Subsequently the plaintiffs filed a petition in the case showing that one of the attorneys died after such award and before anything further was done by him, and that another attorney had been employed in his place, and asking that the same percentage be allowed to the latter which would have been given to the former if he had not died. The court, however, refused to consider the matter, stating that no objection to the allowance of the former attorney had previously been made, and that contracts between solicitors and their clients must be left to be decided in the same manner as all other contracts, and cannot be introduced into and blended with any pending suit.

In fixing the amount of fees to be allowed out of the fund to an attorney for general creditors who succeed in having chattel mortgages executed by the debtor declared invalid after the appointment of a receiver who did nothing in regard to the matter, the fact that the general creditors whom he represented were also liable

to him for fees in the matter, the amount of the funds in the receiver's hands for distribution, the amount of the mortgages declared invalid, the compensation allowed the receiver and his attorney, and the value of the services rendered, should all be considered. *Ohio Valley Nat. Bank v. Cummings*, 21 Ohio C. C. 782.

b. From what part of fund allowance made.

The attorneys for the plaintiff will be allowed their fees out of the part of the fund going to creditors in the same class as the plaintiff, but no part of the fee will be allowed from funds going to prior creditors who are not benefited by the suit, or from that part of the fund which would go to persons other than creditors.

Thus, in a suit by creditors to set aside a fraudulent assignment in which other creditors intervene, the complainant's attorney will be allowed a fee out of the fund which is found to be payable to complainant and such intervening creditors. *Adams v. Kehlor Milling Co.* 88 Fed. 281.

And counsel fees allowed for setting aside a conveyance in fraud of creditors are not to be taken from the claims of specific lien holders who are not benefited, but from those of the general creditors for whom the property was secured. *Richter v. Schoenfeldt*, 1 Ohio L. J. 133.

And an attorney representing absent creditors in a suit to have a cession annulled as fraudulent will not be allowed a fee out of the general fund, but only out of the fund for such creditors. *Andrus v. His Creditors*, 46 La. Ann. 1351, 16 So. 215.

And where a judgment creditor of an insolvent railroad company seeks to set aside a deed of trust for the benefit of certain bondholders the attorneys of creditors holding a second lien, who filed a cross bill for the foreclosure of the trust deed, which was held to be valid, will be permitted to ask for reasonable fees from any surplus which may be left for the payment of holders of such second lien. *Morton v. New Orleans & S. R. Co. & I. Asso.* 79 Ala. 624.

The attorneys for plaintiff in a creditors' bill to vacate deeds for fraud are entitled to a fee out of the proceeds of a sale of the land to the extent that they may be applied to the creditors who may come in and share in the result of the suit; but if the land sells for more than enough to pay creditors, the balance should not be diminished by any portion of the fee, or, in other words, the fee should be deducted from the amount of proceeds applied to creditors' claims. *Wagner v. Mara*, 27 S. C. 97, 2 S. E. 844.

And in *Miller v. Keboe*, 107 Cal. 340, 40 Pac.

lected by the receiver under his appointment made under the original bill. It appears to have been decreed in the court below (upon what authority or what ground we are not informed, though there is no appeal) that the complainant, Campbell, in whose name the original bill was filed, was what was known as a "free shareholder," and that for this reason his claim was postponed until other creditors and shareholders were paid in full, the result of which was that there was nothing left to pay on the debt of Campbell, in whose name the bill was originally filed. It does not appear that the funds which were realized were under any mortgage or lien, but we simply infer from what we see in the record (and it is an agreed record and very meager) that the funds were paid out upon other series of stock or claims, which, under the arrangement, appear to have been preferred. So that the result reached was that, although all the funds were collected by the receiver-

ship established under this bill in process of distribution, they were all used up before the complainant's claim could be reached. But at the same time, so far as we can see from this record, all of these funds were collected by the receiver, and all were brought into court under this bill. But for the filing of the bill, so far as it appears from this record, they might not have been realized upon, and they certainly all were brought into court, as we say, under this bill. Upon this state of facts, we are of the opinion that the solicitors for the complainant (the appellants, Ruhm & Son) were entitled to be paid their reasonable fees, which it is agreed should be fixed at the sum of \$200 out of the funds collected by the receiver, and should be a charge upon such general funds, notwithstanding, under the decree of the chancellor, nothing was realized to pay the original complainant. This case does not belong to that class of cases of which *Kelly v. Mountain City Club*, 101 Tenn. 286,

485, a suit was brought by creditors to have a deed by the debtor to his wife declared fraudulent, in which they were successful, and the court held that their attorney was not entitled to fees out of the gross proceeds of a sale of the land, as that would be to make the debtor's wife pay the attorney's fee out of the residue coming to her, and there is no provision under the California statute for recovering an attorneys' fee from an adverse party in such an action. The court said in this case that where one beneficiary brought an action for the benefit of himself and all the other beneficiaries the plaintiff might have a reasonable counsel fee out of the fund, but that such rule applied only where all the parties had a common interest. The opinion does not show whether the fee was allowed out of that part of the fund available for the payment of debts, but such allowance would probably have been made if there had been a request therefor.

And *Lippincott v. Shaw Carriage Co.* 34 Fed. 570, holds that a solicitor's fee will not be allowed out of the fund to complainant in a creditors' suit to have certain mortgages executed by an insolvent corporation set aside and the mortgages declared trustees for creditors as to the proceeds of mortgaged property sold in which the mortgages are held invalid on the sole ground that some of the directors of the corporation were liable as indorsers on the notes secured by the mortgages, as the allowance of such fee from the fund would be to make the mortgages pay more than their pro rata share of the fee, as it would come out of the surplus which would otherwise come to them. The court said, however, that an allowance of such fees, if asked, might properly be made against interveners who had accepted the invitation of the bill.

But where a litigation is instituted by general or unsecured creditors of an insolvent trust estate to set aside a conveyance made and judgments confessed by the trustee for the purpose of giving a preference to certain other creditors by which a large amount of property is restored to the estate for the benefit of all the creditors, the fees of plaintiff's attorneys should be paid out of the whole fund, including that going to the creditors who had been preferred by the trustee. *Weed's Estate*, 163 Pa. 595, 30 Atl. 272. See also *Annlston Loan & T. Co. v. Ward*, 108 Ala. 85, 18 So. 937; *Lochte v. Blum*, 10 Tex. Civ. App. 885, 30 S. W. 925, *supra*, I.; *Stanton v. Hatfield*, 1 Keen, 358, *infra*, III. b. 54 L. R. A.

III. *Suit for administration of decedent's estate.*

a. *In general.*

A very common action in England and Ireland, but one which is quite infrequent in this country, is that by a creditor for the administration of a decedent's estate. Where the action is brought by the creditor in behalf of himself and all other creditors, and there are no creditors prior to complainant, his attorney will be allowed fees out of the fund realized if there is not a sufficient amount to pay the debts in full; but if there is more than enough for that purpose such fees will not be allowed out of the entire fund, as that would be allowing the fees out of the fund going to the legatees, heirs, or next of kin.

Thus, in such a suit the plaintiff will be allowed costs as between solicitor and client where the fund realized is insufficient to pay debts in full. *Re Flynn*, Ir. L. R. 17 Eq. 457; *Hood v. Wilson*, 2 Russ. & M. 687; *Tootal v. Spicer*, 4 Sim. 510.

And where the assets are sufficient to pay the debts, but not sufficient to pay in addition the costs taxed as between party and party, the plaintiff's extra costs as between solicitor and client will be paid out of the fund. *Sutton v. Doggett*, 8 Beav. 9, 9 L. J. Ch. N. S. 335, 4 Jur. 959.

And in *Brodie v. Bolton*, 3 Myl. & K. 168, a fund remained after the satisfaction of all debts, and the master of the rolls held that the insufficiency of the fund to pay the debts was the only case in which the plaintiff in a creditor's suit was entitled to his costs as between solicitor and client.

And in *Blackett v. Blackett*, 5 L. J. Ch. N. S. 213, the master of the rolls held that costs as between solicitor and client could not be given, even with the consent of all the parties, unless it clearly appeared that the estate was insufficient to pay the debts, as otherwise it would be giving extra costs out of a fund belonging to the legatees or next of kin.

And where creditors bring suit against the devisees for the administration of the testator's estate, there being no personality, the costs of both plaintiffs and defendants as between party and party will be first paid out of the fund realized, and then the costs of the plaintiff as between solicitor and client if the fund is insufficient to pay debts, after which the debts

47 S. W. 426, is an example. That case and the other cases there cited in the opinion of the court are cases where a fund has been appropriated by a mortgage or fixed lien, and is so secured that no action on behalf of the beneficiaries is needed, and where general creditors come in seeking a sale of the property belonging to the corporation, and a foreclosure of the mortgage. In such cases it is evident that the complainant in a general creditors' bill confers no benefit upon the beneficiaries under the mortgage. He secures nothing for them, and it would be an obvious injustice to allow such a creditor or his counsel to reduce the fund already secured by contract by costs and charges which are of no benefit. And in these cases, too, it appears that the beneficiaries under the first mortgage came in themselves, asking active relief and seeking

an enforcement of their security, and did not accept and did not receive any real benefit under the general creditors' bill. Such cases, in our opinion, in no sense resemble the case at bar. Here all the assets that were administered upon in this case were brought in by reason of and under the general creditors' bill, and it does not appear that there was any mortgage or other fixed lien upon the assets. As we say, the record is meager, and we are not accurately informed why it was that the original complainant was unable to realize anything out of the assets. He claims in his bill to have been a creditor, and in one sense he was; but, under our decisions, the association having become insolvent, he would be placed upon a par with other stockholders, and treated as such. There is an intimation in the record, or a recitation, from which we

will be paid; but if the funds are more than sufficient to pay debts the latter costs will not be allowed. *Henderson v. Dodds*, L. R. 2 Eq. 582, 14 L. T. N. S. 752, 14 Week. Rep. 908, 33 Beav. 286.

And in *Ferguson v. Gibson*, L. R. 14 Eq. 379, 41 L. J. Ch. N. S. 640, the vice chancellor said that he would deal with the costs according to the preceding case of *Henderson v. Dodds*, L. R. 2 Eq. 582, 14 L. T. N. S. 752, 14 Week. Rep. 908, 33 Beav. 286, which laid down a very just and simple rule.

And where an action is commenced by the administratrix against the next of kin, and the administratrix does not go on with the suit, but the conduct of it is given to certain creditors who carry it on in behalf of all the creditors and succeed in recovering a fund which is insufficient to pay the debts in full, such creditors will be entitled to costs out of the fund as between solicitor and client as though the action had been commenced by them. *Re Richardson*, L. R. 14 Ch. Div. 611, 49 L. J. Ch. N. S. 612, 43 L. T. N. S. 279, 28 Week. Rep. 942.

And a creditor to whom the conduct of such a suit is given will be allowed costs as between solicitor and client. *Joseph v. Goode*, 23 Week. Rep. 225.

In *Horne v. Horne*, 14 Week. Rep. 957, which was an administration action by legatees, the vice chancellor said that the reason for taxing costs as between solicitor and client in a creditor's suit was that a creditor as a party suing for the benefit of others is entitled to something more than ordinary creditors, but that the mere fact that one of the plaintiffs was a creditor did not make such rule applicable where he sued as a legatee.

Where a petition for the sale of real estate is filed by an encumbrancer, and a fund is produced for the payment of several encumbrances of the same priority as plaintiff's, the latter's costs will first be allowed out of the fund. *Watson v. Fitzpatrick*, 11 Ir. Ch. Rep. 213.

Where a separate creditor of a testator who was a member of a firm of traders brings an action for the general administration of the estate, and enough is realized through his efforts to pay the separate creditors in full and to partly pay the firm creditors, he will be entitled to costs as between solicitor and client out of the fund, as otherwise he would be in a worse condition than the other separate creditors. *Re McRea*, L. R. 32 Ch. Div. 613, 55 L. J. Ch. N. S. 708, 54 L. T. N. S. 728.

In *Shortley v. Selby*, 5 Madd. 447, the vice chancellor held that the plaintiff's solicitor in a creditors' suit had waived the right to deduct a fee from the claims of other creditors

by the plaintiff's failure to pursue the decree and call for contribution.

A suit by a creditor in behalf of himself and other creditors to subject the real estate of a deceased debtor, which had descended to his heirs, to the payment of his debts, is practically a creditors' bill in which the plaintiff is entitled to have his counsel fee paid out of the common funds which have been brought into court by his action, even though, after the commencement of the action, controversies arose as to the relative priorities of creditors, and the heirs are the same persons in fact, though not in law, as the beneficiaries under a judgment which is given priority over plaintiff's judgment. *Lawton v. Perry*, 45 S. C. 319, 28 S. E. 53.

And where a bill for the administration of the insolvent estate of a decedent and the sale of the real estate is properly filed by a creditor in behalf of himself and other creditors in accordance with Shannon's (Tenn.) Code, §§ 4102-4108, by which the estate is brought under the jurisdiction of the court, the solicitors for plaintiff are entitled to a fee out of the proceeds of a sale of the real estate, although the administrator expected to file such a bill himself, as his solicitor would probably have claimed an equal amount, and a bill by a creditor is specially authorized by the statute. *Bank of Blount County v. Smith* (Tenn. Ch. App.) 48 S. W. 286.

But where the sole object of a creditor's suit to administer a decedent's estate is to secure the payment of the debt due the creditor bringing the suit, and the only other creditor is represented by attorney, and no advantage accrues to him from the services of plaintiff's attorney, such attorney will not be allowed a fee out of the fund, under Ky. Stat. § 489, authorizing the making of reasonable compensation in such a suit if it appears that one or more of the parties to the suit have prosecuted it for the benefit of others, and have been at trouble and expense in conducting the same. *Dougherty v. Cummings*, 20 Ky. L. Rep. 1948, 50 S. W. 551.

And attorneys for certain creditors of an insolvent decedent's estate, who begin proceedings to surcharge the accounts of the administratrix, the object of which is to increase the assets of the estate, and who succeed in largely augmenting the funds for distribution, cannot have the funds in the hands of the administratrix charged with a solicitor's fee in their favor, where their efforts are in the main directed to securing all the benefits flowing from their services to their own clients to the exclusion of all others. *Rives v. Patty*, 74 Miss. 381, 20 So. 862. The court says in this case

infer that the assets which were brought in were paid to creditors and to preferred stockholders. We know of no law in this state authorizing preferred stock in building and loan associations, but we do not regard it as making any material difference, as the question now stands before us, as to why the complainant did not receive anything. It appears that, under decrees which have not been appealed from, such is his status. But, whether he was a stockholder or a creditor, it appears that the result of the filing of his bill was to bring into court for the benefit of all a considerable fund; that on this fund no liens were fixed, but that, as being funds of an insolvent corporation, certain priorities were adjudicated; and that by this adjudication the funds were all appropriated before complainant's claim was reached. But he and his counsel brought the funds into court for the benefit of all, and as it does not appear, as we say, that the funds had been covered by any mortgage or fixed lien, his bill was not an interference with fixed

rights, but was an attempt to save the assets for all the creditors and stockholders of the corporation, to be properly administered and distributed according to their several rights. It appears that the work was done for the benefit of all, and it is clearly proper and right that this work should be paid for out of the general fund brought into court. The result is, therefore, that the decree of the chancellor is reversed, and the cause will be remanded to the chancery court to be further proceeded with, with directions to pay Ruhm & Son a fee of \$200 out of the funds in court impounded under this bill. The costs of this proceeding will also be paid out of such funds, and a decree will accordingly be so entered. All concur.

Mr. John Ruhm for appellees.

The above decision was affirmed by the Supreme Court without further opinion on January 15, 1901.

that it would be a dangerous precedent to hold that counsel might intervene to protect the interests of persons who had not signified any desire for their services, and obtain attorney's fees if their efforts were successful, and that it would be almost as dangerous to compel litigants in a common cause to bear the expense of counsel fees incurred by their fellow litigants without their procurement or consent because of incidental benefits resulting from the services of the fighting litigants.

b. From what part of fund allowance made.

Where a fund is realized in a creditors' suit to set aside a fraudulent conveyance by the executor through the diligence of plaintiff, and the assets are more than sufficient to pay the debts and legacies, leaving a surplus for the residuary legatees, the costs of the plaintiff as between party and party will be paid out of the general fund, and his extra costs as between solicitor and client will be paid out of a fund equal to the amount of the debts, so that each creditor will pay a proportionate part of such costs. *Stanton v. Hatfield*, 1 Keen, 358.

Where a simple contract creditor brings a creditors' suit and procures the sale of real estate, the proceeds of which are more than sufficient to pay the debts, the plaintiff is not entitled to make judgment creditors contribute in proportion to their demands to his costs as between solicitor and client, as the parties should be paid their costs out of the proceeds of real estate according to the priorities of their demands, and the judgment creditors have priority over simple contract creditors. *Newby v. Drew*, 10 Ir. Eq. Rep. 58.

c. Where plaintiff's debt not reached.

The cases in England, while conflicting to some extent, seem to be to the effect that plaintiff's attorneys' fees will be allowed if the suit is brought in good faith, although the fund is exhausted before plaintiff's debt is reached. In Ireland no costs of any kind are ordinarily allowed in such a case,—at least where the plaintiff knew that his debt would not be reached,—except for services in making out the title to land and bringing the fund into court, the benefit of which accrues to prior creditors. In several cases the question of costs is considered generally, and it is impossible to tell from the 54 L. R. A.

opinion whether the matter of attorneys' fees was before the court in any way whatever. In such case the decisions are not taken unless there is something in them which would seem to be helpful on the question of such fees.

Thus, where a creditors' suit is instituted by a simple contract creditor in behalf of himself and all other creditors, the plaintiff will be allowed his costs as between solicitor and client out of the estate, although the assets realized are insufficient to satisfy the specialty debts. *Jenkins v. Robertson*, 22 L. J. Ch. N. S. 874, 1 Week. Rep. 298. In this case the vice chancellor said that it was hard that when the specialty creditors did not have enough to pay them, their money should be taken to pay the extra costs of a creditor of a lower degree, but that he did not know of a case in which such costs had been refused.

But *Lechmere v. Brazier*, 1 Russ. Ch. 72, 4 L. J. Ch. 95, holds that where simple-contract creditors bring a suit against the personal representative of a decedent for an administration of his estate and the sale of his real estate, and the assets prove insufficient to pay specialty debts, the costs of the plaintiff as between party and party, but not as between solicitor and client, will be allowed out of the estate, where the specialty creditors could have satisfied their demands without the aid of a court of equity if such suit had not been brought. In this case the plaintiff's solicitor stated that he could find no instance in which any costs beyond those taxed as between party and party had been allowed in such a case.

In *Larkins v. Paxton*, 2 Myl. & K. 320, and *Barker v. Wardell*, 2 Myl. & K. 818, the master of the rolls held that where a simple contract creditor instituted a suit for the administration of a testator's estate, and the assets proved insufficient to pay the specialty creditors, the plaintiff should still be permitted his costs out of the fund, nothing being said as to costs between solicitor and client.

But in *Sullivan v. Bevan*, 20 Beav. 399, costs were refused on the ground that the plaintiff was informed before prosecuting the order that the assets were insufficient to pay the specialty creditors.

Where a simple contract creditor files a bill for the administration of the estate, and the assets are insufficient to pay the only specialty creditor whose suit at law had been enjoined at

the instance of the executor, the master of the rolls expressed the opinion that the assets ought not to be diminished by the payment of the plaintiff's costs; but, as there was a probability that further assets would be realized, the case was referred back to the master to continue the accounts. *Young v. Everest*, 1 Russ. & M. 426.

And in *Rowlands v. Tucker*, 1 Russ. & M. 635, the master of the rolls refused to allow costs in a case by a simple contract creditor where the assets were insufficient to pay specialty debts.

Ordinarily no costs of any kind will be allowed the plaintiff in a creditors' suit where the assets are insufficient to pay creditors who have a lien prior to that of plaintiff. *Gray v. Crawford*, 1 Ir. Eq. Rep. 274, *Jones & C.* 174.

In *Smyth v. Murphy*, 10 Ir. Ch. Rep. 42, the master of the rolls says that in suits by encumbrancers of real estate the rule in Ireland is that the plaintiff gets his costs in the same priority as his demand, the rule being different in England, the plaintiff there being paid his costs in the first instance.

No costs were given a simple contract creditor who brought a suit for the administration of a decedent's estate out of assets which proved insufficient to pay judgment and specialty creditors, where she knew before filing the bill that there were judgment debts far exceeding the amount of the assets, and instituted the suit merely to try their nature. *Fisher v. King*, 11 Ir. Eq. Rep. 460. The Lord Chancellor said that in suits to raise charges on real property the rule had long been settled that plaintiff gets his costs in the priority of his demands, and will not be allowed them out of a fund insufficient to pay prior creditors unless funds were thereby realized which might otherwise have been lost.

In *Drake v. Forde*, 3 Ir. Eq. Rep. 56, a simple contract creditor who instituted a suit for the administration of personal assets was not allowed his costs as against judgment and specialty creditors, for the payment of which debts the assets proved insufficient, where it did not appear that the suit was necessary for the due administration of the assets, and it does not seem to have been brought in good faith.

And in *Watson v. Fitzpatrick*, 11 Ir. Ch. Rep. 213, in which plaintiff was first allowed his costs out of a fund produced for the payment of several encumbrancers of the same priority as plaintiffs, the master of the rolls said that the rule established in *Peyton v. McDermott*, 1 Dru. & Wal. 234, and *Nelson v. Brady*, 2 Dru. & Wal. 143, 1 Connor & L. 239, 4 Ir. Eq. Rep. 359, was adopted to prevent junior creditors from bringing suit for the sole purpose of realizing costs when they knew that the funds could not reach them.

And where a junior creditor instituted a suit which he might have known was desperate he will not be allowed his costs, but if the debt was a hopeful one and instituted in good faith, his costs will be first paid, although the fund is exhausted before his demand is reached. *Egan v. Baldwin*, 1 Molloy, 539.

But *Bennett v. Goling*, 1 Molloy, 529, holds that a creditor filing a creditors' suit is entitled to his costs out of the fund, in case it is deficient, the first thing after payment of the costs as executor, although there are not enough assets to reach his claim.

And where a suit for the administration of the assets of an intestate by some person is necessary, and a simple contract creditor brings the same and conducts it properly, he will be allowed the costs therein out of the funds in preference to the demand of any specialty or judgment creditor. *Jameson v. Farrer*, 3 Ir. Eq. Rep. 346.

And in *Kelly v. Kelly*, 1 Ir. Eq. Rep. 317, 54 L. R. A.

costs of bringing the fund into court were allowed to plaintiff, although his demand was not reached, because the fund had been reached by his diligence, and he had no notice of the prior demand until it had been realized. In this case the master of the rolls states that he has the authority of the Lord Chancellor, who rendered the decision in *Taylor v. Gorman*, 1 Dru. & Wal. 235, note, which gave the rule as between several judgment creditors as to the costs of prosecuting the suit prior to the decree, that such rule was not intended to apply to the costs subsequent to the decree for making out the title to land and bringing the fund into court.

And in *Nelson v. Brady*, 2 Dru. & Wal. 143, 4 Ir. Eq. Rep. 359, 1 Connor & L. 239, a judgment creditor who brought a creditors' suit, the funds from which were insufficient to pay prior debts, was not allowed, out of the fund as against prior creditors, the cost of carrying on the same, but was allowed the cost of preparing the land sold to realize the fund and of procuring counsel's opinion upon it, of preparing conditions of sale and of proceeding upon the order to settle them before the master, as the prior creditors derived all the benefit of such proceedings.

And in *Smyth v. Murphy*, 10 Ir. Ch. Rep. 42; *Maguire v. Dundass*, 1 Ir. Eq. Rep. 25; and *Kelly v. Kelly*, 1 Ir. Eq. Rep. 317,—the costs of making out the title to land were also allowed on the ground that they had been incurred for the benefit of all parties.

IV. Suit for appointment of receiver and to wind up insolvent corporation.

a. In general.

Where a creditor of an insolvent corporation brings an action for the appointment of a receiver and to wind up its affairs the fees of his attorney for services rendered before the appointment of the receiver will be allowed out of the fund in the latter's hands if such services prove beneficial to other creditors.

Thus, where the complainant in a general creditors' bill to wind up the affairs of an insolvent corporation succeeds in securing a large fund for the bondholders generally, his counsel will be entitled to receive a reasonable compensation from the fund for their services. *Bristol-Goodson Electric Light & P. Co. v. Bristol Gas, Electric Light & P. Co.* 99 Tenn. 371, 49 S. W. 19.

And where a creditor of a corporation institutes proceedings for the appointment of a receiver for it on the ground of the fraud and mismanagement of its officers, as a result of which a large amount of money is saved for certificate holders and other creditors, he will be allowed a reasonable attorney's fee out of the fund in the receiver's hands. *Davis v. Bay State League*, 158 Mass. 434, 33 N. E. 591.

And where a creditors' bill to have the court take charge of the assets of an insolvent and dissolved corporation and distribute them ratably among its creditors is brought by certain creditors in behalf of themselves and other creditors, the fee of plaintiff's attorney should be paid out of the fund before any distribution between the creditors is ordered. *White v. University Land Co.* 49 Mo. App. 450.

And a railroad bondholder, who, in behalf of himself and other bondholders, brings an action to have fraudulent conveyances by the trustees of a trust fund to secure payment of the bonds set aside and for the appointment of a receiver by whose efforts a large amount of the trust fund is secured and saved, is entitled to have his counsel fees paid out of the fund. *Internal Improv. Fund Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157.

And the attorneys for plaintiff in an action to wind up the affairs of an insolvent banking corporation will be allowed out of the funds compensation for prosecuting the bill and for valuable services rendered in the general litigation. *Moses v. Ocoee Bank*, 1 Lea, 398.

And where creditors bring an action for the appointment of a receiver on the ground that the debtor is insolvent, and a large amount is realized for general creditors through having certain mortgages and assignments given by him held to constitute a general assignment for creditors, the attorneys of complainants will be allowed compensation out of the fund thereby created. *Fechheimer v. Baum*, 43 Fed. 719. See also *Anniston Loan & T. Co. v. Ward*, 108 Ala. 85, 18 So. 937; *Lochte v. Blum*, 10 Tex. Civ. App. 885, 30 S. W. 925, *supra*, 1.

And where a bill to foreclose a mortgage on a railroad is filed, and the holder of a lien on the railroad files a creditors' bill bringing in all the lien holders, which bill is consolidated with the bill for foreclosure, the one filing the creditors' bill is entitled to have the fees of his counsel paid out of the fund realized from a sale of the road, it being indispensable to a successful sale that the property should be cleared of the liens, and the action of the one filing such creditors' bill being beneficial to all concerned. *Central Trust Co. v. Condon*, 14 C. C. A. 814, 31 U. S. App. 387, 67 Fed. 84.

And where the holders of second mortgage bonds brought suit for the appointment of a receiver, and the trustees and holders of the first mortgage bonds recognized the necessity of a receiver and acquiesced in the appointment of one, and the trustees of the second mortgage bonds made no objection except to the complainant's right to sue, all parties interested agreeing that the course pursued by complainant was for the good of all parties concerned, the fees of his attorneys will be allowed out of the fund. *Bound v. South Carolina R. Co.* 43 Fed. 404.

And where a bill is brought for the appointment of a receiver of an insolvent corporation by a creditor in behalf of himself and all other creditors, and the attorneys for complainant continue to conduct the litigation after the appointment of the receiver, contesting all unfounded claims and performing services very beneficial to all the creditors, they will be allowed compensation out of the fund for the services performed after as well as before the appointment of the receiver. *Burden Central Sugar-Ref. Co. v. Ferris Sugar-Mfg. Co.* 31 C. C. A. 233, 58 U. S. App. 166, 87 Fed. 810.

Where a corporation brought a general creditors' bill on behalf of itself and all other creditors against an insolvent corporation for the appointment of a receiver and the distribution of its assets, in which it failed because of an illegal combination with such corporation in restraint of trade, its solicitors will be allowed out of the corporate assets for services which were for the benefit of all creditors generally, but not for services in behalf of complainant alone from which the other creditors received no benefit. *American Handle Co. v. Standard Handle Co.* (Tenn. Ch. App.) 59 S. W. 709.

And where creditors of an insolvent corporation consent to the business being carried on for several years by the assignee for the benefit of creditors, who pays dividends to the creditors for several years, after which a majority of the creditors enter into a scheme of a new corporation to buy the corporate properties, whereupon a creditor who has received dividends on his debts brings a creditors' bill to have the affairs of the corporation wound up, in which nothing is brought into existence for the benefit of creditors, no complications removed from the properties, and none of the

properties in existence protected or preserved, a fee will not be allowed to his attorneys out of the corporate assets arising from a sale of the properties. *Parkhurst & W. Co. v. Etna Coal Co.* (Tenn. Ch. App.) 54 S. W. 58.

And where a creditor and stockholder of an insolvent corporation files a petition in behalf of himself and other creditors and stockholders for the appointment of a receiver and the winding up of its affairs, the fees of his attorneys will not be ordered paid out of the assets in the hands of the receiver on the ground that his action was a benefit to the creditors generally, where he was liable as a stockholder to an extent greatly exceeding the debt due to him, and it was to his interest as a stockholder to see that the debts were paid out of the corporate assets. *Kandiah v. Chicago Co-Op. Brewing Assn.* 35 Ill. App. 411.

b. From what part of fund allowance made.

Where a bill in the nature of a creditors' bill is brought against a railroad company to require the payment of certain unfunded coupons of 6 per cent bonds by a holder of such coupons in behalf of himself and all others standing in the same condition, and afterwards certain holders of 7 per cent bonds intervene and summon a particular holder of the 6 per cent bonds to represent such bondholders, and the bondholder so summoned employs counsel, and all creditors of the company are called in, and a contest then arises between the holders of the 6 per cent and 7 per cent bonds as to the priority of their lien, in which the 6 per cent bondholders are successful, the entire amount realized from a sale of the railroad being insufficient to satisfy the prior lien, counsel fees out of the common fund will be allowed only to the attorney for the one thus representing the 6 per cent bondholders, although counsel for other bondholders of that class render valuable assistance to such class without being specially employed by them as a class. *Hand v. Savannah & C. R. Co.* 21 S. C. 162. The court also says that the attorneys for the plaintiff as representing the holders of unfunded coupons of the 6 per cent bonds might be entitled on the same principle to a fee out of so much of the common fund as the holders of such coupons might be entitled to. On a former hearing in 17 S. C. 219, the court had said that the fees of all the attorneys properly chargeable for successful services should be paid out of the common fund so as to make the successful litigants pay their proper proportions.

Where nearly all the members of a railroad relief association assign their interests to the railroad company in trust for a new relief association to be organized, and soon after the dissolution of the old association two nonassigning members file a bill against the railroad company alleging that the assignments were void and asking for the appointment of receivers for the old association, and receivers are appointed but the order therefor is reversed on appeal, whereupon the railroad company files a bill asking the court to assume jurisdiction over the distribution of the assets of the old association, and the whole fund is brought into court for such distribution, the attorneys for the two members bringing such suit will not be allowed a counsel fee out of the entire fund, but only out of the part belonging to the non-assigning members, as their action was hostile to the railroad company and the assigning members and in no way beneficial to them. *Baltimore & O. R. Co. v. Brown*, 79 Md. 451, 29 Atl. 527.

The fees of counsel for plaintiff in a proceeding for the appointment of a receiver of an insolvent partnership on the ground of collusion

between the firm and an attaching creditor will be allowed only against that portion of the partnership property not covered by the attachment, where such attachment is held to be a lien on the property prior to that of the one applying for the appointment of the receiver. *Byrne v. First Nat. Bank*, 20 Tex. Civ. App. 194, 49 S. W. 710.

c. Where plaintiff's debt not reached.

Although the fund realized from the suit is exhausted before the plaintiff's debt is reached, the fees of his attorneys will be allowed out of the fund if the services performed by them were necessary to enable the prior creditors to recover, and proved beneficial to them; but if such services were unnecessary and of no benefit no fee will be allowed.

Thus, *CAMPBELL v. PROVIDENT SAV. & L. SOC.* holds that where a general creditors' bill is brought against an insolvent building and loan association, by means of which considerable funds are collected, all of which are absorbed in the payment of claims prior to that of the one bringing the bill, a reasonable fee for his solicitor will nevertheless be allowed out of the fund where there is no mortgage or other fixed lien on the assets by means of which they would have been available for payment of such prior claims without the assistance rendered by means of the creditors' bill.

And *D. A. Tompkins Co. v. Chester Mills*, 90 Fed. 37, holds that an unsecured creditor of an insolvent corporation which had ceased doing business, who commenced a creditor's suit for the conservation and distribution of the corporate assets according to priority and the appointment of a receiver at a time when the bondholders could not act because nothing was due them at the time and no one but an unsecured creditor could act, will be allowed a contribution from the fund created toward his expenses as between solicitor and client, although the fund is insufficient to pay the corporate bonds which constituted a claim prior to his, all the parties having acquiesced in the suit and received the benefits.

And *Lowry Banking Co. v. Abbott*, 87 Ga. 134, 13 S. E. 204, holds that where a petition in the nature of a creditors' bill is filed asking for a receiver of the debtor's assets, and a mortgagee of such debtor is made a party on its own application, thus recognizing the necessity of the petition and ratifying the filing of it, the attorneys for the plaintiff will be entitled to a fee out of the fund, even though the mortgages were sufficient to consume the entire assets, rendering the appointment of the receiver unnecessary. The court said, however, that if the mortgagee had not joined in the proceeding the attorney's fee could not have been allowed out of the fund.

But *Lewis v. Edwards*, 92 Ga. 533, 17 S. E. 920, holds that where a creditors' petition was filed for the appointment of a receiver for an insolvent trader and the sale of his property, all of which was covered by a chattel mortgage for an amount sufficient to exhaust all its proceeds, and the mortgage was foreclosed and placed in the hands of the sheriff for the purpose of claiming the fund, before the receiver's sale took place, the mortgagees not having been made parties, the fees of the attorney for the complainant will not be allowed out of the fund, as there was no necessity for the filing of the petition so far as the mortgagees were concerned, and they derived no benefit therefrom.

And in *Hooper v. Clegg*, 99 Ga. 167, 25 S. E. 96, the court said that the case was controlled by the preceding case of *Lewis v. Edwards*, 92 Ga. 533, 17 S. E. 920, and that the attorneys' fee asked for had been properly refused.
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And *Kelly v. Mountain City Club*, 101 Tenn. 286, 47 S. W. 426, holds that the attorneys for complainant in an action by a second mortgage bondholder and general unsecured creditor to wind up the affairs of an insolvent corporation are not entitled, as against the first mortgage bondholders, to have their fees paid out of the proceeds of a sale of the real estate mortgaged, where such first mortgage bondholders were not interested in having the proceeds paid into court, but could have foreclosed their mortgage outside of court, even though the complainant's action was treated as a general creditors' bill on the petition of a first mortgage bondholder, who was also a second mortgage bondholder and general creditor and joined in the bill, the real estate selling for much less than the amount of the first mortgage.

V. Suit to enforce stockholder's liability.

A fee will be allowed to the attorneys for a creditor who brings a suit to enforce the liability of stockholders in an insolvent corporation for such services as were for the common benefit of all the creditors.

Thus, where a creditor of an insolvent corporation brings a suit to enforce the statutory liability of stockholders, the purpose of which is to bring into court a fund for distribution among creditors, the attorney for plaintiffs should be paid a reasonable fee out of the sum realized from the collection of judgments against stockholders before distribution among creditors. *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435.

And the attorney for plaintiff in an action to enforce the statutory liability of a stockholder brought in behalf of all creditors should be allowed out of the fund a fee for such services as were for the common benefit of all creditors on the equity rule that where one of many parties having a common interest in a trust fund takes proceedings at his own expense for the collection of the fund for the benefit of all interested, he is entitled to reasonable reimbursement out of the fund before its division; but where one of the principal creditors was also a principal stockholder, and part of the attorney's services consisted in opposing his claim, no allowance should be made for the latter services. *Helm v. Smith-Fee Co.* 79 Minn. 297, 82 N. W. 639.

Where counsel for certain creditors file a bill on behalf of all creditors to hold the stockholders of an insolvent bank individually liable for any deficiency in assets and incidentally for an accounting and disbursement of the trust assets, and are unsuccessful on the main issue, their fees will not be allowed out of the trust fund. *Hume v. Commercial Bank*, 13 Lea, 496.

And where a creditor intervenes in sequestration proceedings against an insolvent corporation in which a receiver has been appointed in order to have the personal liability of stockholders for corporate debts enforced, and, pending the proceeding, a syndicate of stockholders buys up all outstanding claims with funds contributed by them, whereupon the proceedings against the stockholders are dropped without anything having been realized thereon, the attorney for such intervening creditor is not entitled to a fee out of the corporate assets in the receiver's hands. *Dwinnell v. Badger*, 74 Minn. 406, 77 N. W. 219. The court, said, however, that if a fund had been realized through the efforts of such intervener and his attorney, which had been paid over to creditors, they were not prepared to say that the attorney should not be reimbursed out of the corporate assets.

VI. Proceedings in bankruptcy cases.

a. In general.

Attorneys' fees were allowed to petitioning creditors in involuntary bankruptcy for procuring an adjudication of bankruptcy under the act of 1867, although no express provision therefor was made in such act, on the ground that the assets of the bankrupt were secured and saved by their diligence, and that if they were required to pay their own expenses, including their attorneys' fee, out of the share coming to them, they would be in a worse position than other creditors who did nothing towards the preservation of the fund.

Thus, a reasonable attorneys' fee will be allowed to the petitioning creditors out of the general fund in cases in involuntary bankruptcy proceedings before distribution to creditors, although no provision in regard thereto is contained in the bankruptcy act. *Re King*, 4 Bias. 319, Fed. Cas. No. 7,780; *Re New York Mall S. S. Co.* 7 Blatchf. 178, Fed. Cas. No. 10,208; *Re Mitteldorfer*, Chase Dec. 288, Fed. Cas. No. 9,675; *Re O'Hara*, 8 Am. L. Reg. N. S. 113, Fed. Cas. No. 10,465; *Re Williams*, 2 Nat. Bankr. Reg. 88, Fed. Cas. No. 17,704.

And such fee will be allowed although the Federal statute as to fees makes no provision therefor, as such statute was intended to reach only taxable costs, leaving power in a court of equity to tax counsel fees in those peculiar cases where a fund is in court upon which different parties have distinct rights or claims. *Re parie Jaffray*, 1 Low, Dec. 321, Fed. Cas. No. 7,170.

And in *Re Schwab*, 3 Ben. 231, Fed. Cas. No. 12,498, the district judge held that the expenses of the petitioning creditors, among which counsel fees were probably included, were allowable under § 1 of the bankruptcy act of 1867 providing for due distribution of the assets of the bankrupt, as otherwise the petitioning creditor would not share equally with other creditors.

And under the bankruptcy act of 1898, § 64b, subd. 3, permitting the allowance of one reasonable attorneys' fee for the professional services actually rendered to the petitioning creditors in involuntary cases, the attorney is entitled to the allowance of such reasonable fee as a matter of right, and its allowance or disallowance is not a matter of discretion. *Re Curtis*, 41 C. C. A. 59, 100 Fed. 784.

b. Amount of fee.

Under the bankruptcy act of 1867, the tendency was to allow excessive amounts for counsel fees, so that at times almost nothing was left for creditors, but under the present act the courts have endeavored to keep the fee down to a reasonable amount, and to consider the assets of the bankrupt as a fund to be distributed mainly among the creditors, instead of among the attorneys.

A reasonable attorneys' fee should be allowed to attorneys for the petitioning creditor for filing the petition, but not for services performed after the adjudication, where they consisted principally in an unsuccessful attempt to exclude the other creditors from participating in the choice of an assignee and from sharing in the assets. *Re Mead*, 8 Phila. 174, Fed. Cas. No. 9,364.

And in *Re Sanger*, 5 Nat. Bankr. Reg. 54, Fed. Cas. No. 12,318, a counsel fee of \$1,000 to the attorneys for the petitioning creditors was held to be too extravagant where the assets of the estate amounted to only \$15,000, and the court refused to allow the same unless the assignee, the bankrupts, and all the creditors who had proved their claims assented thereto.

And in *Re Jones*, 9 Nat. Bankr. Reg. 491, Fed. Cas. No. 7,451, the court states that the attorneys' fee allowed for the petitioning creditors would be limited to what the court considered as a bare compensation where the bankrupt estate was a small one.

And under general order No. 30 in bankruptcy as amended April 12, 1873, providing that no allowance shall be made for fees of counsel except when necessarily employed by the assignee, and general order No. 31, providing that in case of involuntary bankruptcy, where the debtor resists the application and the court shall adjudge the debtor a bankrupt the petitioning creditor shall recover, to be paid out of the fund, the same costs that are allowed to a party recovering in a suit in equity, the only counsel fees allowable to the petitioning creditor is the docket fee of \$20 taxable to the prevailing party in a suit in equity. *Re Lloyd*, 7 Fed. 459; *Re Bignall*, 3 McCrary, 440, 9 Fed. 385.

But *Re Mead*, 8 Phila. 174, Fed. Cas. No. 9,364, holds that the attorneys will not be entitled to a docket fee, where no denial was filed and no contest made on the petition.

Re Sheehan, 8 Nat. Bankr. Reg. 353, Fed. Cas. No. 12,738, holds that an attorneys' fee in excess of what is allowed in a suit in equity will not be granted to the attorneys for the petitioning creditor where there are no other creditors and the petition is dismissed on the payment of the petitioner's debt.

The petitioning creditors will not be allowed a retainer paid to their attorneys, nor for any services rendered by the attorneys after the adjudication of bankruptcy. *Re Comstock*, 9 Nat. Bankr. Reg. 88, Fed. Cas. No. 3,075.

The amount to be allowed as attorneys' fees under the act of 1898, § 64b, subd. 3, permitting the allowance of one reasonable attorneys' fee for the professional services actually rendered to the petitioning creditor in involuntary cases, rests in legal knowledge and judicial discretion, and not in unrestrained discretion, and such discretion is subject to review, and the amount allowed must, in every case, be reasonable. *Re Curtis*, 41 C. C. A. 59, 100 Fed. 784.

In *Re Silverman*, 97 Fed. 325, 3 Am. Bankr. Rep. 227, a fee of \$75 to the attorneys for the petitioning creditors was held to be sufficient where the adjudication was not contested and no special services in the collection of assets was shown, and, as their special duties to the petitioning creditors ended with the choosing of a trustee, no allowance for subsequent services was made.

In *Re J. W. Harrison Mercantile Co.* 95 Fed. 123, the court, while stating that under § 64 of the present act and general rule No. 13 the fee of the attorneys of the petitioning creditors for preparing the petition and schedules when paid out of the funds could not exceed \$50 and that no other fee was payable where there was no contest or trial as to the adjudication, nevertheless allowed a fee of \$100 for drawing the petition, as it was drawn before the passage of such rule. A fee of \$25 was also allowed for a petition to restrain the trustees under a mortgage given by the bankrupt from disposing of the property *pendente lite*, but they were not allowed any compensation for sending out notices of the first meeting of creditors, as that was the duty of the referee. The court, however, stated that they would be allowed for money advanced to the referee for the expense of sending such notices. And they were not allowed compensation for their services in attending meetings of creditors and there resisting the allowance of other claims, nor for their services in influencing bidders to attend the sale of the bankrupt's property.

A deposit fee of \$25 paid by the attorneys for petitioning creditors to the clerk will be refunded to them. *Re J. W. Harrison Mercantile Co.* 95 Fed. 123; *Re Silverman*, 97 Fed. 325, 3 Am. Bankr. Rep. 227.

Where the only contest on a petition for adjudication in involuntary bankruptcy is as to whether the petitioning creditors have not estopped themselves to maintain the petition by participating in proceedings in the state court under an assignment for the benefit of creditors by the bankrupts, and the time consumed by counsel in conducting and preparing the case did not exceed one month, and the assets available for payment of debts will probably not exceed \$100,000, a fee of \$12,500 for the attorneys of the petitioning creditors for their services is excessive and should be reduced to \$2,000. *Re Curtis*, 41 C. C. A. 59, 100 Fed. 784.

VII. Conclusion.

The fees of attorneys for creditors who bring suit in behalf of themselves and other creditors will always be allowed out of the fund going to creditors in the same class with the plaintiffs if the suit is beneficial to them, on the ground that otherwise the one incurring the risk and conferring the benefit will be in a worse condition than those who do nothing towards realizing the fund, although the mere fact that a suit proves beneficial to other creditors will not justify the allowance of such fees out of the fund if the plaintiff brought the suit solely in his own behalf.

Where there are different classes of creditors, and the fund is exhausted before the plaintiff's debt is reached, the fee of his attorney will nevertheless be allowed out of the fund if the services performed were necessary to enable the prior creditors to recover, and proved beneficial to them, and the suit was brought in good faith under the belief that the plaintiff's debt would be reached before the fund was exhausted; but if the suit was commenced in bad faith, or if no benefit resulted to prior creditors therefrom, no fees will be allowed.

No fee will be allowed to plaintiff's attorneys out of any part of the fund which would go to some person other than a creditor, such as the surplus going to a fraudulent grantee in a suit to set aside the conveyance, or the surplus going to legatees, devisees, or distributees in a suit for the administration of a decedent's estate.

A fee has been allowed to the attorneys for the petitioning creditors in involuntary bankruptcy proceedings on the ground that by their efforts a fund had been secured or saved for creditors generally, the expense of which ought to be borne by the fund or by all the creditors benefited, instead of by the creditors by whose diligence the fund was realized. The present act provides expressly for the payment of such fees. Under the former act the amount allowed was often excessive, but under the present act the tendency is to allow only moderate fees to attorneys, and distribute the bulk of the fund among the creditors. J. H. H.

ILLINOIS SUPREME COURT.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, *Appt.*,

v.

George F. JENNINGS, Admr., etc., of
George M. Jennings, Deceased.

(190 Ill. 478.)

1. What facts will create the contract relation of carrier and passenger is a question of law.
2. The duty of a railroad company to one as a passenger has not arisen when, with a passage ticket in his pocket, he is crossing its tracks on a public highway for the purpose of boarding a train standing on the track farthest from him, and when he has not yet reached the platform provided for passengers.
3. Under a declaration seeking to recover from a carrier for the negligent killing of a passenger no recovery can be had unless the relation of carrier and passenger is shown, although the facts are such as to warrant a recovery in the absence of such relation.

(*Magruder, J., dissents.*)

(June 19, 1901.)

A PPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court

for Cook County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinions.

Messrs. S. A. Lynde and W. H. Lyford for appellant.

Messrs. Edward J. Dahms and Wing & Chadbourne, for appellee:

The matter of Jennings' care was a question for the jury, and under the evidence, which is somewhat conflicting, reasonable and fairminded persons might, acting reasonably, have reached different conclusions, and, this being so, the case was properly submitted to the consideration of the jury.

Chicago & A. R. Co. v. Kelly, 80 Ill. App. 675, Affirmed in 182 Ill. 267, 54 N. E. 979; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713.

The questions whether the plaintiff was using due care and caution at the time of the injury, and whether the defendant was guilty of negligence, are questions of fact which are conclusively settled by the judgments of the trial and appellate courts.

Harris v. Shebek, 151 Ill. 287, 37 N. E. 1015; *Brownell v. Welch*, 91 Ill. 523; *Germania F. Ins. Co. v. McKee*, 94 Ill. 494; *Brant v. Lill*, 96 Ill. 608; *Chicago West Div.*

NOTE.—For cases in this series as to when a person who has started for a train becomes a passenger, see *Webster v. Fitchburg R. Co.* (Mass.) 24 L. R. A. 521, and note; *Wood v. Pennsylvania R. Co.* (Pa.) 35 L. R. A. 199; 54 L. R. A.

Western & A. R. Co. v. Volls (Ga.) 35 L. R. A. 655; *Southern R. Co. v. Smith* (C. C. App. 5th C.) 40 L. R. A. 746; *Young v. New York, N. H. & H. R. Co.* (Mass.) 41 L. R. A. 193; and *Phillips v. Southern R. Co.* (N. C.) 45 L. R. A. 163.

R. Co. v. Mills, 105 Ill. 63; *Montgomery v. Black*, 124 Ill. 57, 15 N. E. 28; *Alphin v. Working*, 132 Ill. 484, 24 N. E. 54; *Hewitt v. Normal School Dist. Bd. of Edu.* 94 Ill. 528; *Sconce v. Henderson*, 102 Ill. 370; *Bennett v. Connelly*, 103 Ill. 50; *Springside Coal Min. Co. v. Grogan*, 169 Ill. 50, 48 N. E. 190; *Lake Shore & M. S. R. Co. v. Kelsey*, 180 Ill. 530, 54 N. E. 608; *North Chicago Street R. Co. v. Baur*, 179 Ill. 126, 45 L. R. A. 108, 53 N. E. 568; *McGregor v. Reid, M. & Co.* 178 Ill. 470, 53 N. E. 323; *Baltimore & O. S. W. R. Co. v. Alsop*, 176 Ill. 476, 52 N. E. 253; *Offutt v. World's Columbian Exposition*, 175 Ill. 473, 51 N. E. 651; *Chicago & A. R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901; *Chicago & A. R. Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633.

The train that struck and killed the deceased was running in violation of the ordinance of the city, and that fact alone, in conjunction with the fact of the injury, by force of the statute, created a prima facie liability.

Chicago & A. R. Co. v. Fell, 79 Ill. App. 376.

At the time the deceased was struck and killed he had been received by the appellant on its premises as a passenger.

The responsibility of a carrier begins when the passenger presents himself for transportation; and this he may be said to do when he approaches the place of reception for the purpose.

Cooley, Torts, 770.

Neither the purchase of a ticket nor the entry into the car is essential to create the relation of carrier and passenger.

Norfolk & W. R. Co. v. Galliher, 89 Va. 643, 16 S. E. 935; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 301; *Baltimore & O. R. Co. v. State use of Hauer*, 60 Md. 463; *Lent v. New York C. & H. R. R. Co.* 120 N. Y. 467, 24 N. E. 653; *Allender v. Chicago, R. I. & P. R. Co.* 37 Iowa, 264; *Johns v. Charlotte, C. & A. R. Co.* 39 S. C. 162, 20 L. R. A. 520, 17 S. E. 698; *Phillips v. Rensselaer & S. R. Co.* 57 Barb. 644; *Thomp. Carr. of Pass.* p. 43, note 2; *Schouler, Bailments & Carriers*, 3d ed. § 621; *McDonough v. Metropolitan R. Co.* 137 Mass. 210; *Smith v. St. Paul City R. Co.* 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; 2 Redf. Carr. 6th ed. p. 245; *Central R. & Bkg. Co. v. Perry*, 58 Ga. 461; *Devire v. Boston & M. R. Co.* 148 Mass. 343, 2 L. R. A. 160, 19 N. E. 523; *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 160, 50 N. E. 713.

The allegation that deceased was a passenger was not material.

If there is one good count to which the evidence is applicable, the error of the court, if any, in refusing to instruct the jury to disregard the other counts, becomes harmless.

Consolidated Coal Co. v. Scheiber, 167 Ill. 539, 47 N. E. 1052; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 457, 44 N. E. 876; *Chicago & A. R. Co. v. Anderson*, 166 Ill. 575, 46 N. E. 1125; *Chicago & A. R. Co. v. 54 L. R. A.*

Harbor, 80 Ill. App. 607; *Swift & Co. v. Rutkowski*, 82 Ill. App. 113.

Railroads are liable for running down persons crossing their railroad tracks at stations to leave or take passage on standing trains, who neither look nor listen for the trains that injure them.

Chicago & A. R. Co. v. Kelly, 80 Ill. App. 676; *Partlow v. Illinois C. R. Co.* 150 Ill. 321, 37 N. E. 663; *Chicago, B. & Q. R. Co. v. Czaja*, 59 Ill. App. 22; *Chicago, St. P. & K. C. R. Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Chicago & A. R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901; *Chicago & E. I. R. Co. v. Chancellor*, 60 Ill. App. 525.

The deceased, being at the station, and approaching the car to take passage on it, was not obliged to look and listen for approaching trains.

Wheelock v. Boston & A. R. Co. 105 Mass. 208; *Pennsylvania R. Co. v. White*, 88 Pa. 333; *Terry v. Jewett*, 78 N. Y. 343; *Brassell v. New York C. & H. R. R. Co.* 84 N. Y. 246; *Baltimore & O. R. Co. v. State use of Hauer*, 60 Md. 463; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 529, 8 L. R. A. 673, 20 Atl. 2; *Jewett v. Klein*, 27 N. J. Eq. 550; *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 20 L. R. A. 729, 33 Pac. 108.

If the death of the deceased was caused by the wanton and wilful negligence of appellant, then the verdict and judgment were warranted in law, although the deceased may not have exercised due and ordinary care for his own safety.

Blanchard v. Lake Shore & M. S. R. Co. 126 Ill. 416, 18 N. E. 799; *Lake Shore & M. S. R. Co. v. Bodemer*, 139 Ill. 606, 29 N. E. 692; *Chicago, B. & Q. R. Co. v. Mehlsack*, 44 Ill. App. 128; *Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 548; *East St. Louis Connecting R. Co. v. Jenks*, 54 Ill. App. 91; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 458, 44 N. E. 876; *New York, C. & St. L. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809; *Chicago West Div. R. Co. v. Ryan*, 131 Ill. 474, 23 N. E. 385; *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Werner v. Citizens' R. Co.* 1 Mo. 368.

Cartwright, J., delivered the opinion of the court:

Appellee brought this suit as administrator of the estate of George M. Jennings, who was killed by one of appellant's trains while crossing its tracks at Seventy-Sixth street, in the city of Chicago, to recover damages from appellant for his death. The declaration contains five counts, in each of which it is averred that the defendant received said George M. Jennings upon its premises as a passenger at or upon the intersection and crossing of its railroad and Seventy-Sixth street, and near to its Seventy-Sixth street depot, to be safely carried from thence to its Dearborn street station, in the city of Chicago, upon a train about to arrive at and stop and wait at said Seventy-Sixth street station or depot to receive said George M. Jennings and other passengers, to convey,

and carry them to their several destinations. Each of said counts also alleges, in substance, that it thereupon became the duty of defendant to have permitted the said George M. Jennings to safely cross over its railroad tracks while going to said depot, and to have allowed and permitted him to safely take and mount said train of cars which was about to arrive and stop at said station, and to have carefully conveyed and carried him to his said destination, but that while he was, with all due care and diligence, walking upon and across said Seventy-Sixth street at said crossing of the same and defendant's railroad, to reach and mount defendant's train, the defendant, by its servants, disregarding said duty, ran another train in a southerly direction upon and over the said crossing, and struck the said George M. Jennings, and killed him. While the counts are substantially alike in making the foregoing allegations, they differ in respect to the character of the negligence charged as a breach of said duty. In the first there is a general charge that the train which struck Jennings was carelessly, negligently, and improperly driven, managed, and run. The second count charges that said train was carelessly and negligently driven and run at an unlawful rate of speed, in violation of an ordinance of the city of Chicago, set out in that count. The third alleges that the defendant ran the train without maintaining a flagman upon the street crossing to warn said George M. Jennings of trains. The fourth charged defendant with not ringing the bell or blowing a whistle on the engine 80 rods from the crossing, and until the crossing was reached, as was required by the statute. The fifth alleges that defendant failed to ring a bell in its tower or tower house near the crossing, to warn said George M. Jennings of the approach of the train. Each count was based upon the existence of the contract relation of passenger and carrier, and alleged duties, arising out of that relation, and charged as breaches of that duty the several acts above stated. There was no count alleging any relation or duty except as carrier and passenger, nor any negligent act except as a breach of such duty, and there was no count of which the averment of that relation was not a necessary element. The defendant pleaded the general issue, and there was a trial, resulting in a verdict for \$4,800, and a judgment thereon, which has been affirmed by the appellate court.

The following facts were proved by the plaintiff, and not disputed by the defendant, but are conceded: The defendant owns and operates a railroad in the city of Chicago, with a station at the corner of Polk and Dearborn streets. It also has a station at Seventy-Sixth street. That street runs east and west, and the tracks run north and south, crossing it at right angles. At that place there are four tracks, and the depot is on the east side of them, and north of the street. The two easterly tracks nearest the depot are used for passenger trains. The first track to the east is No. 1, and the

trains running on that track are north-bound passenger trains. The second track from the east is No. 2, on which south-bound passenger trains run. The two tracks to the west of these are for north and south bound freight trains. There is a sidewalk running east and west on the north side of Seventy-Sixth street, and east of all the tracks there is a wooden platform running north from the sidewalk, about 100 feet. At the north end the platform is 10 feet wide, and at the south end it runs over to the depot, and is probably 18 feet wide. Between the passenger tracks Nos. 1 and 2 there is another platform 8 feet wide, running north from the sidewalk 100 feet. These platforms are level and even with the top of the rails, and are for the use of passengers. The street crossing is planked in the usual manner entirely across the tracks. In 1894 there was a train which went north from this station at 7:37 in the morning, and George M. Jennings was in the habit of taking that train, and other passengers were in the habit of taking trains at that station for down town every morning. On the morning of April 16, 1894, Mr. Jennings walked across lots from his home west of the railroad to take this train. He came to the Seventy-Sixth street crossing, and walked along the sidewalk over the freight-car tracks. The train going north which he intended to take was on the further track, just drawing up to the station, and was entirely stopped, or was in the act of stopping. He was looking to the east or southeast towards that train, and away from a passenger train, which was approaching from the north on track No. 2. As he reached track No. 2, on which the south-bound passenger train was coming, and had stepped one foot over the west rail, he was struck by that train, and killed. He had not reached any platform provided for passengers, or a point where such platform connected with the sidewalk that he was on, or any place where passengers were accustomed to get upon the train. He had a commutation ticket in his pocket, which was still good for one ride.

The charges of negligence and the allegation of due care on the part of Jennings were in controversy at the trial, but the bill of exceptions shows that the principal dispute was as to whether Jennings had become a passenger on defendant's railroad. On that question the defendant asked the court to give to the jury five instructions as to what facts were necessary to prove the averment that Jennings was a passenger, and four of them required proof of that averment to authorize a recovery under the declaration. The general purport of these instructions was that Jennings would not become a passenger, or be received by the defendant as a passenger, until he should have reached the station or platform for the purpose of taking such train, or the point where passengers were in the habit of getting on such train; and the fifth was as follows: "The plaintiff in this case has alleged in his declaration that Jennings was received by the defendant as a passenger, and in order to re-

cover under this declaration the plaintiff must prove, by a preponderance of the evidence, that the relation of passenger and carrier existed between Jennings and the defendant when he was struck by the defendant's engine. As a matter of law, the court instructs the jury that a person does not become a passenger until he has in some way placed himself under the care and control of the carrier, and has been expressly or impliedly received as a passenger by the carrier, and that the fact, if it be a fact, that Jennings was on his way to defendant's station, for the purpose and with the intention of taking the defendant's train into the city, is not sufficient to make him a passenger and create the relation of passenger towards the defendant, and that relation would not commence, and he would not be received as a passenger, until he should reach the defendant's station or platform or point where he intended to take his train." The court refused to give any of these instructions, and did not give any which covered the same ground, or give the jury any information as to what proof was required to sustain the averment that Jennings had become a passenger. The jury were left without any guide as to the law on that subject.

What facts will create the contract relation of carrier and passenger is a question of law, and, when the existence of such relation is in controversy, it is the duty of the court to give a proper instruction, presented by a party, informing the jury what facts will be sufficient evidence of the contract. Peculiar duties and liabilities on the part of the carrier arise out of, and are based on, the existence of such contract. There is a wide difference between the liability of a railroad company to persons on street crossings or on its premises who are not passengers and its liability to its passengers. A railroad company owes to its passenger the highest practicable degree of care in transporting him and in the management and operation of its trains, and slight negligence is such a breach of that duty as will render it liable. If Jennings was a passenger the defendant owed to him the highest degree of care and prudence to carry him to his destination, to protect him from injuries from its servants and trains, and to afford him a reasonable opportunity to leave the train with safety. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713. The responsibility for this degree of care, and the liability for a failure to exercise it, begin when the contract relation begins. It is not necessary, to create the relation, that the passenger should have entered a train; but if he is at the place provided for passengers, such as the waiting room or platform at the station, with the intention of taking passage, and has a ticket, he is entitled to all the rights and privileges of a passenger. A railroad company owes a general duty to receive and carry those who present themselves at the time and place provided for passengers requiring transportation. In *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167, 54 L. R. A.

Wilson, after purchasing a ticket for a train, was standing on a platform constructed by the railroad company for the convenience of passengers between the main track and a switch track. He was waiting for the passengers to alight from the train upon which he expected to take passage, when he was struck and injured by another train. The court regarded him as a passenger, and held the company liable for the character of the platform. In *North Chicago Street R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672, it was held that the contract constituting the relation of carrier and passenger might be implied from the attempt of Williams to enter, in a proper manner, a street car as a passenger, with the intention of being transported thereon.

When the passenger has presented himself at the proper place to be transported, his right to care and protection begins. *Cooley, Torts*, 653. But it is uniformly held that the passenger must have placed himself under the care of the railroad company, so that the circumstances will warrant an understanding on the part of the company that he is a passenger and under its care as such. Although it is not necessary that fare should have been paid or an express contract made, it is necessary that a person should be under the control of a carrier in order to be entitled to its care as a passenger. 2 *Wood, Railroads*, 1037. He must be at some place under the control of the carrier and provided for passengers, so that it may exercise the high degree of care exacted from it, and the mere fact that an intending passenger has a ticket and intends to take a train does not create the relation of carrier and passenger. In 5 *Am. & Eng. Enc. Law*, 2d ed. p. 488, the time when that relation begins is stated as follows: "The relation of carrier and passenger begins when one puts himself in the care of the carrier, or directly within its control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier. Seldom, however, is there any formal act of delivery of the passenger's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation; hence the existence of the relation is commonly to be implied from the circumstances attendant. The rule is that these circumstances must be such as will warrant an implication that one has offered himself to be carried, and that the offer has been accepted by the carrier." In *Elliott, Railroads*, § 1579, it is said: "A person may become a passenger before he has entered the train or vehicle of the carrier. We think it safe to say that a person becomes a passenger when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting room, or the like, at a time when such a place is open for the reception of persons intending to take passage on the trains of the company." In § 1581 the author says: "The relation cannot exist unless the person claiming to be a passenger has been implied-

ly or expressly received as such by the carrier."

In *June v. Boston & A. R. Co.* 153 Mass. 79, 26 N. E. 238, a person was walking towards the station on a plank walk, on the premises of the railroad company, intending to take a train, and was struck by another train. The court held that he was not a passenger, and said that argument was not necessary to show that a man walking towards a railroad station, with the intention of buying a ticket and taking a train after he got there, was not a passenger, even if he might be in the same place if he had begun his journey. If the relation has never been entered into, the question is not the same as where a passenger may rightfully be without ceasing to be a passenger after the relation has been assumed.

In *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L. R. A. 521, 37 N. E. 166, plaintiff alleged that her intestate was a passenger on defendant's railroad. The evidence was that he had in his pocket a 10-trip ticket between Boston and the station where the accident happened. He was running from the street across the company's tracks on its premises to catch a train about to start, when he was struck and killed by another train. The court held that he had not become a passenger, and said: "One becomes a passenger on a railroad when he puts himself into the care of the railroad company, to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad."

In *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115, 39 L. R. A. 148, 48 N. E. 294, plaintiff's intestate got upon the train after it had left the station and platform, and at a place not provided for passengers. We held, in accordance with the authorities, that a passenger must put himself in the care of the railroad company, and there must be something from which it may fairly be implied that the company had accepted him as a passenger.

Since a railroad company owes the duty of protection to its passengers, it seems plain that the circumstances must be such that the company will understand that such a person is a passenger in its care and entitled to its protection. The company certainly has a right to know that the relation and duty exist, and the passenger must be at some place provided by the company for passengers, or some place occupied or used by them in waiting for or getting on or off trains. Whenever a person goes into such

a place with the intention of taking passage, he may fairly expect that the company will understand that he is a passenger and protect him. If he could be a passenger before reaching such a place, there would be no limit or place where it could be said that he became a passenger. The intention of taking a train would only prove a purpose to enter into the contract relation, but would not create it. Any person walking towards a train on a public sidewalk might have no intention whatever of taking the train, but might have an intention to keep on along the street. So long as a person merely intends to be carried, but has not reached any place provided for passengers or used for their accommodation, he is not a passenger. Counsel for appellee have not found any authority holding differently from those above cited, and all the authorities seem to be in accord on the question.

Appellee, however, insists that, even if the relation of passenger and carrier alleged in the declaration was not proved, it was not so material as to require absolute proof; that the evidence justified a finding that defendant was guilty of negligence in failing to observe its common-law duty of ordinary care not to injure a person on a street crossing; that it failed to exercise such ordinary care as it would owe to Jennings if he was not a passenger; and that it could not have been harmed by the refusal of the instructions. Even if it were true that a recovery might be had, under the declaration, by proof of a different relation and duty from those alleged in the declaration, it would not justify the refusal of the court to inform the jury what would create the relation of carrier and passenger, and impose upon the defendant the highest degree of care and diligence for the safety of Jennings. The third instruction refused was of that character. If that were the case, the rights and duties of the parties would be presented to the jury in two aspects, with different duties and liabilities. If Jennings was not a passenger, and his rights grew out of the fact that he was crossing a street at an intersection of defendant's railroad, the defendant would be bound to exercise towards him ordinary care, while if he was a passenger it would owe him the highest degree of care. The jury would be called upon to determine the liability of the defendant upon entirely different grounds, and might conclude that the defendant exercised ordinary care, but not the highest degree of care. The rule, however, is fundamental that a plaintiff must recover, if at all, upon the case made by his declaration (*Chicago & E. I. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921); and under the declaration the allegation in question was a material one. There was no count upon the common-law duty of a railroad company arising out of its relations to a person crossing a street over its tracks or resting on a relation of that kind. Every count was based on the contract relation, and plaintiff was bound to prove it. The defendant did not, in any manner, waive its rights in that

respect or fail to opportunely object to a variance. The objection was continually made in the course of the trial, as appears from the bill of exceptions. Evidence as to the use of the platform between the two tracks and the possession of the commutation ticket by Jennings was objected to as an attempt to make a different case, and because the evidence already showed that he was not a passenger. The defendant also moved to direct a verdict for it because there was no proof that Jennings was a passenger or had been received as such, and that the proof was at variance with the declaration. The objection of variance was never waived, but was insisted upon throughout the trial and by asking the instructions in question. The court need not have given all of the five instructions, as they were mainly repetitions of the same rule, but it was harmful error to refuse to give any of them.

The judgments of the Circuit Court and Appellate Court are reversed, and the cause is remanded to the Circuit Court.

Magruder, J., dissenting:

I do not concur in much that is said in this opinion, nor do I agree to the conclusion reached by it. In my judgment the appellate court was right in affirming the judgment of the trial court, and gave good reasons for doing so in the following opinion:

"On behalf of appellant it is claimed that there was error—First, in not directing a verdict for appellant; second, in the admission of evidence; and, third, in the refusal of instructions asked by appellant, and also in the modification of certain instructions requested by it.

"Under the first point, it is argued that Jennings failed to use the slightest care and caution for his own safety. We think the matter of Jennings' care was a question for the jury, and under the evidence, which is somewhat conflicting, reasonable and fair-minded persons might, acting reasonably, have reached different conclusions; and, this being so, the case was properly submitted to the consideration of the jury. *Chicago & A. R. Co. v. Kelly*, 80 Ill. App. 675, Affirmed in 182 Ill. 267, 54 N. E. 979, and cases there cited; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713. The evidence shows that Jennings, at the time of his death, was sixty-five years of age, and had been in the habit of taking the appellant's suburban trains at its Seventy-Sixth street station almost daily for a period of nearly five years, at or about 7:37 A. M., to go to his work, which was that of a glass bender, at Fifty-Ninth street and Union avenue, nearer the heart of the city than Seventy-Sixth street. In his pocket-book, in the pocket of a suit which he was wearing at the time of the accident, there was found a commutation 10-ride ticket from Auburn Junction to Fifty-Ninth street, with one ride unused. This ticket was the one ordinarily used on appellant's railway

between Seventy-Sixth and Fifty-Ninth streets. At Seventy-Sixth street appellant's depot is upon the east side of its tracks, which consist of four main tracks, a spur, and two cut-offs, the two easterly tracks being used for passenger trains; the most easterly being for north-bound trains, and known as 'Track No. 1,' the next to the west being for south-bound trains, and known as 'No. 2,' and the two tracks still to the west being for freight trains. Directly east of track No. 1, extending from that track to the depot on the east, is a platform made of 2-inch planks on a level with the top of the rails, extending north from the sidewalk crossing about 100 feet, at the north end being about 10 feet wide, and at the south end being about 17 or 18 feet wide. To the west of the north-bound track, on the same level, and extending from the north-bound to the south-bound track, from the Seventy-Sixth street sidewalk, about 100 feet north, is a similar platform. Substantially the whole crossing of Seventy-Sixth street is covered by similar planking on the same level with the platforms, extending across all of appellant's tracks, and reaching to the north sidewalk of the crossing, and making a continuous platform or planking between tracks Nos. 1 and 2 from a point about 100 feet north of Seventy-Sixth street to the south line of said street, and a similar continuous platform and planking, on the same level, east of and immediately contiguous to track No. 1, from a point 100 feet north of Seventy-Sixth street to the south line of the street, with the exception of a narrow space between the south sidewalk and the planking of the street crossing proper between the rails of track No. 1, and also to the east of the east rail of track No. 1. The north sidewalk of Seventy-Sixth street joins the east rail of track No. 2, and there is a small space between this sidewalk and the planking of the street crossing extending from the east rail of track No. 2 towards the west. All this planking between tracks Nos. 1 and 2, including the sidewalks on both sides of Seventy-Sixth street was commonly used by persons in the habit of taking or leaving appellant's suburban trains at this point, and Jennings, during all the time he had taken these trains at this station, was in the habit of approaching this platform between the tracks Nos. 1 and 2 from the west on the north sidewalk of Seventy-Sixth street, his home being at a point northwesterly from the intersection of Seventy-Sixth street and appellant's railroad tracks. He usually and ordinarily took appellant's north-bound suburban train leaving the Seventy-Sixth street station at 7:37 A. M., and at the time he was killed was on his way to take this train, going along the north sidewalk, and was struck by appellant's south-bound train, either as he stood very near the west rail of the south-bound track, or just as he was in the act of stepping across this track on the sidewalk connecting with the platform beyond it to the east. The north-bound train was about on time, but the south-bound train which struck

Jennings, as we think a preponderance of the evidence clearly establishes, was several minutes behind time. These trains usually and ordinarily passed each other, when on time, at or about Eighty-First street, which is five blocks to the south of Seventy-Sixth street, and several of the witnesses testify that they never knew, although they were familiar with the running of the trains at this point, of this south-bound train passing Seventy-Sixth street at the time the north-bound train was stopping there or about to stop there. The north-bound train was scheduled to stop at this station at or about the time that it did actually stop on the morning of the accident, but the south-bound train was not scheduled to stop at this station. Appellant's engineer was an experienced man, had for some years been running this particular south-bound train, and must be presumed to have been familiar with the fact that the north-bound train was scheduled to stop at this station for the receipt and discharge of passengers, and, in any event, the evidence shows that he saw the north-bound train as he approached the station from the north, and could easily have seen, if he did not see, that the north-bound train was either stopped at the station or was in the act of stopping. He testified that this north-bound train was not a stranger to him, and he had seen it leaving there as his train would be coming up, sometimes; that he knew perfectly well that this was not the place he commonly passed it; that it stopped at this station for passengers at about 7:37 A. M., as far as he recollected. There were also offered in evidence two rules of the appellant company which were in force at the time, as follows: 'Rule 114. Great care must be exercised by trainmen of a train approaching a station where any train is receiving or discharging passengers. Rule 114a. On double track, opposing trains must not pass while passengers are being received or discharged.'

"The engineer of the south-bound train was no doubt familiar with these rules, though he testifies that he did not remember of being told by one Friedlander that there was a rule prohibiting him from passing a train at a station. He should have been familiar with them. While it does not appear that Jennings was, in fact, familiar with these rules, from the fact that for five years preceding he had been in the habit of riding upon appellant's suburban trains almost daily, it is reasonable to presume that he knew of such a rule, and, if he did, he had the right to rely upon its observance by appellant's servants. Moreover, because of his long daily habit of taking this particular north-bound train at this time, it must be presumed that he knew of the fact that the two trains usually and ordinarily passed each other at or about Eighty-First street, which was about half a mile to the south, and it is but reasonable that he should have expected that the south-bound train had already passed at the time he reached the vicinity of the station. It also appears from the evidence that as he approached the sta-

tion from the west, and as he walked along the sidewalk, across the spur, cut-offs, and freight tracks, the north-bound train was coming into the station, and at the time that he approached track No. 2, and as he stood very near it, there was considerable noise from the movement of the train and escaping steam, and that he was looking towards this train; some of the witnesses saying in an easterly, but most of them in a southeasterly, direction. The preponderance of the evidence is that, when the north-bound train came to a stop, the rear cars of it, the train being composed of some seven or eight coaches, extended partly across, if not entirely across, Seventy-Sixth street. The engine of the south-bound train, as the evidence tends to show, struck Jennings either just as the north-bound train was stopped or about to stop, and we think the clear preponderance of the evidence is that at the time he was struck the engine of the north-bound train and several of the cars had already passed the north sidewalk of Seventy-Sixth street. The preponderance of the evidence shows, we think, that the whistle of the south-bound engine was sounded, some of the witnesses saying that it gave several shrill whistles near or north of Seventy-Fifth street, in order to warn a colored man who was walking upon the tracks at a point near and south of Seventy-Fifth street; and there is also evidence that a shrill blast of the whistle was given—the engineer says three or four short whistles and then a long one—as it approached Seventy-Sixth street; also that he first blew the whistle as a warning to Jennings when the train was 40 feet or more north of the crossing. All of the witnesses who testified as to the circumstances attending the accident say that they heard the whistle of the south-bound train either north of Seventy-Fifth street or as it was near Seventy-Sixth street. Most of these witnesses stood either at points on the platform or crossing east of track No. 1, or near the crossing on the west.

"Other circumstances testified to by the various witnesses, bearing upon the question of Jennings' care, appear from the evidence, all of which we have carefully considered, and we cannot say that a finding by the jury, considering all the evidence, that Jennings exercised such care as an ordinarily prudent person would have done under the circumstances shown, can be said to be manifestly against the evidence. Whether he should have looked to the north, under all the circumstances shown, was a question of fact for the jury, as has been repeatedly held by this and the supreme court. *Partlow v. Illinois C. R. Co.* 150 Ill. 321, 37 N. E. 663; *Chicago & N. W. R. Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071; *Pennsylvania Co. v. Frana*, 112 Ill. 398; *North Chicago Street R. Co. v. Nelson*, 79 Ill. App. 229; *Chicago & A. R. Co. v. Smith*, 180 Ill. 453, 54 N. E. 325; *Illinois C. R. Co. v. Batson*, 81 Ill. App. 143. In the *Partlow Case*, 150 Ill. 321, 37 N. E. 663, while the court says that it has been said, in discussing a ques-

tion of fact, it was the duty of a person approaching a railroad crossing to look and listen before attempting to cross, and that a failure so to do was negligence, it also says: 'The court cannot say, as a matter of law, that the failure to look and listen is negligence. These facts are proper for the consideration of the jury in determining whether a person has been negligent, but it cannot be said, as a matter of law, that a failure to observe such acts is negligence,'—citing cases. The same doctrine is reaffirmed in the *Hansen Case*, 166 Ill. 623, 46 N. E. 1071, and the court says: 'It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety, under like circumstances, must be left to the jury as one of fact.'

"On the matter of the speed of the south-bound train at and immediately preceding the time of the accident there is a conflict in the evidence, the various witnesses placing the speed at from 20 to 40 miles per hour. The engineer says he was running between 20 and 25 miles per hour. A brakeman on the same train said that it was running about 20 miles an hour. One of plaintiff's witnesses, who was engaged in the coal business at Seventy-Sixth street for six years and entirely familiar with the running of trains, says that it was going about 35 miles per hour. Another, Johnson, who lived close by the tracks, and was walking upon the south-bound track about half way between Seventy-Fifth and Seventy-Sixth streets, to warn whom the first shrill whistles were given, said the train was going at 35 or 40 miles an hour,—'she was flying.' Another witness, an advertising agent, familiar with the running of railway trains, says that it was running 35 or 40 miles an hour; that before it struck Jennings it seemed to be going a little slower, but it was coming very fast. The ordinance which was put in evidence limited the speed of passenger trains at this point to 30 miles per hour.

"From a full consideration of the evidence, we cannot say that a finding by the jury that the speed of the train between Seventy-Fifth and Seventy-Sixth streets exceeded 30 miles an hour can be said to be manifestly against the evidence. But if it be conceded that the speed of the train was less than 30 miles per hour, and therefore not in violation of the ordinance, we are of opinion that under the first count of the declaration, which charges that the train was carelessly, negligently, and improperly driven, managed, and run, the claim of negligence, generally, is established by the evidence. The running of the train at all past the station was a violation of the rule of the company which required that it should not pass the north-bound train while passengers were being received or discharged. There is evidence that the north-bound train had stopped for the purpose of receiving and

discharging passengers, and that there were numerous passengers upon the platform and at the crossing waiting to take the train. Also, taking the evidence of the engineer that he was running at the rate of 20 to 25 miles per hour, that was a negligent rate of speed, considering all the circumstances shown, and was in direct violation of the rule of the company, which required that 'great care must be exercised by trainmen of a train approaching a station when any train is receiving or discharging passengers.' In the *Kelly Case*, 80 Ill. App. 675, Affirmed in 182 Ill. 267, 54 N. E. 979, it was said, Mr. Justice Wright delivering the opinion of the court, and which was adopted by the supreme court, that 'the running of a freight train at a high rate of speed past a station where a passenger train is receiving and discharging passengers is so plainly negligent as not to require comment. It is equally negligent to so run a freight train just as the passenger train is pulling into the station, and more especially when the track on which the freight train is moving is between the depot and the track on which the passenger train is moving.' So we are of opinion in this case that the jury were justified in finding that the appellant was negligent, not only because the train was run at a speed in violation of the city ordinance, but in violation of its own rules, and also in running past the north-bound train at the rate of 20 or 25 miles per hour, even if it had not stopped, but was upon the point of stopping, at the station for the purpose of receiving and discharging passengers.

"It is claimed by appellant's counsel that as it is alleged in each count of the declaration that Jennings was received by the appellant as a passenger, and because there was no evidence tending to prove this allegation of the declaration, there could be no recovery. We think the contention is not tenable, for two reasons: First, because the evidence tends to show that Jennings was received as a passenger, and from it the jury were justified in finding that he was so received; and, second, the proof of the allegation was not necessary to a recovery in this case.

"From the evidence, partly hereinabove stated, while it appears that Jennings was not actually upon the platform between tracks Nos. 1 and 2, he was within a few feet of it, approaching it upon the sidewalk built of the same kind of material as the platform by the appellant, which platform was immediately adjoining the sidewalk, between the tracks, upon the same level therewith, and the sidewalk was immediately adjoining and connected with the planking which formed the street crossing, all of which crossing, including the said sidewalk, was habitually and commonly used by persons and passengers who were received and discharged from appellant's suburban trains. This, with the further fact that Jennings had for several years prior thereto been almost daily in the habit of approaching appellant's trains, as well as leaving

them, by this platform crossing and sidewalk, and that he had upon his person a commutation ticket which was good for passage upon appellant's railway trains, was sufficient proof to support the allegation that he was received as a passenger by the appellant. We think that under these facts it may be said that he was upon the premises of the carrier,—at least, premises which it had appropriated and used for the purpose of receiving and discharging its passengers, and for their convenience.

"In 2 Wood, Railway Law, 1037, it is said: 'It is not always easy to determine when the relation of passenger begins, but it would seem from the cases that it is not necessary that a contract for passage should have been actually made, or the fare actually paid, in order to create the relation, but it is necessary that a person should be under the control of the carrier in order to be entitled to its care as such. Therefore a person cannot be regarded as a passenger who is not upon the premises of the carrier.' In *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115, 39 L. R. A. 148, 48 N. E. 294, the court, in considering the question as to when the relation of passenger and carrier exists, says: 'One does not become a passenger until he has put himself in charge of the carrier, and has been expressly or impliedly received as such by the carrier.' In *Cooley, Torts*, 770, the author says: 'The responsibility of the carrier begins when the passenger presents himself for transportation, and this he may be said to do when he approaches the place of reception for the purpose.' The following authorities hold, in substance, that this relation commences when a person goes upon the premises of the carrier for the purpose of taking a train, and its premises are considered as any place where it has been allowed a custom to receive passengers, even where there is no platform provided, and that it is necessary only, in order to create the relation, that the person should be upon the premises of the carrier for present transportation and waiting to take the train. *Lent v. New York C. & H. R. R. Co.* 120 N. Y. 467, 24 N. E. 653; *Allender v. Chicago, R. I. & P. R. Co.* 37 Iowa, 264; *Norfolk & W. R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935; *Thomp. Carr. of Pass.* 43; *Devire v. Boston & M. R. Co.* 148 Mass. 343, 2 L. R. A. 166, 19 N. E. 523; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713.

"As we have seen by the several counts of the declaration, besides the allegation that Jennings was received as a passenger, it is averred that it was the duty of appellant to have allowed Jennings to safely cross the railroad track to safely take and mount the train, and not to have negligently driven its engine and train of cars up to and over the crossing when Jennings was standing or walking over the crossing, with all due care and diligence on his part, for the purpose of reaching and mounting the north-bound train. We think the proof of this allegation was entirely sufficient, so far as concerns the question of care on Jennings' part and the negligence of the appellant, to justify

a recovery without any proof that he was received as a passenger. It is elementary that in this class of cases the proof of one charge of negligence is sufficient to justify a recovery, so far as negligence is concerned, without proving other charges of negligence made by the declaration. If Jennings was received as a passenger, appellant's duty to him was that of the highest care; but, if he was not, it still owed him the duty of exercising ordinary care, at least, to avoid injuring him.

"On behalf of appellant it is also claimed that there was error in permitting evidence as to the use made, prior to the accident, of the planking between the north and south bound tracks in alighting from, and taking suburban trains at, the Seventy-Sixth street station, and also as to the extent of such use. No authority is cited in support of the contention, and we think what has already been said shows that this evidence was entirely proper and admissible.

"The learned trial judge refused thirteen instructions asked for appellant, and modified two others, each of which rulings is claimed to have been erroneous. Five of these instructions, numbered 1 to 5, inclusive, are based upon the theory that it was necessary for appellee to prove, before there could be a recovery, that Jennings had been received as a passenger by appellant. What has been said sufficiently disposes of the claim that it was error to refuse these instructions.

"Two others of these instructions, Nos. 6 and 7, are based upon the theory that it was the duty of Jennings to have looked in each direction for the approach of trains, and in substance tell the jury that there could be no recovery unless he did so look. What has been said we think disposes of this contention, and shows that it was not error for the court to refuse the instructions.

"The ninth refused instruction is, in substance, covered by the tenth. Instruction No. 11, refused, is, in our opinion, properly refused, because it singles out and calls to the attention of the jury a particular part of the evidence. We think the twelfth and thirteenth refused instructions were properly refused; the twelfth because there was evidence that the north-bound train had stopped at the station for the purpose of receiving and discharging passengers, and that it was a violation of the appellant's rule for the south-bound train to pass it under such circumstances. The thirteenth instruction ignores the rule of the company, and was therefore properly refused. The fourteenth instruction was properly refused, because, among other things, it tells the jury there was no proof as to whether or not the bell on the engine of the south-bound train or the tower bell was ringing as the south-bound train approached the crossing. The first of appellee's witnesses testified that 'aside from the shrill whistling that occurred before the accident I didn't hear, notice, or remember anything else.' From this evidence we think the jury were justified in finding that neither of these bells was rung.

The fifteenth instruction was properly refused because it is argumentative, and, besides, it in substance tells the jury that certain facts constitute negligence. *Illinois C. R. Co. v. Griffin*, 184 Ill. 10, 6 N. E. 337. Instructions numbered 10½ and 11 were properly modified. Instruction 10½, as asked, had the same defect, as to Jennings' duty to look up and down the tracks, as in instructions 6 and 7, refused. As modified, this objection was cured. The eleventh instruction was as favorable to appellant as it was modified. Being of opinion that the jury was sufficiently instructed as to the issues involved, and that there is no error in the record, the judgment is affirmed."

Emma PETERSON, Appt.,

v.

James W. GIBSON.

(191 Ill. 865.)

1. A provision in a certificate of membership in a benefit society, that the holder shall comply with the constitution and by-laws of the association, a copy of which is attached to the certificate, refers to such laws as they then exist, and will not bind him to submit to a change subsequently made depriving him of the right to dispose of the benefit by will, although the constitution provides for amendment.
2. Action of the appellate court not assigned as error is not subject to review in the supreme court.

(June 19, 1901.)

APPEAL by defendant Peterson from a judgment of the Appellate Court, First District, affirming a decree of the Circuit Court for Cook County in favor of defendant Gibson in an interpleader proceeding to determine the title to a fund due on a mutual benefit certificate upon the life of Lester E. Nelson, deceased. *Affirmed*.

The facts are stated in the opinion.

Messrs. M. C. Harper and O. C. Peterson, for appellant:

Substitution can be effected only in the manner provided by the by-laws or constitution.

Supreme Lodge, K. of H. v. Nairn, 60 Mich. 44, 26 N. W. 826; *Follman's Appeal*, 92 Pa. 50; *Hellenberg v. District No. 1 of I. O. of B. B.* 94 N. Y. 580; *National Mut. Aid Soc. v. Lupold*, 101 Pa. 111; *Harman v. Lewis*, 24 Fed. 97; *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. 19; *Hainer v. Iowa L. of H.* 78 Iowa, 245, 43 N. W. 185; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Coleman v. Supreme Lodge, K. of H.* 18 Mo. App. 189;

NOTE.—As to power of benevolent society to change or amend its by-laws, see, in this series, *Supreme Lodge, K. of P. v. Knight* (Ind.) 8 L. R. A. 409, and note; *Supreme Lodge K. of P. v. La Maita* (Tenn.) 30 L. R. A. 838; and *Thibert v. Supreme Lodge, K. of H.* (Minn.) 47 L. R. A. 186.
54 L. R. A.

Olmstead v. Masonic Mut. Ben. Soc. 37 Kan. 93, 14 Pac. 449; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166; *McCarthy v. New England O. of P.* 153 Mass. 314, 11 L. R. A. 144, 26 N. E. 966; *Shuman v. Ancient Order of U. W.* 110 Iowa, 642, 82 N. W. 331; *Supreme Council A. L. of H. v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770; *Duer v. Supreme Council O. of C. F.* 21 Tex. Civ. App. 493, 52 S. W. 109; *Thomas v. Thomas*, 131 N. Y. 205, 30 N. E. 61; *Bennett v. Slater* [1899] 1 Q. B. 45, 68 L. J. Q. B. N. S. 45; *Baldwin v. Begley*, 185 Ill. 180, 66 N. E. 1065.

No act of the society after Nelson's death could change the rights of the parties as they then existed.

Wendt v. Iowa L. of H. 72 Iowa, 682, 34 N. W. 470; *McLaughlin v. McLaughlin*, 104 Cal. 171, 37 Pac. 865; *Smith v. Harman*, 28 Misc. 681, 59 N. Y. Supp. 1044, Bacon Ben. Soc. 2d ed. § 307; *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408.

More than three years before Nelson's death an amendment was regularly adopted, prescribing the steps which must be taken to make an effective change of beneficiary. This amendment, from the time of its adoption, became a part of the contract.

No one has a right to presume that the by-laws will remain unchanged. Associations and corporations have a right to change their by-laws when the welfare of the corporation or association requires it, and it is not forbidden by the organic law.

Supreme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479; *Borgards v. Farmers' Mut. Ins. Co.* 79 Mich. 440, 44 N. W. 856; *Bacon, Ben. Soc.* § 81; *Supreme Council, C. K. of A. v. Franke*, 137 Ill. 118, 27 N. E. 86; *Catholic Knights v. Kuhn*, 91 Tenn. 214, 18 S. W. 385; *Supreme Council C. K. of A. v. Morrison*, 16 R. I. 468, 17 Atl. 57; *St. Patrick's Male Beneficial Soc. v. McVey*, 92 Pa. 510; *McCabe v. Father Matthew Total Abstinence Ben. Soc.* 24 Hun. 149; *Fugure v. Mutual Society of St. Joseph*, 46 Vt. 362; *Poulney v. Bachman*, 31 Hun. 49; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125.

Where a contract of life insurance issued by a mutual company is conditioned to be subject to any by-law thereafter enacted, the insured is bound by a subsequent by-law forfeiting the policy if the assured should die by his own hand.

Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 20 So. 712; *Hughes v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 98 Wis. 292, 73 N. W. 1015; *Schmidt v. Supreme Tent K. of M.* 97 Wis. 528, 73 N. W. 22; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 449, 46 Am. Rep. 332; *Fulenwider v. Supreme Council, R. L.* 73 Ill. App. 321, *Affirmed* in 180 Ill. 621, 54 N. E. 435.

The legislature has constitutional authority to pass a statute affecting the execution of wills, and to give it a retrospective effect upon testaments already made at the time of its passage, but which have not yet taken effect by the death of the testator.

3 Am. & Eng. Enc. Law, p. 761, note;

Long v. Zook, 13 Pa. 400; *American Baptist Missionary Union v. Peck*, 10 Mich. 341; *Loveren v. Lamprey*, 22 N. H. 434; *Sturgis v. Ewing*, 18 Ill. 176; *Evans v. Price*, 118 Ill. 593, 8 N. E. 854; *Kochersperger v. Drake*, 107 Ill. 122, 41 L. R. A. 446, 47 N. E. 321.

It was perfectly competent for the legislature to say, as it did by the acts of 1887 and 1893, that this class of property should not pass by will.

In taking steps to change the beneficiary the statute and by-laws in force at the time the steps were taken should have been followed.

Cooley, *Const. Lim.* 4th ed. 350; 5 *Am. & Eng. Enc. Law*, 2d ed. p. 103; *Amesbury v. Bowditch Mut. F. Ins. Co.* 6 Gray, 596; *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143; 2 *Kyd. Corp.* 155; *Black, Constitutional Prohibition*, § 192; *Henschall v. Schmidts*, 50 Mo. 454; *Rich v. Flanders*, 39 N. H. 304; *Bird v. Keller*, 77 Me. 270.

Mr. George G. Bellows for appellee.

Beggs, J., delivered the opinion of the court:

Leander E. Nelson (now deceased) at the time of his death was a member in good standing in the Scandinavian Mutual Aid Association. He was admitted to membership on the 8th day of November, 1886, and on that day received a mortuary benefit certificate issued by the said association, in the sum of \$3,000, to be paid to Eva Nelson, his mother, and appellant's (Peterson's) intestate, she having died during the pendency of this proceeding. The said Leander E. Nelson departed this life March 12, 1897, leaving a last will and testament, which was duly admitted to probate. The will appointed appellee, Gibson, executor, and provided that the provision in the benefit certificate making said Eva Nelson sole beneficiary of the mortuary fund should be revoked, and that such fund should be bequeathed and made payable as follows: \$1,000 to his mother, said Eva Nelson; \$1 each to Minnie Peterson, Hannah Cederstrom, John Nelson, and Gustav Nelson; and the remainder to the appellee, James W. Gibson. Said Eva Nelson, who was then living, asserted a claim to the entire amount of said mortuary fund, and said appellee, Gibson, as legatee under the will of said Leander E. Nelson and as executor thereof, claimed the right to receive all of such mortuary fund above the sum of \$1,000, in accordance with the will of the deceased assured. Under a bill of interpleader filed by the association these rival claimants were brought into court, and required to submit their contentions to the court for determination. The association deposited in court the mortuary fund, less \$13 allowed it for costs in that behalf, and was dismissed from the proceeding. Upon a hearing the chancellor sustained the right of the assured to dispose of the mortuary fund by will, and the decree was affirmed in the appellate court for the first district on appeal. This is a further appeal from the judgment of the appellate court.

Section 1 of the act of June 18, 1883 (154 L. R. A.

Starr & C. Anno. Stat. 1885, p. 1348), under which the Scandinavian Mutual Aid Association was incorporated, authorized the association to furnish life indemnity, or pecuniary benefits to certain relatives by consanguinity or affinity, and to the "devises or legatees" of deceased members. This section was in full force, and in no wise modified or changed, when said Leander E. Nelson received his beneficiary certificate, on the 8th day of November, 1886. Nor had the association, by by-law or otherwise, attempted to place any restriction on the right of any member to appoint by his last will a beneficiary other than the person named in the certificate to receive the mortuary fund. In such associations the beneficiaries do not, as a general rule, acquire a vested right to the mortuary fund, but during the lifetime of the member have a mere expectancy only, subject to be defeated by the exercise of the power of appointment which is vested in the member. *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657; *Moore v. Chicago Guaranty Fund Life Soc.* 178 Ill. 202, 52 N. E. 882; *Bloomington Mut. Ben. Asso. v. Blue*, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 543. The power of appointment thus vested in the assured member may be divested by future changes in the constitution of the association or the organic law under which it was organized, if it was made a part of the contract admitting the assured to membership that his right in this respect should be subject to such future changes in the law governing the association but otherwise the power of appointment is a vested right, and cannot be taken away by any subsequent enactment or change in the laws of the association. *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 543; *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065.

The contention of the appellant is that the said assured, as a part of the contract admitting him to membership in the association, agreed that he would comply with and be bound by, the constitution and by-laws of the association, as such constitution and by-laws might or should be amended or changed in the future; and appellant further contends that the constitution and by-laws of the association were subsequently so legally amended and changed as to divest the said member of the right to change the beneficiary by his last will. The insistence that it was part of the contract that the association reserved to itself power to change and amend the constitution and by-laws, and that the said Leander E. Nelson agreed that power should be so reserved, and that he would be bound by the constitution and by-laws as they might be thereafter amended, is based alone upon a clause or provision found in the certificate of membership issued to the said Nelson. The provision in the certificate is as follows: "This certificate is issued upon the condition that the said Leander E. Nelson shall comply with the constitution and by-laws of the association, and that the statements

made in the application for this certificate are true." A copy of the constitution and of the by-laws of the association was attached to the certificate of membership, and made a part thereof. Section 7 of article 9 of said constitution, as it stood at the time said certificate was issued to Nelson, was as follows: "The constitution can be amended and changed at the annual meeting of the association by a majority of two thirds of all the members present." It should here be noted that that which is referred to as the constitution of this association is in no sense the charter of the association. What is here referred to as the constitution is but a code of laws adopted by the association. It was correctly said in *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479: "A constitution of a voluntary association or a corporation is nothing more than a by-law under an appropriate name."

The clause in the certificate does not purport to bind the member to the observance of constitutional provisions or by-laws other than such as then existed, and a copy of the so-called "constitution and by-laws" then in force was attached to the certificate as a part thereof. It was the constitution and the by-laws so made a part of the certificate to which the certificate had reference and which the member consented to obey. It is only when a member, in express terms, agrees to be bound by such constitutional amendments or by-laws as may thereafter be enacted that he is bound by future amendments or by-laws which impair the obligations of his contract of membership injuriously. *Covenant Mut. Life Assn. v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065. In the absence of such an express agreement the contract of membership cannot be impaired by subsequent changes effected by the association. The constitutional provision contained in said § 7 of article 9 of the constitution of the association at the time of the admission of said Nelson to membership in the association, to the effect that the constitution could be amended and changed at an annual meeting of the association by a majority of two thirds of all the members present, cannot be construed to authorize an amendment or change in the constitution which should act retrospectively, and impair the obligation of the contract entered into between the association and said Nelson prior to such amendment of the constitution.

As before remarked, that which is called the constitution of the association is but a code of by-laws adopted by the association. The association had inherent power to enact by-laws consistent with the provisions of the enactment under which it was organized, and not repugnant to the constitution of the state of Illinois, and to alter and amend such by-laws. The by-law incorporated in the code called the constitution, relative to amendments and changes in such code, did not confer upon the association the right or power to make such amendments or

changes. The association possessed that power as an attribute of its corporate life. The said § 7 of article 9 of the code of by-laws had no other effect than to declare the mode or manner of exercising the power of amendment possessed by the association, viz., by a majority of two thirds of all the members present at the annual meeting. If the section had been wholly omitted from the constitution or by-laws, the association would have had ample power to pass any lawful amendment of the constitution or by-laws. Niblack, Ben. Soc. p. 105, § 28; 1 Bacon, Ben. Soc. 2d ed. § 9. The assent of the assured, therefore, did not confer any power on the association which without such assent it had not, nor did it bind the assured to submit to any amendment to which he could not be compelled to submit in the absence of said § 7. His assent was that the association, at any annual meeting, might make any change or amendment lawful to be made, by a majority of two thirds of all the members present, and cannot be construed as an assent to the adoption of a by-law divesting him of a vested right, and impairing the obligation of his contract of membership. Section 14 of article 2 of the Constitution of 1870 inhibited the general assembly from adopting any statute impairing the obligation of such contract of membership. Subsequent enactments of the legislature or future amended by-laws of the association could not operate retrospectively, and thus divest the vested rights of a member or destroy existing contract obligations. In revoking the direction of the certificate as to the person to receive the mortuary benefit, and in appointing others as beneficiaries to receive such fund, said Leander E. Nelson but exercised a legal right of which he was possessed.

A portion of the brief in behalf of appellee is devoted to the criticism of the action of the chancellor in relieving the appellant from the payment of any portion of the cost of the proceeding. The appellate court affirmed the action of the chancellor in respect of the order as to costs. The action of the appellate court in that respect is not assigned as for error in this court, and for that reason is not subject to review in this court.

The judgment of the Appellate Court is affirmed.

Petition for rehearing denied October 10, 1901.

J. A. BAILEY, *Plff. in Err.*,

v.

PEOPLE of the State of Illinois.

(190 Ill. 28.)

The police power will not justify the restriction of the number of persons which lodging-house keepers alone may per-

NOTE.—For some other cases in this series as to limitations upon exercise of the police power, see *State v. Schlemmer* (La.) 10 L. R.

mit to occupy one room during the same night, since they are thereby deprived of their property, and the discrimination in limiting the provision to lodging-house keepers prevents the regulation being due process of law.

(April 18, 1901.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of violating a statute prohibiting lodging-house keepers from permitting more than a specified number of persons to occupy the same room during a night. *Reversed.*

The facts are stated in the opinion.

Messrs. T. J. Scofield and Charles J. Scofield, for plaintiff in error:

The words "lodging house" as used in the amendatory act do not include an inn or a hotel, and probably do not include a boarding house. The law is therefore aimed at one class, the keepers of lodging houses.

Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; *Bullock v. Adair*, 63 Ill. App. 30.

The right to receive lodgers in a lodging house, to contract with them as to compensation, to agree with them as to the number who shall occupy the same room at the same time for sleeping purposes, is a liberty and also a property right. Any abridgment of this right deprives the individual of liberty and property, and, if such abridgment be without due process of law, the act is unconstitutional.

Fraser v. People use of School Fund, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 58 N. E. 1007; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; 10 Am. & Eng. Enc. Law, 2d ed. pp. 298, 299.

The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness.

Cooley, Const. Lim. 1st ed. 393.

"Due process of law" does not mean a statute passed for the purpose of working the wrong. These words are held to be synonymous with the words, "law of the land," and this means general public law, binding

upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108.

There is no right of discrimination against the lodging-house keeper, and in favor of the inn keeper or hotel keeper, who is engaged in business of the same general character.

Ramsey v. People, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 58 N. E. 616; *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627.

The amendatory act in question is not a proper exercise of the police power.

It is impossible that, under the police power, what is lawful if done by A can be a misdemeanor if done by B, the circumstances and conditions being the same.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *Austin v. Murray*, 16 Pick. 121.

Compensation must be made before the property or labor of a citizen can be appropriated to the benefit of the public.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Morse v. Stooker*, 1 Allen, 150; *State v. Glen*, 52 N. C. (7 Jones, L.) 321.

Messrs. C. E. Demeeen, A. O. Barnes, and E. J. Smejkal, with *Mr. H. J. Hamlin*, Attorney General, for defendant in error:

The police power embraces the protection of the lives, health, and property of citizens, the maintenance of good order, and the preservation of good morals.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115.

It may be said to be that inherent and plenary power in the state which enables it

A. 135, and note; *Ritchie v. People* (Ill.) 29 L. R. A. 79; *Eden v. People* (Ill.) 32 L. R. A. 659; *State v. Harrington* (Vt.) 34 L. R. A. 100; *State v. Walsh* (Mo.) 35 L. R. A. 231; *Chicago, B. & Q. R. Co. v. State ex rel. Omaha* (Neb.) 41 L. R. A. 481; *State v. Jackman* (N. H.) 42 L. R. A. 438; *People v. Havnor* (N. Y.) 31 L. R. A. 689; *State ex rel. Wyatt v. Ashbrook* (Mo.) 48 L. R. A. 265; *Chicago v. Netcher* (Ill.) 48 L. R. A. 261; *Ruhstrat v. People* (Ill.) 49 L. R. A. 181; and *State v. Schlenker* (Iowa) 51 L. R. A. 847.
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As to constitutional equality of privileges, immunities, and protection, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. E. Co.* (Ky.) 14 L. R. A. 579.

As to interference by police power with right to private property, see *Ford v. State* (Md.) 41 L. R. A. 551; and *State ex rel. Duensing v. Roby* (Ind.) 33 L. R. A. 213.

As to police restraint upon business generally, see cases in note to *State v. Loomis* (Mo.) 21 L. R. A. on page 794.

to prohibit all things hurtful to the comfort, safety, and welfare of society.

Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; *Meadowcroft v. People*, 163 Ill. 56, 35 L. R. A. 176, 45 N. E. 303; *Booth v. People*, 186 Ill. 48, 50 L. R. A. 762, 57 N. E. 798.

All rights, whether to things tangible, or intangible, are subject to the general police power of the state.

Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 634; *Cooley*, Const. Lim. p. 57; *Daniels v. Hilgard*, 77 Ill. 640; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *Cole v. Hall*, 103 Ill. 30; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454.

The fact that a law regulates trade or any business, or in some degree operates as a restraint upon the same, does not render it obnoxious to any constitutional provision.

Daniels v. Hilgard, 77 Ill. 640.

The law of the land may expressly prohibit and make criminal the doing of an act which, in the absence of such law of the land, would constitute a liberty or property right within the meaning of the Constitution, even though such act is not in itself immoral.

Booth v. People, 186 Ill. 48, 50 L. R. A. 762, 57 N. E. 798.

An act general in its terms and uniform in its operation upon all persons and subject-matter in like situation is general, and not obnoxious to the objection that it is local or special legislation.

West Chicago Park Comrs. v. McMullen, 134 Ill. 170, 10 L. R. A. 215, 25 N. E. 676.

The classification is not obnoxious as special legislation, if the restraint imposed rests upon distinctions which differentiate the particular individuals of the class to be affected from the body of the community, or from other classes.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Lasher v. People*, 133 Ill. 231, 47 L. R. A. 802, 55 N. E. 603; *People ex rel. Akin v. Adams County Supers.* 185 Ill. 297, 56 N. E. 1044; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627.

Boggs, Ch. J., delivered the opinion of the court:

The act of the general assembly entitled "An Act to Create and Establish a Board of Health in the State of Illinois," approved May 28, 1877, in force July 1, 1877 (Hurd's Rev. Stat. 1899, p. 1604), was amended by the addition of four sections thereto by an enactment approved April 21, 1899, entitled "An Act to Amend an Act Entitled 'An Act to Create and Establish a Board of Health in the State of Illinois'" (Id. p. 1606). Section 15 of the amendatory act provides the state board of health shall have supervision of "all lodging houses in cities of 100,000 inhabitants or more." Section 16 of the amendatory act is as follows: "It shall be unlawful for more than six persons to occupy the same room for sleeping purposes

at the same time in any such lodging house, and no room in such lodging house shall be occupied for sleeping purposes which does not contain 400 cubic feet or more of space for each person sleeping therein at the same time." A complaint was filed before a justice of the peace alleging that the plaintiff in error was the landlord of a "lodging house" at No. 39 Custom House place, in the city of Chicago, and that on the 26th day of November, 1899, he wilfully and knowingly permitted more than six persons to occupy the same room for sleeping purposes at the same time in said lodging house, in violation of the provisions of said § 16, hereinbefore set out. The plaintiff in error was arrested on a complaint filed with a justice of the peace, tried, and convicted of the offense purported to be set forth in the complaint, and a fine of \$25 assessed against him. He prosecuted an appeal to the criminal court of Cook county, where, upon a hearing, he was again adjudged guilty, and condemned to pay a fine in the sum of \$100 and the costs in the cause. He prosecutes this writ of error to reverse such judgment of said criminal court.

The evidence established, without dispute, that the plaintiff in error kept a lodging house at No. 39 Custom House place, in Chicago, and on November 26, 1899, permitted 19 persons to sleep in one room of the said lodging house, the dimensions of said room being 70 feet in length, 62 feet in width, and 13 feet and 3 inches in height; that there were 64 beds in the room, of which 19 were occupied on the occasion in question. The only defense presented in the lower court was that said § 16 was in contravention of the rights guaranteed to the plaintiff in error by the Constitution of the state, and therefore void. Propositions of law to that effect were presented to the trial court, but were refused. The action of the court in passing upon the propositions of law is the sole error assigned in this court.

The guaranty of § 2 of article 2 of the Constitution of 1870 is that no person shall be deprived of liberty or property without due process of law. The term "property" includes every interest anyone may have in any and every thing that is the subject of ownership by man, together with the right to freely possess, use, enjoy, and dispose of the same. *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 58 N. E. 1007; 19 Am. & Eng. Enc. Law, pp. 284, 285; *Booth v. People*, 186 Ill. 43, 50 L. R. A. 762, 57 N. E. 798. The privilege of contracting to receive gains and profits for the right to use property granted to another is both a liberty and property right. *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395. The right to make a reasonable contract with reference to the use of a thing is an attribute of property and a property right. *Booth v. People*, 186 Ill. 43, 50

L. R. A. 762, 57 N. E. 798. The right to entertain lodgers in a lodging house, and to fix, by contract, with them, the price to be paid for such accommodation, to the number who shall occupy the same room at the same time for sleeping purposes, is a liberty and also a property right. Any restriction upon or abridgment of this right deprives the citizen of both liberty and property. The attorney general insists that § 16 of the enactment in question, though it infringes the property right of the plaintiff in error, may be upheld as a proper exercise of the police power. In *Booth v. People*, 186 Ill. 43, 50 L. R. A. 762, 57 N. E. 798, we said (p. 48, 186 Ill., p. 763, 50 L. R. A., and p. 799, 57 N. E.): "The state inherently possesses, and the general assembly may lawfully exercise, such power of restraint upon private rights as may be found to be necessary and appropriate to promote the health, comfort, safety, and welfare of society. This power is known as the police power of the state. In the exercise of this power the general assembly may, by valid enactments,—i. e., 'due process of law'—prohibit all things hurtful to the comfort, safety, and welfare of society, even though the prohibition invade the right of liberty or property of an individual." "Due process of law" means a general public law, legally enacted, binding upon all members of the community under all circumstances, and not partial or private laws affecting only the rights of private individuals or classes of individuals. An enactment which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions and circumstances are permitted to acquire and enjoy property or contract with relation to it, is not comprehended within the true meaning of the words "due process of law," and is prohibited by the provisions of § 22 of article 4 of the Constitution of 1870. The penalties of the section under consideration are leveled against one class,—the keepers of lodging houses. The keeper of a lodging house is not, in a legal sense, an inn keeper, a hotel keeper, or a boarding-house keeper. *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258; 16 Am. & Eng. Enc. Law, 2d ed. p. 510. Hotel, inn, and boarding-house keepers are given a lien upon the baggage of their guests by paragraph 42 of chapter 82 (Starr & C. Anno. Stat. 1896, p. 2581), and keepers of inns or hotels and keepers of boarding houses are by the common law answerable under a different rule of liability for the loss of the effects of their guests (16 Am. & Eng. Enc. Law, 2d ed. pp. 530-532). Our statute in respect of the liability for the safe custody of the property of guests applies only to landlords and keepers of public inns and hotels, and the keepers of the various places of public entertainment may so conduct their business as that they may bear the relation of an inn or hotel keeper to some of their guests, and that of a boarding-house keeper or lodging-house keeper to others; but, nevertheless, lodging-

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house keepers constitute a class distinguishable from the keepers of other houses of public entertainment, such as hotels, inns, taverns, or boarding houses. This legislation is directed only against lodging-house keepers. Keepers of boarding-houses, inns, hotels, and taverns do not fall within the purview of its prohibition. If the enactment is a valid one, inn or hotel keepers and the keepers of boarding houses may lodge seven or any greater number of guests or patrons in the same room, at the same time, for sleeping purposes, as may suit their convenience, subject only to the consent of their patrons or guests, without incurring the penalties which, under the provisions of this enactment, would be visited upon a lodging-house keeper should he allow more than six persons to occupy the same sleeping apartment at the same time. This is to discriminate against the lodging-house keepers as a class, and to deprive them of liberty and a property right which other persons engaged in business of the same general character and similarly conducted may freely exercise without let or hindrance. As we said in *Frerer v. People use of School Fund*, 141 Ill. 181, 16 L. R. A. 495, 31 N. E. 397: "If A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D, are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract."

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 809, 7 N. E. 631, an enactment which prohibited the owners and operators of coal mines from making contracts which other owners of property and employers of labor might lawfully make was held unconstitutional, and could not be maintained as a lawful exercise of the police power. The same doctrine was reiterated in *Frerer v. People use of School Fund*, 141 Ill. 181, 16 L. R. A. 495, 31 N. E. 397. In *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454, an enactment which prohibited contracts for the employment of females to work for more than eight hours in any one day in any factory or workshop where clothing, wearing apparel, or articles of a similar nature were manufactured was held to be partial and discriminatory in character, and void, as contravening constitutional guaranties, for the reason that other manufacturers and their employees, though engaged in other branches of industry, were not forbidden to so contract. In *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624, an act which made "that an offense, if committed by a person engaged in one branch of mining, which, if done by persons in another branch of the same business, is lawful, without any reason for distinction between the two, we must regard . . . as unconstitutional. In *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108, we held a statute which made it unlawful for a barber to follow his ordinary pursuit on Sunday, and which did not place the like restriction on any other class of business, deprived persons

following that avocation of property, and unjustly discriminated against them, and could not be sustained as a valid enactment under the police power of the state, because of the unequal operation of the law. The doctrine of *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707, is an attempt to deny a property right to a particular class in a community, where all other members of the community are left to enjoy it, is an unwarrantable interference with constitutional rights, whether such denial is contained in a statute or in an ordinance passed under a statute. The principle which may be deduced from the declarations of this court on the subject is that an act which arbitrarily discriminates against one class in the transaction of a business or a lawful occupation, and leaves unaffected by such discriminatory enactment other persons or classes of persons engaged in acquiring property in a manner not distinguishable in character from that in which the class discriminated against is employed, is in contravention of the constitutional guaranties under consideration.

The attorney general concedes that the term "lodging house" and the words "inn," "hotel," or "boarding house" are none of them convertible terms or words, and that a distinction exists between these several institutions and a lodging house; but he insists that the act, though it has no penalties against the inn or hotel keeper or boarding-house keeper, may be legally enforced against the keepers of lodging houses as a sanitary measure, under the police power. Some lodging houses, it is urged, may be, and doubtless are, the recognized abiding places of unclean, diseased, and vermin-infected guests or patrons, who, together with the owners or keepers of the lodging houses, are wholly indifferent to sanitary conditions, rendering such houses sources of contagious and infectious diseases. But it cannot be asserted that all lodging houses are of this character; neither can it be said boarding houses, inns, and hotels are not to be found which shelter the same class of patrons, and whose keepers are likewise indifferent to sanitary conditions. The public health is less endangered by a cleanly and well-conducted lodging house than by a filthy, ill-managed, disease-breeding hotel or boarding house. The lodging of more than six persons in any one room in a cleanly lodging house cannot be condemned, from a sanitary point of view, any more than the lodging of a like number of guests in one room in a hotel or boarding house. If intended as a measure to protect health, the act should have been directed against the evil which threatens to introduce sickness or disease, whether found in a lodging house, boarding house, or hotel, and, as its penalties are not so leveled, it can but be regarded as partial and discriminatory legislation. In *Frerer v. People use of School Fund*, 141 Ill. 181, 16 L. R. A. 495, 31 N. E. 397, we said (p. 186, 141 Ill., p. 497, 16 L. R. A., and p. 399, 31 N. E.): "The police power is limited to enactments having refer-

ence to the comfort, the safety, or the welfare of society, and under guise of it a person cannot be deprived of a constitutional right. It is impossible that, under that power, what is lawful if done by A, if done by B, can be a misdemeanor, the circumstances and conditions being the same."

If the enactment is not referable to the police power, as being for the preservation of the public health, we would feel constrained to declare it unconstitutional because violative § 13 of article 4 of the Constitution of 1870 *viz*: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The title of the amendatory act is, "An Act to Amend an Act Entitled 'An Act to Create and Establish a Board of Health in the State of Illinois,' Approved May 28, 1877, in Force July 1, 1877, by Adding Thereto Four New Sections, to be Numbered Fifteen (15), Sixteen (16), Seventeen (17), and Eighteen (18)." There could be no valid provision in the amendatory act not germane or pertinent to the general subject of the original act, which is the health and lives of the citizens of the state. If the act was passed for the purpose of the purification of elections, it should be declared unconstitutional on the ground that the subject and object of the legislation were not expressed in the title of the act. Moreover, the rights of property will not be permitted to be invaded under the guise of a police regulation for the preservation of health, when such is clearly not the object and purpose of the regulation. We are constrained to declare the section of the enactment in question is in contravention of constitutional guaranties and provisions, and therefore inoperative and void.

The judgment will be reversed, and the cause will not be remanded.

NORTON BROTHERS, *Appt.*,
v.

Emil NADEBOK.

(190 Ill. 595.)

One operating a body maker in a cannery manufactory, having authority to direct the actions of the machine tender, and therefore representing the master in directing the tender to remove a can body which has caught in the machine, does not, by reason of the fact that it is his duty to start the machinery with his own hand, become the fellow servant of the tender in so doing, so as to relieve the master from liability for injuries to the tender caused by his starting the machinery before the tender has withdrawn his hand from within it.

(June 19, 1901.)

NOTE.—On the question of vice principalship determined with reference to the character of the act which caused the injury, see *Lafayette Bridge Co. v. Olsen* (C. C. App. 7th C.) 64 L. R. A. 33, and extensive note thereto.

A PPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. R. S. Thompson and C. L. Jenks, Jr., for appellant.

Messrs. James M. Sheehan and J. W. Kaste for appellee.

Hand, J., delivered the opinion of the court:

This is an action on the case brought by the appellee in the superior court of Cook county against the appellant to recover damages for a personal injury sustained by him while in the employ of the appellant. The declaration consists of three counts. The first alleges that the defendant, which was engaged in the business of manufacturing tin cans, directed plaintiff to take cans from a machine known as a "body maker," which shaped the form of the can, to another machine, for completion; that the body maker was defective, in that cans would sometimes catch or stick therein, making it necessary for plaintiff to insert his hand in the machine and pull out the can so caught, and thus incur the risk of injury, all of which the defendant had knowledge of, and the plaintiff had not; that the defendant gave him no information as to the dangers incident to the use of the machine; that, a can becoming caught, plaintiff was ordered by his superior in charge of the machine, who was not his fellow servant, to take out the "catch;" that he attempted to do so, using due care, etc.; and that the machine descended without warning upon his hand, cutting off the little finger and otherwise injuring the hand. The second count alleges that at the time of the injury one Banning was in charge of the operation of the machine, and had the direction and control of the plaintiff, and was not his fellow servant; that, a can becoming caught in the machine, the plaintiff, pursuant to Banning's direction, and while in the line of his duty, inserted his hand into said machine for the purpose of removing the can which was caught, using due care, etc.; that, while plaintiff's hand was in the machine, Banning then and there negligently set the machine in motion, causing it to descend upon plaintiff's hand and injure the same, etc. The third count avers that, in the operation of the machine, cans frequently caught therein, making it necessary for the operator or his assistant to insert his hand into the machine to loosen or remove the can; that, because of there being sharp blades in the machine, near which the hand would have to be inserted, the duties of the persons so engaged were fraught with unusual danger; that it was the duty of the defendant, upon assigning an inexperienced person to such work, to fully instruct him, etc.; that the defendant wrongfully and neg-

ligently employed plaintiff, a minor of seventeen years, upon said work; that the plaintiff was without experience, and incapable, because of his years, of appreciating the danger of such employment; that the defendant failed to instruct him, etc., whereby plaintiff, in attempting to perform his said duties, and to take out a can which had become stuck, using the care and caution commensurate with his knowledge and appreciation of the danger, etc., had his right hand caught, and the finger cut off, etc. The defendant pleaded the general issue, and upon a trial before a jury there was a verdict and judgment for \$1,000 in favor of the appellee, which has been affirmed by the appellate court for the first district. 92 Ill. App. 541.

At the close of the evidence for the plaintiff, and again at the close of all the evidence, the defendant made a motion to take the case from the jury, which motion was overruled by the court, and which action of the court is assigned as error. In this court as in the appellate court, appellant seeks a reversal without remanding, and also, as in that court, makes but one point in argument, which, as summarized at the conclusion of its argument, is that Banning, in obeying whose orders appellee was injured, was the fellow servant of appellee, and that, in consequence of such relationship, appellant is not liable to appellee for Banning's negligence.

The appellant was engaged in manufacturing tin cans at its factory located in Maywood, Illinois. One of its employees, by the name of Banning, was engaged in operating a machine known as a "body maker." He had charge thereof, starting and stopping it by means of a lever attached to a friction clutch connected with overhead shafting. He fed into the machine oblong pieces of tin, called "blanks," which were by the machine bent around a "horn," the sides hooked together, and thus formed into cylinders constituting the body of tin cans; hence the name of the machine, "body maker." The horn was at the back part of the machine, and Banning, when engaged in feeding in the blanks, stood or sat in front of the machine. The cylinder-shaped product of the body maker fell from the horn into a chute, and from the chute into a bin. The appellee was engaged in carrying these bodies in a basket to another machine, which soldered the side seams. One of the pieces of tin which Banning had fed into the body maker becoming caught in some way at or near the horn, Banning stopped the machine by means of the lever, and directed the appellee, who was at the rear of the machine, putting bodies into a basket, to take out the "catch," as pieces of tin which chanced to be caught in the machine were called. Thereupon appellee, while the machine was at rest, put his hand into it for the purpose of pulling out the catch; and then Banning, before appellee had withdrawn his hand, pulled the lever and set the machine in motion. Appellee's hand was caught and crushed between the horn

and that portion of the machine which came up against it. There was a conflict in the evidence as to whether it was plaintiff's duty to pull out catches, the method of performing such duty, his proper position when at work, whether Banning had any authority over him, and what directions he received when sent to work. Appellee testified that on the morning of the day in which he was hurt he was first engaged in piling tin in another department, the foreman of which was one Magee; that Magee sent him to the body-making department; that there he was told to carry the cans from the body maker, which Banning was operating, to another machine, keep the operator of the other machine going, and to "hustle up;" that he had never worked at the body maker until the day he was injured; that several catches occurred, and Banning at each time of such occurrence told him to take the catch out; that on one of these occasions he said to Banning, "Why can't you take it out?" to which Banning answered, "Take it out. You have got to do what I tell you." A number of witnesses on behalf of appellee testified that they had worked for appellant, and that, in the manufacture of cans such as were being manufactured at the time of the injury, two men were engaged at the machine,—a feeder and a helper; that the duty of the feeder is to feed the tin into the machine, and to run the machine; and that the duty of the helper is to take the cans away, and do whatever the feeder tells him to do.

As a general rule, the question whether servants of the same master are fellow servants is a question of fact, to be determined by the jury from all the circumstances of each case. *Lake Erie & W. R. Co. v. Middleton*, 142 Ill. 550, 32 N. E. 453; *Louisville & St. L. Consol. R. Co. v. Hawthorn*, 147 Ill. 220, 35 N. E. 534; *Mobile & O. R. Co. v. Massey*, 152 Ill. 144, 38 N. E. 787; *Chicago & A. R. Co. v. House*, 172 Ill. 601, 50 N. E. 151; *Chicago & A. R. Co. v. Swan*, 176 Ill. 424, 52 N. E. 916. If, however, the facts are conceded, or there is no dispute with reference thereto, and all reasonable men will agree, from the evidence and the legitimate conclusions to be drawn therefrom, that the relation of fellow servants exists, then the question becomes one of law, and not of fact. *Chicago & E. I. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921.

In this case, there being a conflict in the evidence as to whether Banning had authority over the appellee, it is conceded by the appellant that, the appellate court having affirmed the judgment of the superior court, that controverted question of fact has been settled in favor of appellee; and it is admitted that Banning was a superior servant, and had authority from appellant to direct appellee to put his hand into the machine and take out the catch; but it is contended that as to the manual act of starting the machine at the instant when the injury occurred, as Banning had no delegated authority from the common master to order

someone else to set the machine in motion instead of himself doing so, but was himself employed to do that act with his own hands, he was not as to that act the superior, but was the fellow servant, of appellee, and that appellant is not liable for the consequences of Banning's negligence in starting the machine while appellee's hand was in the same, as such negligence did not consist in the abuse of his delegated authority. In other words, it is conceded that Banning was the superior servant when he ordered appellee to put his hand into the machine and take out the catch, but, it is said, in the act of immediately starting the machine he was his fellow servant; and it is contended, as it is conceded that Banning was employed to operate said machine, the question as to whether he was the fellow servant of appellee at the immediate time when he started the machine is a question of law. We cannot agree with such contention. When the appellee was ordered by his superior servant to put his hand into the machine and take out the catch, in the absence of any warning or notice he had the right to assume that his superior, who gave the order, would not by his own negligence make the act which he had commanded him to do, and which he was bound to obey, unsafe. In *Chicago & A. R. Co. v. May*, 108 Ill. 288, we say (p. 298): "The true rule on the subject, as we understand it, is this: The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority sometimes or generally labors with the others as a common hand will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own circumstances." In *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915, the plaintiff was injured while engaged, as an employee of the defendant, in moving heavy pieces of iron framework intended to be used in constructing a bridge across the Chicago river. In the process of moving such framework, it was necessary to the safety of the employees that a "tag line" should be attached to the framework, wherewith to steady and control the same while it was being hoisted by a block and tackle. One Farnsworth, who occupied the position of foreman, refused to use such tag line, but undertook to hold and control said framework by hand, whereby the framework swung around and struck the appellee. In discussing one of the defendant's refused instructions, the court says (p. 553, 170 Ill., and p. 916, 48 N. E.): "The argument in support of the principle sought to be announced by the instruction as asked is that,

at the immediate time appellee received the injury complained of, Farnsworth was exercising the duties of a common laborer, and at that exact moment was a fellow servant with the appellee; that if appellee was injured, as he contends, because of the negligent failure or inability of Farnsworth to hold and control the swinging framework, the common master is not liable for such act of Farnsworth, whether it resulted from his negligence or lack of strength, for the reason it was the act of a fellow servant. This view is too narrow. . . . If the appellant, through Farnsworth as vice principal, abandoned the use of a tag line,—a confessedly appropriate and safe device,—and adopted an improper and unsafe method of accomplishing such removal, and injury resulted to appellee in consequence thereof, under such circumstances as the master would be liable if Farnsworth had not personally participated in the execution of the plan, no reason is perceived why liability should be avoided upon the ground Farnsworth personally assisted in endeavoring to perform the work. In so assisting, Farnsworth voluntarily assumed temporarily to labor as a common workman; but he was not any the less the representative of the appellant company, nor his position any the less one of superiority." In *Metropolitan West Side Elev. R. Co. v. Skola*, 183 Ill. 454, 56 N. E. 171, the foreman ordered a car repairer to work under a car on a repair track, and then, as motoneer, ran other cars onto such repair track, and thereby injured said car repairer. On page 457, 183 Ill., and page 172, 56 N. E., it is said: "The question as to what cars should be brought from the main track in and upon this cleaning, inspecting, and repairing track, and when such cars should be so brought in, and where cars so coming in should be placed thereon, was to be determined by McCrumb in the exercise of the duties devolving upon him in his capacity as vice principal. Whether if, after he had directed the deceased to engage in work beneath a car standing on the cleaning, inspecting, and repairing track, ordinary care and due regard for the safety of the deceased required that the foreman, before putting into execution his determination to move other cars upon the same track, should have in some way notified or warned the deceased of what he, as foreman, had determined and was about to do, was a question of fact for the jury. If it was negligence to cause cars to be put in motion on the track where other

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cars stood under which workmen were engaged in their duties, without first warning the workmen who would be endangered by such course, then the negligence was that of the master, acting through the foreman as the representative of the master." In *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876, while the appellant, a machinist, was engaged in the work of removing the key of the "equalizer" under the master mechanics' direction, the equalizer was negligently pulled out of its place by the master mechanic, and it fell upon the appellant and very severely injured him. The trial court took the case from the jury on the ground the master mechanic and the appellant were fellow servants. In reversing the case the court says: "It is important to bear in mind that the appellant was performing a special duty enjoined upon him by a superior whom it was his duty to obey. Although the work was within the general scope of his service, nevertheless he was performing it under a special order. It was therefore a wrong on the part of the agent having the right to order him to do the specific work to increase the peril of the service by his own negligence. The employee, acting under the specific order, had a right to assume, in the absence of warning or notice, that his superior who gave the order would not by his own negligence make the work unsafe."

Had the superintendent of the factory ordered the appellee to remove the catch, and then immediately ordered Banning to start the machine, without giving appellee notice and an opportunity to withdraw his hand, there would be no question as to the liability of appellant, and we are unable to see how the fact that Banning had no authority to order any other person to start the machine, but was expressly employed so to do himself, can relieve appellant from liability. The giving of the order to appellee to remove the catch and the act of starting the machine occurred so closely together that the consequences resulting therefrom cannot be separated, and the master is liable therefor. We think the question whether appellee and Banning were fellow servants at the time the injury occurred, under the circumstances of this case, was a question of fact for the jury, and that the court did not err in declining to direct a verdict for the defendant.

The judgment of the Appellate Court will therefore be affirmed.

INDIANA SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, App't.,
v.

Howard FERGUSON.

(.....Ind.....)

Mental anguish resulting from failure to promptly deliver a telegram will not support an action against the telegraph company for such failure.

(Jordan J., dissents.)

(May 28, 1901.)

A PPEAL by defendant from a judgment of the Circuit Court for Monroe County in favor of plaintiff in an action brought to recover damages for neglect to promptly deliver a telegram. *Reversed.*

The facts are stated in the opinion.

Messrs. Chambers, Pickens, & Moores and Loudon & Loudon for appellant.

Messrs. Henley & Wilson for appellee.

Baker, J., delivered the opinion of the court:

This appeal has been transferred here by the appellate court, under Burns's Rev. Stat. 1894, § 1362 (Horner's Rev. Stat. 1897, § 6586), with the recommendation that the case of *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163, be overruled. *Western U. Teleg. Co. v. Ferguson* (Ind. App.) 59 N. E. 416. Appellee brought this action to recover damages for appellant's negligent failure to deliver a telegram. The message read:

To Howard Ferguson, Bushrod, Ind.:

Grandma is dead. Will be buried Thursday, two o'clock. Come.

Fred Ferguson.

By the failure to deliver, appellee received neither pecuniary nor bodily injury, but suffered mental anguish consequent upon his being deprived of the opportunity of attending his grandmother's funeral. The assignment that the court erred in overruling the demurrer to the complaint and in denying appellant a new trial presents the question whether the negligent causing of mental anguish alone is an actionable wrong. An affirmative answer was given in the *Reese Case*, decided in 1890, and the question has not been raised in this court since then. The *Reese Case* is hereby overruled, for the following reasons:

1. Though courts should and do extend

the application of the rules of the common law to the new conditions of advancing civilization, they may not rightfully create a new principle unknown to the common law, nor abrogate a known one. If new conditions cannot properly be met by the application of existing laws, the supplying of needful new laws is the province of the legislative, not the judicial, department. The mental-anguish law, so called, was first announced in *So Relle v. Western U. Teleg. Co.* 55 Tex. 308, 40 Am. Rep. 805, decided in 1881. Telegraphy was then a comparatively new element in society, but mental anguish antedated the beginnings of the common law. In determining the limits within which mental anguish was cognizable in the courts, the common law permitted that state of mind to be considered as an element in admeasuring damages in but two classes of cases, broadly speaking. In one, the negligent act was the proximate cause of a physical hurt, and the mental anguish for which compensation was allowed was the proximate result of the physical hurt, not of the negligent act. For the agonies of mind the plaintiff suffered while the train bore down upon him with his foot caught in the frog, not one cent; but damages were allowable only for the mental anguish resulting from the fact that he must go through life a cripple. The using of cases of this class in support of the mental-anguish doctrine is not an extension of the application of the rules of the common law to new conditions, but is a distortion of the rules themselves, resulting from the failure to distinguish between the mental anguish that is attributable directly to the negligent act and the mental anguish that is the direct result of the physical hurt produced by the negligent act. In the other class of cases, of which malicious prosecution, seduction, and libel are illustrative, the wrongful act was affirmative; was one of commission, not merely of omission; was the product of intent or malice, express or implied. The wrongful act was the proximate cause of the legal hurt (a hurt that the law recognizes), for which damages were recoverable irrespective of mental anguish; and the damages allowable for mental anguish were not merely compensation for the mental condition produced by the legal hurt, but were also punishment for the wilful wrong. This class of cases is further removed from the mental-anguish doctrine than the first. Not only is there the distinction that exists between the first class of cases and the mental-anguish doc-

NOTE.—For conflicting authorities as to right to damages for mental suffering on account of default of telegraph company, see note to *Western U. Teleg. Co. v. Rogers* (Miss.) 13 L. R. A. 859.

For preceeding cases in this series denying the right, see *Wilcox v. Richmond & D. R. Co.* (C. C. App. 4th C.) 17 L. R. A. 804; *Connell v. Western U. Teleg. Co.* (Mo.) 20 L. R. A. 172; *Western U. Teleg. Co. v. Wood* (C. C. App. 5th C.) 21 L. R. A. 706; *International Ocean* 54 L. R. A.

Teleg. Co. v. Saunders (Fla.) 21 L. R. A. 810; *Francis v. Western U. Teleg. Co.* (Minn.) 25 L. R. A. 406; *Morton v. Western U. Teleg. Co.* (Ohio) 32 L. R. A. 735; *Peay v. Western U. Teleg. Co.* (Ark.) 39 L. R. A. 463; and *Western U. Teleg. Co. v. Robinson* (Tenn.) 34 L. R. A. 431.

For cases sustaining the right, see *Mentzer v. Western U. Teleg. Co.* (Iowa) 28 L. R. A. 72, and *Cashion v. Western U. Teleg. Co.* (N. C.) 45 L. R. A. 160.

trine, namely, that in the one the mental anguish hangs upon the hurt produced by the negligent act, while in the other the mental anguish hangs directly upon the negligent act, but there is also the distinction that wilfulness or malice is found in the second class of cases, while the mental-anguish doctrine is based on pure negligence. One who unintentionally fails to perform a duty should pay compensatory damages only. One who maliciously infringes another's legal rights should pay both compensatory and punitive damages. To apply the rules relating to punitive damages for wilful wrongs to a case of unintentional default is certainly not a mere extension of the application of the rules of common law to new conditions. These classes of cases in which mental anguish is cognizable as an incident to causes of action complete without it at least negatively indicate the common-law rule that mental anguish, as the proximate and sole result of a negligent act, does not constitute a cause of action. And the rule follows affirmatively from the principle that damages may not be remote nor conjectural nor speculative. *Hadley v. Baxendale*, 9 Exch. 341, 5 English Ruling Cases, 502, 525. The supreme court of Florida, in *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L. R. A. 810, 14 So. 148, in reviewing the Texas decision in *So Relle v. Western U. Teleg. Co.*, said: "The court in that case asserts that it is the settled rule of law in that state that injury to the feelings caused by the wilful neglect or fault of another constitutes such actual damages, for which a recovery may be had, and cites as authority for such assertion the cases of *Hays v. Houston & G. N. R. Co.*, 46 Tex. 279, and *Houston & G. N. R. Co. v. Randall*, 50 Tex. 261. In neither of these cases is the doctrine either settled or asserted that injury to the feelings or mental suffering alone can be made the subject of a suit for compensative damages. The *Case of Hays*, 46 Tex. 279, was against a railroad company for damages for wrongfully and forcibly ejecting the plaintiff from its passenger train in the presence of his wife and family, in which it was claimed that the ejection was done in a rude and insulting manner and by personal violence, resulting in injury to plaintiff's clothing and bruises to his person. Exemplary or punitive damages were claimed, and the jury were instructed to estimate the actual damages by the 'injuries sustained by the plaintiff in his person, his estate, and his feelings,' and it was held that by this charge the subject of the amount of actual damages was fairly placed before the jury. But nowhere is it asserted that mental suffering alone can be made an independent basis for admeasuring damages. The case, like many others founded on tort that might be cited, simply holds that the mental suffering or injured feelings may be taken into consideration as an element of damage when coupled with or accompanied by substantive injury to the person or estate, upon the ground, as stated in the authorities, that in such cases the men-

tal suffering growing out of and produced by the physical injury is so interwoven with the latter that it is impossible to consider the one without contemplating the other. . . . The same may be said of the *Case of Randall*, 50 Tex. 261. In that case the plaintiff, a brakeman on the defendant's train, sued the company for damages for its negligence in having an open ditch across its tracks, into which he fell while performing the duty of coupling two of defendant's cars, and whereby his arm was run over and crushed by the cars, necessitating its amputation. In that case, too, the doctrine is sanctioned that an element of the verdict may be compensation for the mental and physical suffering caused by the injury. But nowhere is the doctrine sanctioned that mental suffering alone can sustain an action. For the support of its ruling in the *So Relle Case* the Texas court next quotes at length the *dictum* of the authors of *Shearman & Redfield on Negligence*, which *dictum*—as ordinarily incorporated in their work—was entirely without the support of any adjudged case. The seduction case of *Phillips v. Hoyle*, 4 Gray, 568, is next invoked to the support of the Texas court, where injury to the feelings of the parent in consequence of the daughter's seduction was held to be an element of damages. The fact seems to have been overlooked, in citing this case to its support, that in cases of seduction, and other torts independent of contract, injured feelings are given consideration, not so much as a criterion for the admeasurement of compensation, but as a standard by which to estimate the enormity of the outrage wilfully committed, and as a guide whether the damage to be allowed as punishment shall be higher or lower. The next and last authority cited to the support of the *So Relle Case* is the case of *Roberts v. Graham*, 6 Wall. 578, 18 L. ed. 791, but we fail to find in it any reference whatever to the subject of damages for injured feelings or mental suffering; the whole case being confined to a discussion of the question of the sufficiency of the allegations of a declaration or complaint for general damages as a predicate for the introduction of proof of special damage. The doctrine of the *So Relle Case* has for its support, then, in reality, only the unsupported *dictum* of *Shearman & Redfield* in their work on Negligence. In the case of *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, decided in 1883, the *So Relle Case* was expressly overruled in so far as it held that an action for mental suffering alone could be maintained. In *Stuart v. Western U. Teleg. Co.* 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351, decided in 1886, the *Levy Case*, 59 Tex. 563, 46 Am. Rep. 278, is practically overruled, and the court, without the support of any additional authorities, returns to the doctrine of the *So Relle Case*. The ruling in *Stuart v. Western U. Teleg. Co.* has been adhered to in that state ever since, encumbered, however, with finely-drawn distinctions that seem to keep an even pace with the rapid increase of litigation that the enunciation of such a doctrine

would naturally engender." An extended examination of the authorities upholding the mental-anguish rule has disclosed but two claims that the doctrine has any root in the common law. One is the old maxim that for every wrong there should be a remedy. But of an antiquity probably as great, at least extending back to the law-Latin days, are the phrases *injuria sine damno* and *damnum absque injuria*. The fathers of the common law declared that there were infractions of legal rights that produced no loss or injury the courts could deal with, and also that there were losses or injuries that the courts would recognize except for the fact that no legal right had been infringed. In saying that for every wrong there should be a remedy, by "wrong" they meant a violation of the municipal law, the law of civil conduct, not a transgression of the Divine law, as such, nor a breach of etiquette; and by "remedy" (limiting it in this case to a remedy by the way of damages) they intended damages that courts, dealing practically with the practical affairs of life, can find to be certain and measurable from evidence, the source of which is open to both parties, and the nature not transcendental. The common law, so far from furnishing the formula for transmitting a psychical condition into gold, classes the negligent act that causes only mental anguish as an instance of *injuria sine damno*. The other claim that the mental-anguish doctrine is an outgrowth of the common law is the relation of telegraph companies to the public. True, that relation requires telegraph companies to serve all the public impartially, and authorizes the public to control, to a degree, the terms of the contract for the transmission of messages. But the same relation exists between the public and the railroad companies, public water or gas companies, and the like; and when the mental-anguish authorities join all others in the realms of English jurisprudence in declaring that merely negligent acts by these latter companies, producing mental anguish alone, are not actionable at common law, they plainly prove that the mental-anguish doctrine is not a native sprout, but a foreign graft.

2. There is no open or practicable means by which the damages occasioned by a negligent act that causes only mental anguish can be assessed. On account of mere difficulties, courts do not and should not falter in finding remedies; but it is not a question of difficulties, purely, when it is proposed to violate the natural principles of justice and fair play. The parties to a lawsuit should have an even chance. The damage for which the plaintiff seeks compensation should be shown by evidence that the defendant may test, impeach, refute. When the plaintiff asks to recover for physical injuries, open or hidden, the court may require him, as a condition of prosecuting his case, to submit his person to an examination by medical experts, who may be called as witnesses by the defendant. *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271. The determination of the nature and extent of the

physical hurt is not dependent upon the eloquence of the plaintiff as a witness, but upon the eloquence of the facts established by the evidence on both sides, which may not have included the verbal testimony of the plaintiff at all. Now, the mental anguish for which damages are allowable is incident to and dependent upon the nature and extent of the physical injury. And, although there can be no absolute standard for measuring mental anguish in terms of money, nor for measuring physical injuries, yet it is apparent that the differences between the physical injuries in two cases, established by evidence open to both sides, furnished a means of testing in some degree the existence and extent of the mental anguish of the respective plaintiffs outside of their mere assertions. The difference between the mental anguish caused by the presence of a scar on a man's body and that produced by the presence of the same kind of a scar upon a woman's face would hardly be decided in favor of the man, although he alone of the two possessed the vocabulary necessary for a vivid description of the alleged tortures of mind. Even in the case of libel, malicious prosecution, and the like, in which punitive damages may be added to compensatory, the mental anguish of which cognizance is taken is measurable by the enormity of the wilful offense, the nature and extent of which are established by evidence open to both sides. But the mental-anguish doctrine awards damages for a state of mind that is not at all dependent upon or measurable by a cause of action existing outside the mental contemplation of the plaintiff, and provable by evidence open to both parties. If psychometry could determine the difference in the plaintiff's consciousness before and after the defendant's negligent act, it would take something still more occult to measure how much of the total mental disturbance was attributable to the death of the relative, and how much to being prevented from attending the funeral.

3. Manifestly, the defendant is not to pay for the mental anguish caused by the death of the relative. The alleged actionable wrong is in depriving the plaintiff of the opportunity of attending the funeral. But would the plaintiff have accepted the opportunity if seasonably offered? If the defendant is to be mulcted for mere delay, even though the plaintiff would not have gone to the funeral in any event, the damages would be wholly punitive. There would be no loss to compensate. And so in this case (and probably the same thing has been true in all) the plaintiff was asked the following questions:

Q. Suppose the telegram had been delivered to you on the evening of July 13, 1898; could you have reached her funeral by two o'clock on the 14th?

A. I could.

Q. I will ask you whether or not you would have done so?

A. I would, sir; I would.

The plaintiff says he would have gone. But would he? The jury found so, as a fact, wholly from the plaintiff's present opinion on a past condition of things that never existed, but is now summoned before the mind by conjecture. Thus the mental-anguish doctrine not only departs from principle in regard to measuring compensatory damages, but also warps the rules of evidence, which forbid a witness to testify what he would or would not have done in a stated contingency. *Weed v. Martin*, 39 Ala. 587, 8 So. 132: Would you have put the credit on the note if the money had not been paid? *Smith v. Western U. Tele. Co.* 83 Ky. 104 (special interrogatory to the jury): If the message had been received by plaintiff, would you have ordered his stock to be sold? *Allen v. Stout*, 51 N. Y. 668: If you had been permitted to sell those arms, in what condition would it have placed you? *Kansas Gulf Short Line R. Co. v. Scott*, 1 Tex. Civ. App. 1, 20 S. W. 725: How many trips would you probably have made per year, had the railroad not revoked your pass? *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297, 58 N. W. 391: Would you have settled the loss if you had known that the books of the insured were altered? On the answers to the questions put to the appellee in this case, how could perjury be predicated?

4. As a corollary of the preceding proposition, it follows that it is contrary to public policy (corruptive of public morals) for the courts to tie the hands of a defendant, and give the freest hand in collecting compensatory damages to the plaintiff who is most moving in depicting an alleged psychological condition, and readiest to declare what he would have done under circumstances that never occurred.

5. Denial of equal justice, wrongful discrimination between persons in similar circumstances, is at least as vicious in judgment as in statutory law. *Yick Wo v. Hopkins*, 118 U. S. 356, 373, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. To be a law of equal justice and no discrimination, the mental-anguish doctrine should assert, as a broad general principle, that damages are recoverable for mental distress alone, from every person whose negligent act causes that condition. In *Western U. Tele. Co. v. Hamilton*, 50 Ind. 181, this court suggested: "Suppose the despatch had been an invitation to a marriage, to a family reunion, or with reference to any other matter where special damages could not be shown; what substantial remedy can the party have, unless it be the recovery of the [statutory] penalty?" And the supreme court of Minnesota, in *Francis v. Western U. Tele. Co.* 58 Minn. 252, 25 L. R. A. 406, 59 N. W. 1078, inquired: "Upon what legal principle can a court refuse to allow them for the breach of any other contract? The breach of any contract—even the failure of a debtor to pay his debt at maturity—may result in more or less mental anxiety or suffering to the party to whom the obligation is due. Why not allow damage for the mental suf-

fering or disappointment of passengers caused by the delay of trains through the negligence of the carrier? The object of the journeys of travelers is often not pecuniary, but to visit sick relatives or attend the funeral of deceased ones, which are matters affecting the feelings as much and as exclusively as a telegram. If the train is delayed through the negligence of the carrier, so that the passenger does not reach his destination in time to accomplish his desired object, why is he not entitled to damages for his disappointment and mental suffering, as much as the sender or addressee of a delayed telegram?" But it is useless to undertake to give the instances in which the rule is not the rule; for it is not the rule against any one except telegraph companies, and not against them uniformly. The argument that the gravity and urgency of messages relating to death, and the like, should require the telegraph companies to pay mental-anguish damages for delay or failure in transmission, should apply to all telegrams of that character. The gravity of the matter is disclosed by the announcement of the sickness or death and the summons to come. The urgency is apparent from the selection of the telegraph as the means of communication. But, unless the message shows on its face that the addressee is a relative, it is held that the message, equally grave and urgent, fails to give notice that any mental suffering will result from the company's default. The Horatian heir who has been itching for the ancestral estates may recover on the strength of this mourning raiment, while a David who misses the last look upon the face of his Jonathan gets nothing for his bleeding heart.

6. The difficulties of navigation without chart or compass are understandable without experiment, but the experience of the courts that uphold the mental-anguish doctrine probably outrun any mere *a priori* conjecture as to possibilities. A brother-in-law is not a relative of whose mental anguish a telegraph company is bound to take notice, without special information on the subject in advance. *Cashion v. Western U. Tele. Co.* 123 N. C. 267, 31 S. E. 493; *Western U. Tele. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896. Failure to deliver a message reading, "Your stepfather died this morning," will support an action. *Western U. Tele. Co. v. Nations*, 82 Tex. 539, 18 S. W. 709. Negligence that results in nothing but mental anguish is not an actionable wrong (*Williams v. Yoe*, 19 Tex. Civ. App. 281, 46 S. W. 659), unless the defendant be a telegraph company and the circumstances favorable. *Western U. Tele. Co. v. Smith* (Tex. Civ. App.) 46 S. W. 659. There seem to be vital distinctions between "mental anguish," "mental suffering," and "mental anxiety." *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419; *Western U. Tele. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549. Failure to deliver a telegram intended to relieve mental anguish is not actionable. *Akard v. Western U. Tele. Co.* (Tex. Civ. App.) 44 S. W. 538. Failure to deliver

a telegram intended to relieve mental anguish is actionable. *Womack v. Western U. Tele. Co.* (Tex. Civ. App.) 22 S. W. 417; *Western U. Tele. Co. v. Womack*, 9 Tex. Civ. App. 607, 29 S. W. 932. A telegram reading: "Come on first train. Bring Ferdinand. His father is very low,"—does not give notice that negligence will cause the addressee mental anguish. *Western U. Tele. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70. A telegram reading: "Grace is very low. Can you come and bring Maud?"—does give notice that negligence in transmission will cause the addressee mental anguish. *Western U. Tele. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490. A telegram reading: "Willie died yesterday evening. Will be buried at Marshall Sunday evening,"—does not give notice that negligence in transmission will cause the addressee mental anguish. *Western U. Tele. Co. v. Brown*, 71 Tex. 723, 2 L. R. A. 766, 10 S. W. 323. A telegram reading: "Billie is very low. Come at once,"—does give notice that negligence in transmission will cause the addressee mental anguish. *Western U. Tele. Co. v. Moore*, 76 Tex. 66, 12 S. W. 949. The supreme court of Minnesota expressed the opinion that the "Texas doctrine" has opened a probable Pandora box, and the Ohio supreme court states the view that "the wisdom of the doctrine [denying recovery for mental anguish alone] is well illustrated by the experiences of the courts that have departed from it." *Francis v. Western U. Tele. Co.* 68 Minn. 252, 25 L. R. A. 406, 59 N. W. 1078; *Morton v. Western U. Tele. Co.* 53 Ohio St. 431, 32 L. R. A. 735, 41 N. E. 689.

7. Not to tempt the seas of uncertainty, but to travel *super antiquas vias*, is the course that we believe is prescribed by sound reason and the overwhelming weight of authority. The following telegraph cases are directly in point: *Peay v. Western U. Tele. Co.* 64 Ark. 538, 39 L. R. A. 463, 43 S. W. 965; *Russell v. Western U. Tele. Co.* 3 Dak. 315, 19 N. W. 408; *International Ocean Tele. Co. v. Saunders*, 32 Fla. 434, 21 L. R. A. 810, 14 So. 148; *Chapman v. Western U. Tele. Co.* 88 Ga. 763, 17 L. R. A. 430, 15 S. E. 901; *Giddens v. Western U. Tele. Co.* 111 Ga. 824, 35 S. E. 638; *Western U. Tele. Co. v. Haltom*, 71 Ill. App. 63; *West v. Western U. Tele. Co.* 39 Kan. 93, 17 Pac. 807; *Francis v. Western U. Tele. Co.* 58 Minn. 252, 25 L. R. A. 406, 59 N. W. 1078; *Western U. Tele. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859, 9 So. 823; *Connell v. Western U. Tele. Co.* 116 Mo. 34, 20 L. R. A. 172, 22 S. W. 345; *Neuman v. Western U. Tele. Co.* 54 Mo. App. 434; *Curtin v. Western U. Tele. Co.* 13 App. Div. 253, 42 N. Y. Supp. 1109; *Morton v. Western U. Tele. Co.* 53 Ohio St. 431, 32 L. R. A. 735, 41 N. E. 689; *Butner v. Western U. Tele. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087; *Lewis v. Western U. Tele. Co.* 57 S. C. 325, 35 S. E. 556; *Davis v. Western U. Tele. Co.* 46 W. Va. 48, 32 S. E. 1026; *Summersfield v. Western U. Tele. Co.* 87 Wis. 1, 57 N. W. 973; 54 L. R. A.

Chase v. Western U. Tele. Co. 10 L. R. A. 464, 44 Fed. 554; *Crawson v. Western U. Tele. Co.* 47 Fed. 544; *Tyler v. Western U. Tele. Co.* 54 Fed. 634; *Kester v. Western U. Tele. Co.* 55 Fed. 603; *Western U. Tele. Co. v. Wood*, 21 L. R. A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; *Gahan v. Western U. Tele. Co.* 59 Fed. 433; *Stansell v. Western U. Tele. Co.* 107 Fed. 669. And these additional cases required the same conclusion: *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351; *Texarkana & Ft. S. R. Co. v. Anderson*, 67 Ark. 123, 53 S. W. 673; *Morgan v. Southern P. R. Co.* 95 Cal. 510, 17 L. R. A. 71, 30 Pac. 603; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Braun v. Craven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657; *Chicago City R. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366; *North Chicago Street R. Co. v. Duebner*, 85 Ill. App. 602; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 47 N. E. 694; *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740; *dictum in Western U. Tele. Co. v. Hamilton*, 50 Ind. 181; *Tisdale v. Major*, 106 Iowa, 1, 75 N. W. 663; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Block v. Carrollton R. Co.* 10 La. Ann. 33, 38, 63 Am. Dec. 586; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Canning v. Williamstown*, 1 Cush. 451; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88; *Dorrah v. Illinois C. R. Co.* 65 Miss. 14, 3 So. 36; *Trigg v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147, 41 Am. Rep. 305; *Spohn v. Missouri P. R. Co.* 116 Mo. 617, 22 S. W. 690; *Strange v. Missouri P. R. Co.* 61 Mo. App. 586; *Deming v. Chicago, R. I. & P. R. Co.* 80 Mo. App. 152; *Johnson v. Wells, F. & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340; *Knoxville, C. G. & L. R. Co. v. Wyrick*, 99 Tenn. 500, 42 S. W. 434; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 413, 25 S. W. 419 (Tex. Civ. App.) 25 S. W. 431; *Southern P. Co. v. Ammons* (Tex. Civ. App.) 26 S. W. 135; *Chicago, R. I. & T. R. Co. v. Hitt* (Tex. Civ. App.) 31 S. W. 1084; *Bovee v. Danville*, 53 Vt. 183; *Turner v. Great Northern R. Co.* 15 Wash. 213, 46 Pac. 243; *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 376; *Morse v. Duncan*, 14 Fed. 396; *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264; *McBride v. Sunset Teleph. Co.* 96 Fed. 81; *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111, 5 English Ruling Cases, 381; *Lynch v. Knight*, 9 H. L. Cas. 577, 598, 8 English Ruling Cases, 382, 392; *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222, 8 English Ruling Cases, 405; *Canadian P. R. Co. v. Robinson*, 14 Can. S. C. 105; *Henderson v. Canada Atlantic R. Co.* 25 Ont. App. Rep. 437; *Jeannotte v. Couillard* (1894) 3 Quebec Q. B. 461; *Rea v. Ferry Co.* 17 New So. Wales, 92.

Judgment reversed, with directions to sustain the demurrer to the complaint.

Jordan, J., dissenting (Filed June 28, 1901):

I cannot concur in the majority opinion in this case, and will endeavor to briefly assign the reasons which constrain me to dissent. The real question presented in this appeal is: Are damages which are caused solely by mental anguish, suffered by reason of the neglect of a telegraph company to transmit a message to the addressee, recoverable in an action by the latter against such company for its neglect? In my opinion, this question should be answered in the affirmative. A negative answer by this court necessarily results in disturbing what has been considered and adhered to as the settled law in this state for a period of over twelve years. The rule declared and enforced in *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163 (which was decided in 1889), in my judgment is a salutary one. It is true that the rule in question has been denied by the higher courts of several of our sister states, while, upon the other hand, it has been repeatedly affirmed by others. The following cases may be said to answer the question propounded in this appeal in the affirmative: *So Relle v. Western U. Teleg. Co.* 55 Tex. 308, 40 Am. Rep. 805; *Stuart v. Western U. Teleg. Co.* 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351; *Gulf, C. & S. F. R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 423, 11 S. W. 385; *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844, 12 S. W. 857; *Womack v. Western U. Teleg. Co.* (Tex. Civ. App.) 22 S. W. 417; *Western U. Teleg. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, 8 S. W. 574; *Western U. Teleg. Co. v. Robinson*, 97 Tenn. 638, 34 L. R. A. 431, 37 S. W. 545; *Newport News & M. Valley R. Co. v. Griffin*, 92 Tenn. 694, 22 S. W. 737; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 7 So. 419; *Thompson v. Western U. Teleg. Co.* 106 N. C. 549, 11 S. E. 269, 107 N. C. 449, 12 S. E. 427; *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669, 11 S. E. 1044; *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880; *Western U. Teleg. Co. v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. 148; *Logan v. Western U. Teleg. Co.* 84 Ill. 468; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72, 62 N. W. 1. The following text writers also assert and maintain that such damages may be recovered: *Shearm. & Redf. Nez.* p. 692, § 605; *Thompson, Electricity*, § 379; 3 *Sutherland, Damages*, §§ 975-980, inclusive; *Sedgw. Damages*, § 894. Prior to the decision of the *Reese Case*, the question here involved was an open one in this jurisdiction, and I am not convinced that the court, for the reasons expressed in the majority opinion, should at this late date depart from the doctrine asserted and enforced in that case. Nothing is to be gained by

courts of last resort in overruling their decisions, especially when the same have stood as the settled law for a long period of time, unless it is evident that they are radically wrong or operate unjustly. The *Reese Case*, 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163, as we have shown, is well supported by the decisions of other courts and by eminent text writers, and a settled rule of law of this state should not be abrogated simply because there may be a conflict in the authorities. Not only does the majority opinion overrule the case in question, but it necessarily results in overthrowing the decision in *Kenihan v. Wright*, 125 Ind. 536, 9 L. R. A. 514, 25 N. E. 822. The defendants in the latter case were undertakers and funeral directors, who had been employed by the plaintiffs to safely keep in a secure vault the body of their dead daughter. They violated their contract with the plaintiffs by allowing the body to be buried at some place unknown to the parents, which place the defendants refused to disclose. The trial court in that case charged the jury that in the assessment of damages they might take into consideration the mental anguish which the parents had suffered on account of the matters set out in their complaint. The charge on appeal was sustained, the court holding that "where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of the breach of the contract on his part." As a result of the holding in the case at bar, it would follow that where a devoted husband or father employed an undertaker to prepare the body of his deceased wife or daughter, as the case might be, for interment, and the latter, instead of carrying out his contract, should deliver the body over to a medical college, where it was dissected, there could be no recovery by the husband or father for the great mental anguish and pain which he necessarily would suffer by reason of the brutal conduct of the undertaker in disposing, as he did, of the remains of the beloved wife or daughter. Again, upon another view of the question, a railroad train is wrecked upon which the husband of a devoted and loving wife is a passenger, and many of the passengers are killed and maimed, which is disclosed to the wife through the public press. Her husband, however, escapes from the wreck uninjured, and immediately telegraphs her that he is safe, and for her not to be disturbed in respect to his safety. The telegraph company neglects to transmit the message to the wife, although it is aware of its importance. The wife knows that her husband is a passenger on the ill-fated train, the wreck of which she has been apprised, and fears that he has been killed or maimed, and of course suffers great anguish of mind, and continues to suffer the same until she learns of her husband's safety, all of which

is due to the neglect of the telegraph company in not delivering to her the message sent by the husband. Under the harsh rule asserted in this case, she could not recover for the anguish of mind which she suffered and endured, which would be more severe to her, perhaps, under the circumstances, than any physical injury imaginable.

It is said that the common law is not sufficiently elastic to cover such cases, but the fault is not so much in the inelasticity of the law as it is in the narrow manner in which it is construed and judicially applied to a given state of facts. The judges who construed the common law, when at a loss for a precedent, declared one, which becomes controlling in the future. The common law certainly can be made to reasonably adapt itself in the furtherance of justice to new conditions which have arisen in this progressive age. It was well said by Judge Deemer in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72, 62 N. W. 1: "One of the crowning glories of the common law has been its elasticity, and its adaptability to new conditions and new states of fact. It has grown with civilization, and kept pace with the march of events, so that it is as virile to-day, in our advanced state of civilization, as it was when the race was emerging from the dark ages of the past. Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into."

It is argued that damages for mental distress cannot be recovered at common law for a mere breach of contract. This assertion may be said to be true as a general rule, but, like all such rules, it is, in the administration of justice, subject to reasonable exceptions. In fact, there is ingrafted upon the rule at least one well-recognized exception, namely, a man who enters into a marriage contract is presumed to know or contemplate that he is dealing with the affections and feelings of the woman whom he has agreed to marry, and, if he violates his contract, that she will be subject to humiliation, mortification, and mental anguish. In an action by her against him, the law awards, among other things, damages for her wronged feelings. In cases like the one at bar, courts should regard the subject-matter of the contract. Where the neglected message relates solely to matters of property, the common law affords adequate compensation. What sound reason then can be said to exist for construing the law so as to make it deny the liability of a telegraph company when its negligence has resulted in inflicting a great mental shock or mental suffering which is frequently more painful under the circumstances, than a physical injury possibly could be. It is contended that in actions arising *ex delicto*, accompanied by physical injury, damages for the wounded or injured feelings may be awarded, but compensation for injury to the feelings is frequently allowed in actions where the matter complained of is unaccompanied by any physical injury. For instance, a passenger

lawfully on a train is by the railroad company's agent wrongfully ejected from the car, or rather compelled by the imperative orders or demands of the conductor in charge of the train to leave the car. In an action by the passenger against the railroad company, his humiliation or injured feelings, under the circumstances, may be taken into consideration by the jury in the assessment of damages, although he was not touched or in any manner sustained a physical injury. Such is also the rule in actions for slander or libel. Likewise in malicious prosecutions. *Fisher v. Hamilton*, 49 Ind. 341. Also in actions for false imprisonment. *Stewart v. Maddox*, 63 Ind. 51. The removal of the body of a deceased child from the lot where it was lawfully buried to a charity lot is held to entitle the parent of the child to recover against the party removing the body for injury to such parent's feelings. *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. A widow may recover for mental anguish and nervous shock against a person who unlawfully mutilates the body of her dead husband. *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 50 N. W. 238. See also *Sutherland, Damages*, § 979. Damages are also allowed to a father for his wounded feelings in an action by him against one for the seduction of his daughter.

From the above cases it is manifest that damages in actions of tort are frequently allowed for mental suffering or wounded feelings although there is no physical injury. In cases where there is some direct and proximate connection between the wrongful act and the injury to the feelings, whether the action is connected with a contract or arises out of tort, the allowance of damages for injured feelings and anguish of mind is certainly justifiable. But it is said that, in cases like the one at bar, the damages demanded are frequently too shadowy and speculative to be properly measured. If this is true, it is equally so in cases of tort. While if true it might afford reasons for requiring courts to closely scrutinize and review the verdicts of juries returned in such cases, but it represents no reason for an entire abrogation of the rule for which I contend. In conclusion, I may say that I cannot sanction a rule of the law which affirms that a telegraph company, where it neglects to deliver a message to the husband that his wife is dying, or to a father that his son is dead and will be buried at a designated time, is not responsible except for mere nominal damages. Such an interpretation of the law ought not to be sustained. It will certainly result in telegraph companies neglecting their duties in sending messages of such character as, under the decision in this case, they can virtually escape with impunity. Without further extending this opinion by the citation of authorities and the assignment of other reasons in support of the rule in question, I conclude that the *Reese* and *Remihan Cases*, to which I have referred ought not to be overruled, and that the judgment below should be affirmed.

IOWA SUPREME COURT.

STATE of Iowa

v.

Thomas KING, Appt.

(.....Iowa.....)

1. A statute providing for the punishment of one who, being confined in the penitentiary, breaks such prison and escapes therefrom, does not apply to an escape from a state quarry 2 miles from the prison, to which the prisoner has been taken to work.
2. Breaking a prison is not effected by a prisoner's concealing himself in a crevice in a stone quarry to which he has been taken to work, until the guards withdraw, and then walking forth without impediment, although to aid the concealment a cover is placed over the crevice, which is removed when the escape is effected.

(October 1, 1901.)

A PPEAL by defendant from a judgment of the District Court for Jones County convicting him of breaking and escaping from the penitentiary at Anamosa. *Reversed.*

The facts are stated in the opinion.

Mr. B. E. Rhinehart, for appellant:

The quarry is not a part of the penitentiary within the meaning of § 4897, for the reason that the necessary force to effect a breaking must be applied on the penitentiary proper.

It is not a crime to climb over the wall of a prison, but only an escape.

Res v. Haswell, Russ. & R. C. C. 458.

There must be actual breaking, and not such as is implied by construction of law.

11 Am. & Eng. Enc. Law, 2d ed. § 4, p. 303.

Statutes in derogation of the common law are strictly construed. An escape has never been considered at common law to be a felony.

11 Am. & Eng. Enc. Law, 2d ed. p. 296.

Mr. Charles A. Van Vleck, for appellee:

The quarry being a part of the prison property belonging to the state, a breaking and escape therefrom is a breaking such prison and escape.

1 Russell, Crimes, 6th ed. p. 899.

Breach of prison is an unlawful escape out of prison.

Bouvier, Law Dict.; *Wharton*, Crim. Law, 750.

Escape from a house of correction by tying two ladders together, and placing them against the wall of the yard, was a prison breach.

Res v. Haswell, Russ. & R. C. C. 458; *Randall v. State*, 53 N. J. L. 490, 22 Atl. 46.

NOTE.—On the necessity of the actual breaking of an inclosure to constitute a prison breach the above case seems to be a novel one. In this particular the case suggests that of *State v. Crawford* (N. D.) 46 L. R. A. 312, where the question was as to what breaking and entering would constitute burglary.

54 L. R. A.

Mr. Charles W. Mullan, Attorney General, also for appellee.

Ladd, J., delivered the opinion of the court:

The appellant, while a prisoner in the penitentiary at Anamosa for a period less than life, was taken, with about eighty other convicts, to work in the stone quarries, situated about 2 miles northwest of the prison proper, owned and operated by the state under the supervision of the warden. When returning from dinner, he and another dropped into a natural crevice in the rock, the opening to which was thereupon covered by one of their companions. They were soon missed by the guards, and, as the quarry was watched for some time, must have remained there for nearly two days, and then removed the covering and departed. That the accused escaped from custody is conceded, but it is insisted that there was no breaking. The statute under which the indictment was returned reads: "If any person confined in a penitentiary for any less period than for life breaks such prison and escapes therefrom, he shall be imprisoned in such penitentiary for a term not exceeding five years, to commence from and after the expiration of the original term of his imprisonment." Code, § 4897. It will be observed that the offense described is not a breaking and escape from prison generally. The words "such prison" inevitably refer back to "penitentiary," and it is the breaking and escape from that prison only which is denounced by this statute. If this were not true, there would have been no occasion for the enactment of the section following, relating to jail breaking. The argument of the state, then, in so far as based on the various definitions of "prison," is not pertinent to the case. As said, these stone quarries are about 2 miles from the penitentiary, and nothing in this record or the statutes indicates that they are included therein as a part of it. Indeed, § 5707 of the Code, in authorizing the warden to work convicts therein, describes them as the state stone quarries near the penitentiary. Whether they might have been included need not be considered. It is enough that the statute treats them as near to, but not a part of, the penitentiary, and there is no evidence to the contrary. But, if the quarries were to be regarded as a part of the particular prison described, it does not follow that there was a breaking. These men merely concealed themselves from the guard until the latter withdrew, and then walked forth from the quarries without any impediment whatever. The acts constituting the breaking of a prison are not different from those essential to be shown in establishing burglary or other criminal breaking, save, possibly, in the direction from which applied. *Randall v. State*, 53 N. J. L. 488, 22 Atl. 46. Something must be done tending to open a way through confining walls or other obstruc-

tions to free entrance or exit. By getting in or out of the crevice, or causing the covering to be placed, or in removing it, the defendant neither broke away from nor through any obstruction whatever to his confinement in the prison. He merely eluded temporarily the personal custody of the guards, and when he stepped from the hole in the rock it was at precisely the same place he had left when entering, with no physical obstacle to his freedom removed, save in the departure of the guards. His escape was accomplished by stratagem, not by force. It is the same as though he had concealed himself under cover in his cell, or one of the corridors, and the attendant, not observing him, had left the door open, and he had walked out. This would be an escape, but no one would contend that mere hiding constituted a breaking. It has long been settled that there must be some application of force,—an actual breaking, not merely constructive,—to constitute a prison breach. See *Rea v. Haswell*, Russ. & R. C. C. 458; 11 Am. & Eng. Enc. Law, 2d ed. p. 303; *Randall v. State*, 53 N. J. L. 488, 22 Atl. 46. Hiding within was not breaking out. Eluding the guards by stratagem was not an interference by force with the natural or artificial prison barriers to escape. As there was no breaking within the meaning of the law, the jury should have been directed to return a verdict for the defendant.

Reversed.

Jennie IVES, by Next Friend, Appt.,
v.

William WELDEN.

(.....Iowa.....)

1. A merchant who fills a jug with gasoline for a customer without complying with the statute providing that no gasoline shall be sold until the package containing it has been marked "gasoline" is liable for injuries to a member of the customer's family by its explosion when she attempts to use it believing it to be kerosene.
2. A child injured by explosion of gasoline which she attempts to use believing it to be kerosene is not, in an action to hold the merchant who sold it liable for the injury, affected by the negligence of her father, who, with knowledge of its character, permits her to use it, or fails to warn her of the danger.

(October 5, 1901.)

APPEAL by plaintiff from a judgment of the District Court for Hardin County in favor of defendant in an action brought to

recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. H. L. Huff and Wesley Martin, for appellant:

Contributory negligence of the father is no bar to a recovery by the plaintiff.

Wymore v. Mahaska County, 78 Iowa, 306, 6 L. R. A. 545, 43 S. W. 264; *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; *Chicago G. W. R. Co. v. Kowalski*, 34 C. C. A. 1, 92 Fed. 310; *Black, Law & Pr. in Accident Cases*, ed. 1900, ¶ 338; *Payne v. Humeston & S. R. Co.* 70 Iowa, 588, 31 N. W. 880; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619.

Unless the clerk complied with the plain provisions of the law his act was negligence *per se*, and the delivery of the gasoline without compliance with the statutory requirement could not have been in good faith.

The statute imposes a duty upon the defendant, a failure to discharge which constitutes negligence. Proof of such failure establishes one of the conditions essential to the plaintiff's right of recovery.

Dodge v. Burlington, C. R. & M. River R. Co. 34 Iowa, 279; *Ford v. Chicago, R. I. & P. R. Co.* 91 Iowa, 179, 24 L. R. A. 657, 59 N. W. 5, 106 Iowa, 85, 75 N. W. 650; *Sala v. Chicago, R. I. & P. R. Co.* 85 Iowa, 684, 52 N. W. 604; *Tobey v. Burlington, C. R. & N. R. Co.* 94 Iowa, 265, 33 L. R. A. 496, 62 N. W. 761; *Black, Law & Pr. in Accident Cases*, ed. 1900, ¶¶ 22, 212.

To render a person liable in an action for negligence it is not necessary that he should have foreseen the identical injury for which recovery is sought.

Hazard v. Council Bluffs, 79 Iowa, 106, 44 N. W. 219.

The mere fact that some other cause operates with the negligence of the defendant to produce the injury complained of does not relieve the defendant from liability.

Gould v. Schermer, 101 Iowa, 588, 70 N. W. 697; *Pratt v. Chicago, R. I. & P. R. Co.* 107 Iowa, 292, 77 N. W. 1064.

If a person negligently markets a substance hurtful to health, in such form or with such representation as to its identity or properties as to justify the belief that it is harmless, the vendor is liable to any person injured thereby while using the same for an apparently suitable purpose. It is immaterial, in such case, whether the injured person holds a contractual relation to the vendor, or how often the article is resold.

Thomas, Neg. ed. 1895, 730; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

NOTE.—For other cases in this series as to liability for negligence in sale or manufacture of dangerous articles, see *Schubert v. J. R. Clark Co.* (Minn.) 15 L. R. A. 818, and note; *Heiser v. Kingsland & D. Mfg. Co.* (Mo.) 15 L. R. A. 821; *State use of Hartlove v. Fox* (Md.) 24 L. R. A. 679; *Lewis v. Terry* (Cal.) 81 L. R. A. 220; *Smith v. Clarke Hardware Co.* (Ga.) 39 L. R. A. 607; and *Tyler v. Moody* (Ky.) ante, 417. As to liability for failure to label poison, 54 L. R. A.

causing death of child, see *Wise v. Morgan* (Tenn.) 44 L. R. A. 548.

As to imputing negligence of parent to child, see note to *Chicago City R. Co. v. Wilcox* (Ill.) 21 L. R. A. 76; also *Bottoms v. Seaboard & R. R. Co.* (N. C.) 25 L. R. A. 784; *Atlanta & C. Air Line R. Co. v. Gravitt* (Ga.) 28 L. R. A. 558; *Roth v. Union Depot Co.* (Wash.) 81 L. R. A. 855; and *Ploof v. Burlington Traction Co.* (Vt.) 43 L. R. A. 108.

One who holds himself out to the public as a caterer is liable to the parties who partake what is provided for them, in case such parties thereby suffer from eating unwholesome food.

Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543.

Messrs. Albrook & Lundy and C. M. Nagle for appellee.

Sherwin, J., delivered the opinion of the court:

The plaintiff was burned by the explosion of gasoline which she was using for starting a fire, supposing it to be kerosene oil. She was at the time about fifteen years of age, a member of her father's family, and assisting in the general housework. A short time before she was injured, her father went to the defendant's store with a jug, which he testified he directed the clerk to fill with kerosene oil. As a matter of fact, undisputed, the clerk filled it with gasoline, and did not label it as required by statute (§ 2505). The jug was taken home by the father, and the plaintiff, supposing that it contained kerosene oil, poured some of its contents into a small can, and from there into the stove. She then lit it, when it exploded, and set fire to her clothing. The evidence is conflicting whether the father ordered gasoline or kerosene. The defendant claims that he ordered gasoline. But, as we view the matter, it does not materially affect this case one way or the other. Section 2505 of the Code provides that "no gasoline shall be sold, given away, or delivered to any person in this state until the package, cask, barrel, or vessel containing the same has been marked 'gasoline.'" This statute is evidently for the protection of all persons in the state. It is to warn all that the substance they are handling is dangerous, and that its use requires extreme care. If the plaintiff's father had been injured by the use of the gasoline, it would then be material, perhaps, to inquire whether he ordered gasoline or kerosene; for, if he knew what the jug contained, the failure to label it would probably not constitute negligence as to him. But we have no such case, for it is absolutely beyond dispute in the record that the plaintiff herself had no knowledge that she was using gasoline, and, further, that the jug she took it from was one which was used for kerosene, and for that alone. As to her, then, the failure to label the jug as required by law was negligence *per se*, because it was a violation of a statutory requirement that it be marked "gasoline" before delivery to any person. *Dodge v. Burlington, C. R. & M. River R. Co.* 34 Iowa, 279; *Ford v. Chicago, R. I. & P. R. Co.* 91 Iowa, 179, 24 L. R. A. 657, 59 N. W. 5; *Toboy v. Burlington, C. R. & N. R. Co.* 94 Iowa, 256, 33 L. R. A. 496, 62 N. W. 761; 1 Shearm. & Redf. Neg. § 13. The trial court instructed the jury on the theory that, if the father knew that the jug contained gaso-

line, and was negligent in permitting the plaintiff to use it, or in not informing her of the fact, such negligence on his part would defeat her recovery. In so instructing there is error. It has long been the settled law of this state that the negligence of the parents cannot be imputed to the child. *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545, 43 N. W. 264; *Bradshaw v. Frazier* (Iowa) 85 N. W. 752. Whatever diversity of opinion there may formerly have been among the courts on this question, it is now apparent that the tendency of modern decisions is in line with this holding. See 1 Shearm. & Redf. Neg. 5th ed. § 78. Instructions 1, 3, and 4 asked by the plaintiff are in accord with this holding, and should have been given.

For the error pointed out, the judgment is reversed.

Addie CHERRY, Appt.,

v.

DES MOINES LEADER et al.

(.....Iowa.....)

A verdict must be directed for defendant in the absence of anything to show ill will or malice, in an action for the publication in a newspaper of an article ridiculing in exaggerated and uncomplimentary terms a public entertainment which is not only childish, but ridiculous in the extreme.

(May 28, 1901.)

A PPEAL by plaintiff from a judgment of the District Court for Polk County in favor of defendants in an action to recover damages for the alleged publication of a libel. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. B. Crosby and Spurrier & Maxwell, for appellant:

A libel is a malicious defamation of a person by any printing, writing, sign, figure, representation, or effigy tending to provoke him to wrath, and expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse.

Iowa Stat. § 5086.

This definition is applicable in a civil action for the recovery of damages.

Call v. Larabee, 60 Iowa, 212, 14 N. W. 237; *Stewart v. Pierce*, 93 Iowa, 136, 61 N. W. 388; *Halley v. Gregg*, 74 Iowa, 564, 38 N. W. 416; *Mosnat v. Snyder*, 105 Iowa, 500, 75 N. W. 356.

To establish a qualified privilege the defendant must show that he believed the published statements to be true.

NOTE.—For earlier cases in this series as to libel or slander by expressing opinions or comment without misstating facts, see *St. James Military Academy v. Gaiser* (Mo.) 28 L. R. A. 667, and *note*; and *Dowling v. Livingstone* (Mich.) 32 L. R. A. 104.

As to words tending to bring one into ridicule or contempt, see cases in *note* to *Morey v. Morning Journal Assn.* (N. Y.) 9 L. R. A. on page 623.

State v. Haskins, 109 Iowa, 656, 47 L. R. A. 223, 80 N. W. 1063.

The publication in a newspaper of false and defamatory matter is not privileged because made in good faith as a matter of news.

Newell, Slander & Libel, 2d ed. p. 395.

The question whether the occasion is such as to rebut the inference of malice if the communication be bona fide is one of law for the court, but whether bona fides exist is one of fact for the jury, and the jury may find the existence of actual malice from the language of the communication itself, as well as from intrinsic evidence.

Bacon v. Michigan C. R. Co. 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324; *Nichols v. Eaton*, 110 Iowa, 509, 47 L. R. A. 433, 81 N. W. 792.

Mr. James C. Hume, for appellees:

The article complained of was a privileged publication.

Rector v. Smith, 11 Iowa, 302; *Mayo v. Sample*, 18 Iowa, 306; *Smith v. Howard*, 28 Iowa, 51; *Mott v. Dawson*, 46 Iowa, 533; *Long v. Peters*, 47 Iowa, 239; *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785; *Mielens v. Quasdorf*, 68 Iowa, 726, 28 N. W. 41; *Rainbow v. Benson*, 71 Iowa, 301, 32 N. W. 352; *Hauk v. Evans*, 76 Iowa, 593, 41 N. W. 368; *Comfort v. Young*, 100 Iowa, 627, 69 N. W. 1032; *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L. R. A. 734, 72 N. W. 518; *Hollenbeck v. Ristine*, 105 Iowa, 488, 75 N. W. 355; *Clifton v. Lange*, 108 Iowa, 472, 79 N. W. 276; *State v. Haskins*, 109 Iowa, 656, 47 L. R. A. 223, 80 N. W. 1063; *Nichols v. Eaton*, 110 Iowa, 509, 47 L. R. A. 433, 81 N. W. 792; *Loomis v. Des Moines News Co.* 110 Iowa, 515, 81 N. W. 790; *State v. Keenan* (Iowa) 82 N. W. 792; *Hulbert v. New Nonpareil Co.* (Iowa) 82 N. W. 928.

The following subjects have been held to be legitimate subjects of newspaper comment and criticism:

A book and its author's views.

Cooper v. Stone, 24 Wend. 434.

The manager of an Italian opera.

Fry v. Bennett, 28 N. Y. 324.

A clergyman in his ministerial duties.

Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698.

A teacher of stenography who advertised publicly for pupils.

Press Co. v. Stewart, 119 Pa. 584, 14 Atl. 51.

The projector of a railway and his work.

Crane v. Waters, 10 Fed. 619.

The "Cardiff Giant," a stone image of a man, exhibited to the public.

Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322.

A public dinner served by a caterer.

Dooling v. Budget Pub. Co. 144 Mass. 258, 59 Am. Rep. 83, 10 N. E. 809.

A public building being erected by a city.

Bearce v. Bass, 88 Me. 521, 34 Atl. 411.

A flower show.

Green v. Chapman, 4 Bing. N. C. 92, 5 Scott, 340.

An actor.

54 L. R. A.

Reade v. Sweetzer, 6 Abb. Pr. N. S. 9, note.

Whether or not a publication is a privileged one is a question of law to be determined by the court.

Comfort v. Young, 100 Iowa, 627, 69 N. W. 1032; *Clifton v. Lange*, 108 Iowa, 472, 79 N. W. 276; *Nichols v. Eaton*, 110 Iowa, 509, 47 L. R. A. 433, 81 N. W. 792.

The editor of a newspaper has the right, if not the duty, of publishing for the information of the public fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice.

Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322.

The article complained of being a privileged one, does it contain anything that is libelous *per se*?

Words ordinarily slanderous may not be so because spoken by the party in the performance of public or official duty, upon a just occasion, and without malice.

Mayo v. Sample, 18 Iowa, 306.

No defamatory words not libelous *per se* are actionable without extrinsic aid; neither are words published on privileged occasions. Where the words are not actionable *per se*, special damage must be alleged; and proof of such damage is essential to the cause of action.

Lucas v. Flinn, 35 Iowa, 9; *Achorn v. Piper*, 66 Iowa, 694, 24 N. W. 513; *Scholl v. Bradstreet Co.* 85 Iowa, 551, 52 N. W. 500; *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L. R. A. 734, 72 N. W. 518; *Hollenbeck v. Ristine*, 105 Iowa, 488, 75 N. W. 355.

Even when libelous *per se*, if special damages are sought to be recovered, they must be alleged and proved.

Hicks v. Walker, 2 G. Greene, 440.

And even so, unless the special damages are the natural and proximate consequence of the libel, they cannot be recovered.

Georgia v. Kepsford, 45 Iowa, 48; *Irlbeck v. Bierle*, 84 Iowa, 47, 50 N. W. 36.

In cases not libelous *per se*, special damages, if properly pleaded and proved, may be recovered, but are limited to those which are the natural and proximate, though not the necessary, consequence of the defamation.

Hollenbeck v. Ristine, 105 Iowa, 488, 75 N. W. 355; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Woodruff v. Bradstreet*, 116 N. Y. 217, 5 L. R. A. 555, 22 N. E. 354; *Dug v. Mater*, 27 C. C. A. 100, 52 U. S. App. 38f, 82 Fed. 169.

Plaintiff did not sufficiently plead special damages.

Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308; *Fry v. McCord Bros.* 95 Tenn. 678, 33 S. W. 568; *Kansas City, M. & B. R. Co. v. Delaney*, 102 Tenn. 289, 45 L. R. A. 600, 52 S. W. 151; *Cook v. Cook*, 100 Mass. 194; *Hollenbeck v. Ristine*, 105 Iowa, 488, 75 N. W. 355.

When the matter complained of is privileged the burden of proving malice lies on the plaintiff: the defendant cannot be called upon to prove that he did not act maliciously until some evidence of malice, more than a mere scintilla, has been adduced by the plaintiff.

Newell, Libel & Slander, 2d ed. p. 324; *Mayo v. Sample*, 18 Iowa, 306; *White v. Nicholls*, 3 How. 286, 11 L. ed. 600; *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513; *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431; *Fowles v. Bowen*, 30 N. Y. 20; *Lewis v. Chapman*, 16 N. Y. 309; *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109.

Words not libelous *per se* are not evidence of malice.

Scholl v. Bradstreet Co. 85 Iowa, 551, 52 N. W. 500; *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L. R. A. 734, 72 N. W. 518.

Deemer, J., delivered the opinion of the court:

The action is predicated on the publication of the following article: "Billy Hamilton, of the Odebolt Chronicle, gives the Cherry Sisters the following graphic write-up on their late appearance in his town: 'Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the *danse du ventre* and fox trot,—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is springhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle.'" The defendants pleaded that plaintiff, with her sisters, were engaged in giving public performances, holding themselves out to the public as singers, dancers, reciters, and comedians; that their performances were coarse and farcical, wholly without merit, and ridiculous; that the Des Moines Leader is a newspaper published in the city of Des Moines, which the other defendants were conducting, and that the article appeared as a criticism of the performance given by plaintiff, and to expose the character of the entertainment; that it was written in a facetious and satirical style, and without malice or ill will towards plaintiff or her sisters. This is clearly a plea of privilege, and the direction to the jury to return a verdict for defendants was, no doubt, on the theory that the plea of privilege was established. That it was published of and concerning plaintiff in her rôle as a public performer scarcely admits of a doubt, and it is well settled that the editor of a newspaper has the right to freely criticize any and every kind of public performance, provided that in so doing he is not actuated by malice. In other words,

the article was qualifiedly privileged. *Gott v. Pulsifer*, 122 Mass. 238, 23 Am. Rep. 322; *Fry v. Bennett*, 28 N. Y. 324; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698; *Dooling v. Budget Pub. Co.* 144 Mass. 258, 59 Am. Rep. 83, 10 N. E. 809. The occasion was such that the presumption of malice arising from the publication is rebutted, and plaintiff, in order to recover, must prove actual malice. *Nichols v. Eaton*, 110 Iowa, 509, 47 L. R. A. 483, 81 N. W. 792. By the term "actual malice" is meant personal spite or ill will, or culpable recklessness or negligence. Such malice may be shown by extrinsic evidence, or it may be gathered from the publication itself. *Nichols v. Eaton*, 110 Iowa, 509, 47 L. R. A. 483, 81 N. W. 792. There is absolutely no evidence, outside the publication itself, tending in any manner to show malice; hence, if malice be found, it must be from the article published. Ordinarily publication of such an article as the one in question would of itself be an *inducium* of malice, but as applied to the facts of this case, we do not think it should be so held. Plaintiff described the entertainment she and her sisters gave, in part, as follows: "These entertainments are concerts,—literary entertainments. I don't sing much. The others do. I have recitations and readings; recite and read in costume. In feminine costumes. Dresses as long as I have on, or shorter. I don't wear short dresses. Sometimes I have worn men's clothes. I never dance. I recite essays and events that have happened, I have written up of my own. I have none of them with me. One is 'The Modern Young Man;' the other, 'An Event that Happened in the City of Chicago.' I sing an Irish song,—an Irish ballad; also a eulogy on ourselves. It is a kind of a ballad composed by ourselves. I help the others sing it. I have forgotten it. It is about an editor. In the chorus I walked a little around the stage,—kind of a fast walk. A cavalier is a Spaniard, I believe. I represent a Spaniard. That is given in the act that we call 'The Gypsy's Warning.' I wear my bicycle bloomer rig. They reach to my knees, and are divided like leggings,—black leggings with buttons on them. I wear a blue blouse,—a blue velvet blouse. Sometimes red and sometimes green. I have many suits; wear then in turn. The leggings are always black. In the chorus I walked a little around the stage,—kind of fast walk or a little run. Had on different kind of clothes,—mostly silk. We had a reproduction of the performance called 'Trilby.' The singing of Ben Bolt by my little sister. I would come in and hypnotize her in a farce way. I would tell the audience that I would hypnotize her while she would sing. I didn't appear at any show without stockings. My little sister was barefooted in one act,—in very long dresses to her ankles. She also appears in a long robe in a tableau clinging to the cross. 'Cherries ripe and cherries red,' is a eulogy song. I was not asked to repeat only one verse. Q. What is the verse? A. 'Cherries red and

cherries ripe, the cherries they are out of sight, cherries ripe and cherries red, Cherry Sisters still ahead." The defendants' evidence regarding the character of the performance is in part as follows: "It was the most ridiculous performance I ever saw. There was no orchestra there. The pianist left after the thing was half over. She could not stand the racket and left. There was no other music, except vocal music from the Cherrys. They had a drum, and I think they had cymbals. As near as I can recollect, the curtain raised at the beginning, and the Cherrys appeared and gave a walk around and a song. I think it was 'Ta, ra, ra, Boom de ay.' They read essays and sung choruses and gave recitations, interspersed with the remarks that, if the boys didn't stop, the curtain would go down. One young man brought a pair of beer bottles which he used as a pair of glasses. They threatened to stop the performance unless he was put out, but he was not put out, and they didn't stop. When the curtain went up the audience shrieked and indulged in catcalls, and from that time one could hardly hear very much, to know what was going on, to give a recital of it. There was no bad language used, however. When Jessie was on the stage she appeared in the Trilby act in bare feet and short dresses. She was asked to trim her toe nails, and such irreverent remarks as that. She appeared more pleased than anything else. They had a washtub scene. I think Effie and Addie appeared with bare arms showing to the elbow, which was quite prominent. They went through the motions of washing, singing at the time. There was another piece called 'The Gypsy's Warning.' One of the sisters appeared in a male costume. Then there was a song, 'I want to be an editor,' and an explanation, accompanying the song, that an editor down at Cedar Rapids insulted them, and they made him pay dearly for it. The song was so jumbled up one could hardly make anything out of it, except, 'I want to be an editor, I want to be an editor,' whereupon the audience rose as one man and called on me to stand up. I did not stand up. My wife was there. While Jessie sang this she was rolling her eyes and swaying her body. I am not qualified to pass an opinion upon the merits of the singing. The discord was something that grated on one's nerves. There was short stepping around and swaying of the body. They went around the stage in one of their pieces,—I cannot say which,—sort of a mincing gait, shaking their bodies and making little steps. That is what made me describe it as a cross between the *danse du ventre* and a fox trot. They had their hands in front of them and at their sides. There was a tableau at the close, as I recollect. Jessie was the central figure in that piece, with her eyes uplifted, red lights, and so on. There was a 'Rock of Ages.' The audience was talking to the women, and they (the Cherry Sisters) would talk back. They would say: 'You don't know anything. You have not been raised

well, or you would not interrupt a nice, respectable show.' Nobody left during the performance except the pianist." In the light of this evidence, and some other that cannot be reproduced, the trial court directed a verdict for the defendants. We are now asked to set aside its order on the theory that the question of malice was for the jury. This is, no doubt, the correct rule, when there is any substantial evidence of actual malice, either in the publication itself, or in the facts and circumstances surrounding the transaction. A mere scintilla is not sufficient, however, to take the case to the jury. The evidence should raise a probability of malice, and be more consistent with its existence than its absence. When the occasion is privileged the presumption arises that the publication was bona fide and without malice, and it is incumbent on plaintiff to overcome this presumption. If, from defendant's point of view, strong words seemed to be justified, he is not to be held liable unless the court can say that what he published was to some extent, at least, inconsistent with the theory of good faith. These rules are well settled, and need no citation of authorities in their support. One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose. The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the conduct that is made the subject of criticism. Freedom of discussion is guaranteed by our fundamental law and a long line of judicial decisions. As said in the *Gott Case*, 122 Mass. 238, 23 Am. Rep. 322, the editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications, for which no action will lie without proof of actual malice. See also *Eastwood v. Holmes*, 1 Foot. & F. 347; *Paris v. Levy*, 9 C. B. N. S. 342; *Donaghy v. Gaffy*, 53 Conn. 43, 2 Atl. 397; *Carr v. Hood*, 1 Campb. 355, note. Surely, if one makes himself ridiculous in his public performances, he may be ridiculed by those whose duty or right it is to inform the public regarding the character of the performance. *Cooper v. Stone*, 24 Wend. 434. Mere exaggeration, or even gross exaggeration, does not of itself make the comment unfair. It has been held no libel for one newspaper to say of another, "The most vulgar, ignorant, and scurrilous journal ever published in Great Britain." *Heriot v.*

Stuart, 1 Esp. 437. A public performance may be discussed with the fullest freedom, and may be subject to hostile criticism and hostile animadversions, provided the writer does not do it as a means of promulgating slanderous and malicious accusations. *O'Connor v. Sill*, 60 Mich. 175, 27 N. W. 13; *Davis v. Duncan*, L. R. 9 C. P. 396. Ridicule is often the strongest weapon in the hands of a public writer; and, if it be fairly used, the presumption of malice which would otherwise arise is rebutted, and it becomes necessary to introduce evidence of actual malice, or of some indirect motive or wish to gratify private spite. There is a manifest distinction between matters of fact and comment on or criticism of undisputed facts or conduct. Unless this be true, liberty of speech and of the press guaranteed by the Constitution is nothing more than a name. If there ever was a case justifying ridicule and sarcasm,—aye, even gross exaggeration,—it is the one now before us. According to the record, the performance given by the plaintiff and the company of which she was a member was not only childish, but ridiculous in the extreme. A dramatic critic should be allowed considerable license in such a case. The public should be informed as to the character of the entertainment, and, in the absence of proof of actual malice, the publication should be held privileged. There is another rule of general application, now well known to the profession, that is involved, and that is that a motion to direct a verdict should be sustained when it clearly appears to the trial judge that it would be his duty to set aside a verdict in favor of the party on whom the burden of proof rests. *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235.

Viewing the evidence in the light of the rules heretofore announced, and remembering that the trial court had the plaintiff before it and saw her repeat some of the performances given by her on the stage, we are of opinion that there was no error in directing a verdict for the defendants.

Affirmed.

DIAMOND JO LINE STEAMERS *et al.*,
Appts.,
v.

City of DAVENPORT.

(114 Iowa, 432.)

1. The condemnation of land for a public wharf is not prevented by the fact that it is already in use by a common carrier as a landing place in connection with its business as such carrier.
2. Condemnation by a city of land for a public wharf cannot be defeated by the fact that it intends to grant a railroad right

of way over the property after it has acquired title.

(October 2, 1901.)

APPEAL by defendants from a judgment of the District Court for Scott County in favor of plaintiff in a proceeding to condemn real estate for a wharf and public landing. *Affirmed.*

Statement by Waterman, J.:

This proceeding was originally instituted by the city of Davenport to condemn certain real estate belonging to defendants for a wharf and public landing. Commissioners were duly appointed, who appraised the damages, against the protest of the Diamond Jo Line Steamers, and the land was taken by the city. The steamer company appeals.

Messrs. Schmidt & Vollmer, Henderson, Hurd, Lenahan, & Kiesel, and Kretzinger, Gallagher, & Rooney, for appellants:

The right of eminent domain may be exercised only under express grant or necessary implication, and not then if it appears that the property sought to be taken in the exercise of the right is in fact devoted to, and indispensable for, the purposes of the corporation.

2 Dill. Mun. Corp. p. 689; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Re Buffalo*, 68 N. Y. 167; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. 511, 6 Atl. 564; *Union Terminal R. Co. v. Kansas City Belt R. Co.* 9 Kan. App. 281, 60 Pac. 541; *Illinois C. R. Co. v. Chicago, B. & N. R. Co.* 122 Ill. 473, 13 N. E. 141; *Winona & St. P. R. Co. v. Watertown*, 4 S. D. 323, 56 N. W. 1077; *Lake Shore & M. S. R. Co. v. New York, C. & St. L. R. Co.* 8 Fed. 858; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 686; *Minneapolis Western R. Co. v. Minneapolis & St. L. R. Co.* 61 Minn. 502, 63 N. W. 1035; *Barre R. Co. v. Montpelier & W. River R. Co.* 61 Vt. 1, 4 L. R. A. 785, 17 Atl. 923; *Chicago, M. & St. P. R. Co. v. Starkweather*, 97 Iowa, 164, 31 L. R. A. 183, 66 N. W. 87; *Albia v. Chicago, B. & Q. R. Co.* 102 Iowa, 624, 71 N. W. 541.

Unless both the letter and the spirit of the statute relied upon clearly confer the claimed power it cannot be exercised.

Ilgare v. Chicago, 139 Ill. 46, 28 N. E. 934; *Illinois C. R. Co. v. Chicago, B. & N. R. Co.* 122 Ill. 473, 13 N. E. 141; *West River Bridge Co. v. Dix*, 6 How. 508, 12 L. ed. 535.

The method by which title was acquired is immaterial, so long as the use made of the land is a public one.

Chicago, M. & St. P. R. Co. v. Starkweather, 97 Iowa, 159, 31 L. R. A. 183, 66 N. W. 87; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684; *Re Providence & W. R. Co.* 17 R. I. 324, 21 Atl. 965; *Eldridge v. Smith*, 34 Vt. 484.

NOTE.—As to right to appropriate property already taken for public use, see, in this series, notes to *Barre R. Co. v. Montpelier & W. River R. Co.* (Vt.) 4 L. R. A. 785; *Cary Library v. Bliss* (Mass.) 7 L. R. A. 785; and *Miffin Bridge Co. v. Juniata County* (Pa.) 13 L. R. A. 431; 54 L. R. A.

also *Butte, A. & P. R. Co. v. Montana Union R. Co.* (Mont.) 31 L. R. A. 298; *Chicago, M. & St. P. R. Co. v. Starkweather* (Iowa) 31 L. R. A. 183; *Re Stewart* (Minn.) 33 L. R. A. 427; and *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* (Tenn.) 41 L. R. A. 403.

The grant of authority to appellant, under the general laws of this state, to engage in the business of transporting persons and property on the Mississippi river and its tributaries and the storage and forwarding of property, carries with it the implied power to condemn lands for the necessities of its business as such common carrier.

Elliott, Railroads, § 41; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 168, 3 N. E. 448.

Appellee has no power to take the land in question. No such right can be implied from the special act under which appellee acts. § 999. That act contains only a general grant of power.

Re Boston & A. R. Co. 53 N. Y. 574; *New York C. & H. R. R. Co. v. Metropolitan Gas-light Co.* 63 N. Y. 326; *Re Buffalo*, 68 N. Y. 167.

Land already legally appropriated to a public use is not to be afterwards taken for a like use unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication.

Boston & M. R. Co. v. Lowell & L. R. Co. 124 Mass. 370; *Housatonic R. Co. v. Lee & H. R. Co.* 118 Mass. 391.

The use by appellee of the land in question will supersede and defeat appellants' present use of the land.

The proposed wharf will be under the exclusive control and jurisdiction of the city authorities.

The lands could be conveyed by the appellee, or condemned by a railroad or another steamboat company, to the destruction of its use as a wharf for anybody.

Wharfs and docks at which vessels may stop to receive freight and passengers are essential to its business, and without these facilities the corporation would fail to answer the ends for which it was organized.

Chicago, M. & St. P. R. Co. v. Starkweather, 97 Iowa, 159, 31 L. R. A. 183, 66 N. W. 87.

Messrs. Davison & Lane, George W. Scott, and E. M. Sharon for appellee.

Waterman, J., delivered the opinion of the court:

The Diamond Jo Line Steamers is a corporation organized for pecuniary profit under the general incorporation acts of the state. The nature of its business, as stated in its articles, is "the transporting of persons and property on the Mississippi river and tributaries and the storage and forwarding of property." It owns, jointly with the estate of one Richard Gray, deceased, a tract of land in the city of Davenport 208 feet wide on Front street, and extending south 148 feet, at which point it widens to the west 20 feet, and thence extends further south the full width of 228 feet to "low-water mark" of the Mississippi river, as the record before us discloses. Inasmuch as no question is made by counsel as to the south line of this property, and no showing with relation to the source of title, we shall accept the boundaries given. In 54 L. R. A.

our view of the case, it makes no difference whether the tract in dispute extends to low-water mark, as claimed, or only to high-water mark, which this court has fixed as the limit of private ownership on navigable waters. *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Ingraham v. Chicago, D. & M. R. R. Co.* 34 Iowa, 249. On the north part of this tract is a building used by plaintiff for a warehouse. The south 114.60 feet is open ground, which was used as a landing and wharf for plaintiff's steamers. The city of Davenport is acting under a special charter, and has power to acquire land by condemnation for a public landing. Code, § 999. In August, 1898, it instituted proceedings to condemn the south 114.60 feet of plaintiff's said tract, together with contiguous property belonging to others, for the purpose of making a public landing for boats. The Diamond Jo Line Steamers Company protested without avail against the proceedings. Damages were duly awarded, and the land taken. No question is raised here as to the amount of the damages allowed. The contention on the part of the appellant is that the property sought to be taken was already so devoted to public service as to protect it from condemnation for another public use. The general rule on this subject is that, when property has been devoted to public use, in the sense that will be later explained, it cannot be taken and applied to another conflicting public use by the exercise of the power of eminent domain, unless by authority of the legislature, expressly given or necessarily implied. *Chicago, M. & St. P. R. Co. v. Starkweather*, 97 Iowa, 159, 31 L. R. A. 183, 66 N. W. 87, 10 Am. & Eng. Enc. Law, p. 1052, notes. Here arises the principal question in dispute. Was this property devoted to public use, within the meaning of this rule? Before taking up the facts, it may be well to examine the law on the subject. It cannot be that all real estate is exempt from condemnation which the owner uses as a matter of choice for public benefit. If that were so, the real estate of an individual owner of a line of stage coaches or transfer wagons, if he were doing business as a common carrier, would be secured against the exercise of the right of eminent domain. Manifestly, this cannot be the law. "The true criterion by which to judge of the character of the use is whether the public may enjoy it of right or by permission only." *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311. "If the company may abandon its business, and sell its lands by an absolute title, without any responsibility to the state, its property is not so held as to be exempt from condemnation." *Mills, Em. Dom.* § 45. Where the property, by its use will tend incidentally to benefit the public, affording additional accommodations for business, and commerce, yet this is not sufficient to bring it within the rule of property devoted to public use, especially where the property is to remain under private control, and no right to its use or to direct its management is conferred upon the public. *Re*

Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 42. The mere use of the property for public purposes is, then, not enough to give the exemption. Such property, it seems, must be impressed with a trust in favor of the public, so that the latter's use is of right, and not of grace; and this right must be one that cannot be defeated or destroyed at the owner's will. The most pertinent case to which our attention has been called is *Re New York, L. & W. R. Co.* 99 N. Y. 12, 1 N. E. 27, in which plaintiff sought to take by condemnation certain real estate belonging to the defendant and which was used by the latter in connection with the operation of its boats on the northern lakes. The same defense as here was set up,—that the real estate was already devoted to public use by the steamboat company. The court disposed of the issue as follows: "It is further contended that the property sought to be taken is already so devoted to the public use as to protect it from condemnation to another public use. The proof shows that the Union Steamboat Company is a corporation created and existing under the laws of this state, and engaged in the business of carrying by water passengers and freight on the great lakes of the north, and using the property in question as a dock or wharf for the landing and delivery of a portion of its freight. In one sense, therefore, the property is already in use for public purposes, and quite as much so, it is contended, as it will or can be when devoted to the uses of the petitioner. Undoubtedly, the facts bring us to the inquiry whether the use of corporate property for the public convenience, and for purposes of a quasi public character, is sufficient to protect it from the grasp, under the right of eminent domain, of another corporation, whose property is held for similar public uses. The law did not confer upon the steamboat company the right to acquire land *in invitum*, and that now held by it is held by purchase, and by the same tenure as that of a private individual. The general authority conferred upon railroad corporations to acquire lands against the will of the owner is broad and comprehensive. In terms it covers all and excepts none. But because it could not be intended that the state, having authorized one taking, whereby the lands became impressed under authority of the sovereign with a public use, meant to nullify its own grant by authority to another corporation to take them again for another public use unless it so specially decreed, it has been ruled that lands so held and impressed with a public trust were not embraced in words of general authority. Were the rule otherwise, this evil would result. A corporation (No. 1) having the right of eminent domain takes land from a similar corporation (No. 2) having the same right. Number 2 thereupon proceeds again to condemn it for its own use, and No. 1 retaliates, and so the absurd process goes on. It is clear that the legislature never meant any such result, and hence, from any general grant containing in its terms no word of exception, there is necessarily ex-

cepted property already held upon a public trust by the authority and under the ward and control of the state. An examination of the cases in this court will show that the exception has gone no further. . . . Is the property here sought to be condemned so held? The steamboat company was organized under a general law. . . . Under that law it was and might remain a private corporation. Its charter did not make it a common carrier, or impose upon it public obligations. If it became a common carrier, or assumed public obligations, that sprang from its own voluntary action, and not from the will of the sovereign. It might carry passengers or not, as it pleased. It might transport freight for one firm or corporation or a single individual, excluding all others, and confine its operations within that narrow boundary; and practically and mainly such was the scope of its business. It might use the land here in question wholly for the purpose of building and equipping the vessels of its line, and then apply them solely to private uses. The test appears to be, not what it does or may choose to do, but what, under the law, it must do, and whether a public trust is impressed upon it. It does not so hold its property impressed with a trust for the public use unless its charter puts that character upon it, and so that it cannot be shaken off. If the law of its existence does not prevent it from being a mere private corporation, from disregarding, if it pleases, all public uses; if it may abandon its business at any moment, and refuse to run its propellers, and sell its lands by an absolute title, without responsibility to the sovereign, which is permitted by its charter; . . . in short, if under that charter it may be a purely private corporation,—its property is not so held as to be exempt from a taking under the law of eminent domain. Any other rule would be surrounded with difficulties. If the test should be made that of the actual use, of the character of the business done, and the benefit to the public realized, we shall never know where to draw the line, and must equally exempt individuals whose property is thus used; and in every case an uncertain and shifting question of fact would dominate the decision to be rendered." See also, as in point, *New York C. & H. R. R. Co. v. Metropolitan Gaslight Co.* 63 N. Y. 326. It is held in this case that the fact of a corporation's business being of a public nature is not sufficient to impress its real estate with a trust in favor of the public, and thus exempt it from being taken by the exercise of the power of eminent domain.

Now, looking to the facts, plaintiff company was incorporated under the general statutes as a carrier of freight and passengers. It acquired this real estate for use in its business. But it does not appear that the ownership or possession of such property was essential to the operation of its boats. It had a right to land them at the city of Davenport, using the public landing, or it could maintain a wharf boat in the river. Furthermore, it is not obliged under its art-

cles to act as a common carrier longer than it sees fit to do so. Nor is it compelled to give the public any use of this property. There is no way to prevent plaintiff from inclosing this tract at any time it desires, and thus shutting the public out from its use. Clearly, the public use here is a matter of favor, and not of right. Another consideration of weight is that the title to this property is so held that it cannot be devoted absolutely and as of right to public use by plaintiff, for the estate of Richard Gray, a private owner, has an undivided one half interest therein. Counsel for plaintiff cite a number of cases as sustaining their position. *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255, is not in point. All the others are cases where the owners from whom the property sought to be taken devoted it to public use as matter of right; and, furthermore,—and this is an important, if not controlling, consideration,—such owners had authority to condemn the lands for the uses to which they were put. We may say in this connection that the plaintiff in the case before us has no authority under the law to exercise the power of eminent domain. We do not wish to be understood as saying that no real estate is impressed with a public use save such as has been actually condemned. But it is important, if not essential, in determining the character of the use to which it is put, to ascertain whether the holder might have condemned it for such purpose; for it seems that only in the hands of one having such power can it be impressed with a trust in favor of the public. Our conclusion is that the real estate in question was subject to condemnation by the city.

2. It is claimed on the part of the appellant that the real purpose of the city in condemning this real estate was not to make a public landing, but was to procure a right of way across the tract for a railway line which was seeking to enter the city. It is urged that the extraordinary power of eminent domain cannot be resorted to for such ulterior purpose. A certain question was propounded to a witness by appellant's counsel for the purpose of developing this phase of the case. An objection to it was sustained, and plaintiff then made the following offer of proof: "The appellants offer to show by the testimony of witness that the city of Davenport, in the condemnation proceedings commenced by it for the purpose of appropriating the strip of land in front of the property owned by the Diamond Jo Line Steamers and the estate of Richard Gray, deceased, and lying southerly from a line parallel with the south line of the buildings upon said premises, and 25 feet therefrom, for the ostensible purpose of establishing a wharf and landing place for boats, in fact intended by said proceeding to acquire said property with the purpose and intention of thereafter giving the Davenport & Rock Island Bridge & Railway Terminal Company and its successors the right to lay down upon said strip of ground its double tracks within 25 feet of the buildings of the appellants, and to be operated as a railway
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thereafter. Appellants propose further to show that all of said condemnation proceedings were under the direction and control of the officers and agents of the Davenport & Rock Island Bridge & Railway Terminal Company or its successors, and that certain of the expenses connected with such condemnation were paid or were to be paid by said railway company upon the completion of the condemnation proceedings thus commenced in the name of the city of Davenport." It will be noted that this offer does not include any evidence going to establish that the city did not need a public landing, and did not intend to devote this land to that purpose. The most that can be claimed for it is that appellant desired to show that the railroad company was interested in the matter, and when the city obtained title it intended to grant an easement or right of way across it to said railroad company. This the city had a right to do. See § 767 of the Code; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649, 36 Iowa, 357, with cases therein cited. The proceeding to condemn cannot be annulled because the city had agreed to do that which it had a legal right to perform.

The judgment of the District Court is in all respects correct, and therefore affirmed.

George H. MARSHALL

v.

John A. BULLARD, *Appt., et al.*

(.....Iowa.....)

Payment of part of a judgment by a third person for the benefit of the debtor is a sufficient consideration for a release of the entire judgment.

(October 4, 1901.)

APPEAL by defendant Bullard from a decree of the District Court for Lee County in favor of plaintiff in a suit to enjoin the issuance of execution upon a judgment. *Affirmed.*

Statement by Ladd, J.:

On February 4, 1895, the First National Bank of Ft. Madison obtained judgment against plaintiff and Fannie Bullard for the sum of \$555.50, with costs. About February 20, 1895, the defendant, with said Fannie, executed a stay bond. In December of that year execution issued, whereupon the defendant paid the amount necessary to satisfy it to the bank's attorney, who indorsed on the judgment record: "Received

NOTE.—For part payment as accord and satisfaction in general, see, in this series, *note* to *Fuller v. Kemp* (N. Y.) 20 L. R. A. 785; also *Tanner v. Merrill* (Mich.) 31 L. R. A. 171; *Clayton v. Clark* (Miss.) 37 L. R. A. 771; and *Chicora Fertilizer Co. v. Dunan* (Md.) 50 L. R. A. 401.

As to effect of payment of debt by volunteer to the original undertaking, see *Crumlish v. Central Improv. Co.* (W. Va.) 23 L. R. A. 120, and *note*.

satisfaction of this judgment and atty's fees of John A. Bullard, except sheriff's fees, and execution ordered, and same is returned, and judgment is hereby assigned to him without recourse," and signed as "Atty. for Pltff." About July 14, 1897, the defendant caused execution to issue, and directed it levied on property of plaintiff. Before this was done, however, the parties hereto agreed that, if plaintiff would raise for defendant \$320,—one half the amount due on the judgment,—the judgment should be satisfied in full. This money was raised, as will more fully appear in the opinion, and defendant signed an indorsement on the record in these words: "Received the sum of \$320 from Geo. H. Marshall, being settlement in full of one half of this judgment." Shortly before the beginning of this action, in 1898, the defendant ordered execution against plaintiff, and this suit was brought to enjoin issuing the same. Decree as prayed, and defendant appeals.

Mr. T. B. Snyder, for appellant:

Payment of a part of a liquidated debt does not operate to extinguish the whole debt, although such payment is made and received as payment in full.

Rea v. Owens, 37 Iowa, 262; *Eldred v. Peterson*, 80 Iowa, 264, 45 N. W. 755; *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 62; *Stoutenberg v. Huisman*, 93 Iowa, 213, 61 N. W. 917; *Keller v. Strong*, 104 Iowa, 585, 73 N. W. 1071.

Messrs. Herminghausen & Herminghausen, for appellee:

Compromises are highly favored in law. Receiving part of a debt in payment of all before due is good.

Boyd v. Moats, 75 Iowa, 151, 39 N. W. 237.

Receiving part of a judgment in lieu of all, when the debtor is insolvent, is a valid agreement.

Stoutenberg v. Huisman, 93 Iowa, 213, 61 N. W. 917.

When a debt is liquidated, but a dispute arises as to its justness, part payment in settlement of the whole debt is good.

Potts v. Polk County, 80 Iowa, 401, 45 N. W. 775.

The rule that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt does not apply when the payment of a less sum is made before the debt falls due or at another place than that stipulated in the contract; and any collateral benefit received by the creditor which would raise a technical legal consideration, however small, is sufficient to support the agreement.

Anson, Contr. 2d Am. ed. 108; *Harper v. Graham*, 20 Ohio, 105; *Varney v. Conery*, 77 Me. 527, 1 Atl. 683; *Kellogg v. Richards*, 14 Wend. 116; *Brooks v. White*, 2 Met. 285, 37 Am. Dec. 95; 2 *Parsons*, Contr. 7th ed. 750.

So, where a debtor pays costs and expenses of an action brought to recover a liquidated debt, in addition to a part payment of the same.

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Mitchell v. Wheaton, 46 Conn. 315, 33 Am. Rep. 24; *Jaffray v. Davis*, 124 N. Y. 164, 11 L. R. A. 710, 26 N. E. 351.

When the payment was made new obligations were assumed and the positions of the parties changed.

First M. E. Church v. Donnell, 110 Iowa, 5, 46 L. R. A. 858, 81 N. W. 171.

Marshall became liable to Wilson Bullard for the money furnished,—a greater sum than could have been realized out of the sale of his property under execution.

Marshall, the debtor, if such he was, procured Wilson Bullard, a third party, to secure the money to pay the amount agreed upon. Wilson Bullard secured the money from the bank and gave his own individual note, and this is a sufficient consideration.

Keeler v. Salisbury, 33 N. Y. 653; *Steinman v. Magnus*, 11 East, 390; *Fuller v. Kemp*, 138 N. Y. 231, 20 L. R. A. 794, 33 N. E. 1034.

When Bullard received the full sum of money he had agreed to accept, the source of it made no difference in the discharge of the contract.

Drummond v. Crane, 23 L. R. A. 707, and note, 712, 159 Mass. 577, 35 N. E. 90.

Ladd, J., delivered the opinion of the court:

It may be conceded that John A. Bullard became the equitable owner, at least, of the judgment, as the amount thereof was paid to the judgment plaintiff's attorney upon the express understanding that it should be assigned to him. Thereafter he caused an execution to issue, and directed the sheriff to levy upon the property of plaintiff, one of the judgment defendants; but when the sheriff was about to do so Bullard told Marshall if he would raise and pay one half the judgment he would release him therefrom, and would give the other to his (Bullard's) mother, the other judgment defendant. Possibly the word "release" may not have been used, but such was clearly the understanding of the parties, though denied by Bullard. The latter knew at the time that Marshall had no property other than four horses and fourteen pigs, and that this was inadequate to satisfy the debt. The design was evidently that he should raise money by procuring it from another, and he accordingly consulted Willard Bullard, advising him fully of the circumstances. It should here be noted the debt was that of Mrs. Bullard, and the liability of Marshall resulted from signing with her as surety. Upon being informed of the situation, she executed a chattel mortgage to Willard Bullard, securing him the payment of the money which he promised to procure. The latter, in the evening of the same day, went to see John A. Bullard, and said, "Marshall tells me you will settle that judgment in full if he will raise you \$320," and was answered, "I did tell him I would;" and he was then informed Willard Bullard would help Marshall to the money, and that his (Bullard's) mother would secure him therefor by a chattel mortgage on his personal property. Wil-

lard Bullard borrowed the necessary amount of one McCown, executing his individual note therefor, and paid the \$320 to the sheriff. This was done in reliance on John A. Bullard's agreement to release the judgment as against Marshall. The note to McCown was afterwards paid by Mrs. Bullard. Shortly after the above payment, Marshall and John Bullard each by agreement paid one half of the sheriff's costs. Being after the close of the transaction, this cannot be regarded as of controlling importance. But see *Harper v. Graham*, 20 Ohio, 105; *Baum v. Buntyn*, 62 Miss. 110; *Mitchell v. Wheaton*, 46 Conn. 315, 33 Am. Rep. 24.

1. The rule that an agreement to accept part in satisfaction of the whole of a liquidated demand is invalid because without consideration has been declared too many times in this state to permit of reconsideration. *Keller v. Strong*, 104 Iowa, 585, 73 N. W. 1071; *Bryan v. Brazil*, 52 Iowa, 350, 3 N. W. 117; *Works v. Hershey*, 35 Iowa, 340; *Myers v. Byington*, 34 Iowa, 205; *Rea v. Owens*, 37 Iowa, 262; *Sullivan v. Finn*, 4 G. Greene, 544. But see *Clayton v. Clark*, 74 Miss. 490, 37 L. R. A. 771, 21 So. 505, 22 So. 189, an interesting decision to the contrary. It is applicable to judgment debts. *Deland v. Hiett*, 27 Cal. 611, 87 Am. Dec. 102; *Fletcher v. Wurgler*, 97 Ind. 223; *Coblentz v. Wheeler & W. Mfg. Co.* 40 Ark. 180. If, however, such an agreement is supported by any new consideration, though insignificant, or technical merely, if valuable, it will be upheld. Thus, if a part is to be and is paid before due, or at a place other than that at which the obligor was legally required to pay, or if payment is made in property, no matter what its value, or by the debtor in composition with his creditors generally, in which they agree to accept less than their demands, the consideration is held to be sufficient. *Boyd v. Moats*, 75 Iowa, 151, 39 N. W. 237; *Stoutenberg v. Huismen*, 93 Iowa, 213, 61 N. W. 917; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136, and note; *White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423; *Very v. Levy*, 13 How. 345, 14 L. ed. 173. See cases collected in note to *Fuller v. Kemp* (N. Y.) 20 L. R. A. 785; also in 1 Cyclop. Law & Proc. 323; 1 Am. & Eng. Enc. Law, p. 415. So, too, payment by a stranger to the original debt of a less amount than due in full satisfaction has been uniformly held to be a good accord and satisfaction, and to bar a subsequent action for the balance. *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Fowler v. Smith*, 153 Pa. 639, 25 Atl. 744; *Clark v. Abbott*, 53 Minn. 88, 55 N. W. 542; 1 Cyclop. Law & Proc. 325. In *Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578, the debtor furnished money to another to obtain the judgment in his name, which he did, and then discharged the defendant therefrom; and in a suit for the balance this was held to be no defense. 64 L. R. A.

"As the sum paid was really the money of the debtor, and paid over by his agent, it is the same as if paid by himself." In *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546, the compromise was to be effected if the debtors could induce their friends to raise and loan them the portion to be paid, which was done; but the court said: "The money, when paid, was to belong, and in fact did belong, to the defendants. It was to be paid and was paid as their money. Suppose a debtor agreed to go to work and earn the money, or to dig for it in the earth, would this furnish a new consideration to uphold an agreement of the creditor to take less than his conceded due? In all cases an embarrassed debtor must make some effort to procure the money to make a compromise, but no case can be found holding that the fact that he had agreed to make such effort furnishes any consideration to uphold the compromise. The debtor is legally bound to pay, and it is utterly indifferent to the creditor where he gets the means to do it; that is a matter of the debtor, and all his efforts are expended in simply endeavoring to discharge a legal obligation. Hence the fact that the defendants agreed to induce their friends to loan them the money, and that they did induce them to loan it, furnishes no new consideration to uphold the compromise." In *Harriman v. Harriman*, 12 Gray. 341, the creditor agreed "that, if the defendant . . . would raise and pay plaintiff the sum of \$20, he would receive the same in full satisfaction of the judgment;" but there was nothing to indicate that a portion was to be borrowed, and it was held payment under such circumstances operated as no defense, as the raising implied no more than a proposition to collect or obtain from other funds. The facts of the case at bar clearly distinguish it from those cited. Marshall had not borrowed the money, as was done in *Bunge v. Koop*, and the arrangement for raising it implied procuring it from another, as he had no other way of obtaining it, as was known to the owner of the judgment. The money paid never belonged to the debtor, but was the property of and paid by a third party in reliance on the agreement to release plaintiff. True, repayment was secured by the other judgment debtor, but on the faith of this same promise. This, however, did not affect the title in any way to the money borrowed by said third party for the express purpose of releasing the plaintiff from liability of the judgment. It may be, as contended, that there was no consideration moving from plaintiff, but, as the agreement contemplated furnishing money by a third party, and it was so furnished, a new consideration moved from said third party for his benefit, and the agreement will be upheld. See *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884.

Affirmed.

ILLINOIS SUPREME COURT.

Telitha MUNRO, Appt.,
v.
Samuel M. BOWLES.

(187 Ill. 346.)

Delivery of a deed in escrow sufficient to pass title is made where the grantor turns the deed over to his housekeeper, with instructions to deliver it to the grantee on his death, with no apparent intention of retaining control thereof and no subsequent attempt to control or take possession of it, although it is placed by her for safe keeping, together with other papers of hers, in the grantor's trunk, which is locked, and the key to which he retains until his death.

(Magruder, J., dissents.)

(October 19, 1900.)

NOTE.—Delivery of deed to third person; or record, or delivery for record, by grantor.

I. Delivery to person previously authorized or designated by grantee.

II. Delivery to person not previously authorized or designated by grantee; recording.

a. General rule as to delivery to third person.

1. In general.

2. When not to be delivered to grantee until after grantor's death.

b. Requisites on part of grantor.

1. General statement.

2. Particular instances and illustrations.

a. Delivery without directions to await grantor's death.

(1) When held effective.

(2) When held ineffective.

b. Delivery with directions to await grantor's death.

(1) When held effective.

(2) When held ineffective.

c. Deed remaining within physical power of grantor.

d. Effect of grantor's purpose to avoid his obligations.

e. Reservation of life estate as illustrating grantor's intent.

3. Recording or delivery for record.

a. In general; presumption from record.

b. Grantor's intent.

c. Effect of return of deed to grantor.

2. Acceptance; how and when deed takes effect; status of title.

1. Necessity of acceptance.

2. What sufficient to show actual acceptance; effect of assent or dissent.

3. Different theories with respect to acceptance.

a. In general; their relation to the time when, and manner in which, the deed takes effect.

b. Theory of relation back.

c. Presumption of acceptance.

(1) In general.

A PPEAL by plaintiff from a judgment of the Circuit Court for Rock Island County in favor of defendant in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. McEniry & McEniry and Sweeney & Walker, for appellant:

The purpose to make the deed a gift would make no difference, and would not and did not, assist in passing the title to the grantee, unless the deed itself was delivered in accordance with law.

Wells v. Bitter, 180 Ill. 620, 54 N. E. 565.

The fact that the appellee obtained possession of the deed when it had not been properly delivered, and had the same record-

II. c. 3, c—continued.

(2) Deed to person non sui juris.

(3) Trust deeds.

(4) Deed not beneficial to grantee.

d. Cases illustrative of the nature of the instrument and of the time when it takes effect.

e. Right of the grantor to revoke.

f. Rights of third persons.

g. Grantor's interest in, and rights respecting the property.

III. Summary.

Scope.

This note, so far as the subject of a delivery to a third person is concerned, is confined to deeds which meet the requirements of Chief Justice Shaw's definition of a deed presently (*Foster v. Mansfield*, 3 Met. 412, 37 Am. Dec. 154) *i. e.*, a deed delivered to a third person to await the happening of some contingency, and not the performance of a condition, before its delivery to the grantee. Instruments which come within his definition of an escrow, *i. e.*, when the future delivery is to depend upon the payment of money or the performance of some other condition, are excluded. In some cases, however, instruments which come within the above definition of a deed presently are treated by the courts as escrows. Such cases are, of course, included.

I. Delivery to person previously authorized or designated by grantee.

It is obvious that a delivery of a deed to a third person, previously authorized by the grantee to receive it, is equivalent to a delivery to the grantee himself, and it is so held in *Skinner v. Baker*, 79 Ill. 496; *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212; *Young v. Stearns*, 3 Ill. App. 498; *Miller v. Irish Catholic Colonization Assn.* 86 Minn. 857, 81 N. W. 215; *Sowards v. Moss*, 58 Neb. 119 78 N. W. 873; *Bond v. Wilson* (N. C.) 40 S. E. 179; *Peck v. Rees*, 7 Utah, 467, 13 L. R. A. 714, 27 Pac. 581.

A deed may be delivered to a third person as the servant or bailee of the grantee, and such delivery will be valid. *Souveryby v. Arden*, 1 Johns. Ch. 240.

The delivery of a deed to one of the officers of a corporation is a delivery to the corporation

ed, would place it on the same basis as a forged deed.

Hadlock v. Hadlock, 22 Ill. 388.

The act of recording a deed cannot amount to a delivery when there does not appear to be an assent to, or knowledge of the grantor of, its delivery, which could not be in this case by the acts of the housekeeper after the death of the grantor.

Doe ex dem. Herbert v. Herbert, Breese (Ill.) 278; *Wiggins v. Lusk*, 12 Ill. 132; *Wormley v. Wormley*, 98 Ill. 544.

To constitute a valid delivery of the deed, whatever method of delivery is adopted by the grantor, it must appear that by his acts or words, or both, he intended to divest himself of his title and put the deed beyond his control or dominion forever.

Walter v. Way, 170 Ill. 105, 48 N. E. 421; *Fouts v. Bell*, 172 Ill. 345, 50 N. E. 198;

itself, and the deed, therefore, takes effect immediately. *Price v. Pittsburgh*, Ft. W. & C. R. Co. 84 Ill. 13.

Provided that it is for the use and benefit of the corporation, and with intent to pass an absolute title or interest. *Southern Life Ins. & T. Co. v. Cole*, 4 Fla. 359.

The delivery of a chattel mortgage to the agent of the mortgagee is valid notwithstanding that his agent was also the attorney of the mortgagor. *Fletcher v. Martin*, 126 Ind. 55, 25 N. E. 886; *Day v. Sines*, 15 Wash. 525, 46 Pac. 1048.

A delivery of a deed by the grantor to a person whom the grantee had requested to obtain it, with directions to hand it to the grantee, is a good delivery, although it was not handed over to the grantee, and was found among the grantor's papers after his death. *Stinger v. Com.* 26 Pa. 422.

Where a deed is signed and acknowledged and left with the common agent of the parties without any qualifications or instructions by the grantor, the delivery is complete, and it cannot be affected by the subsequent instruction by the grantor not to deliver it until the purchase price is paid. *Blight v. Schenck*, 10 Pa. 286, 51 Am. Dec. 478.

The delivery by a father of a conveyance of an equitable interest to his infant son, to an attorney whom he, as the guardian of his son, had employed to procure the legal title to the lands, constitutes a delivery to the son. *Byington v. Moore*, 62 Iowa, 470, 17 N. W. 644.

The delivery of a deed, after it had been signed, sealed, and acknowledged, to one engaged by the grantee to prepare it and to take the grantor's acknowledgment, is, in the absence of any condition or restriction, a delivery to the grantee, since, under the circumstances, such person is to be deemed the grantee's agent for the purposes of the delivery. *Swank v. Swank*, 37 Or. 439, 61 Pac. 846.

The court, in *Ward v. Small*, 90 Ky. 198, 13 S. W. 1076, expressed the opinion that the person to whom the deed was delivered, though not expressly authorized to receive it, or to act as the grantee's general agent, was so far the latter's agent as to render the delivery to him effective as a delivery to the grantee, it appearing that he had for many years, to the grantor's knowledge, attended to various matters for the grantee, notwithstanding that he testified that it may have been two, or even ten, years before the reception of the deed, since he had last attended to any matters for the grantee, he having also testified that he would not have received the deed unless he thought he had authority to do so.

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Hawes v. Hawes, 177 Ill. 415, 53 N. E. 78; *Provost v. Harris*, 150 Ill. 40, 36 N. E. 958; *Stinson v. Anderson*, 96 Ill. 373; *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041; *Bovee v. Hinde*, 135 Ill. 140, 25 N. E. 694. Messrs. W. J. Entringer and J. T. Kenworthy for appellee.

Carter, J., delivered the opinion of the court:

In an action of ejectment brought by the appellant, Telitha Munro, against the appellee, Samuel M. Bowles, in the court below, to recover a farm of 320 acres in Rock Island county, there was a verdict of not guilty, and a judgment for defendant, the appellee. On this, her appeal, the appellant contends that upon the evidence the verdict and judgment should have been for the plaintiff, and that the court erred in the

But while the delivery of a deed of release to a known agent of the releasee is, in law, a delivery to the principal, and the deed will ordinarily be operative from the time of such delivery, there is no such identity between the releasee and his agent as to preclude the latter from becoming the depository of an escrow, where the acceptance of an agency from both parties involves no violation of duty to either. *Cincinnati, W. & Z. R. Co. v. Ill.*, 13 Ohio St. 235.

So, leaving a deed with a depository is not a delivery to the grantee even if the depository was the latter's agent, where it was not delivered unconditionally, but was to remain subject to the dominion and control of the grantor. *Vanstone v. Goodwin*, 42 Mo. App. 39.

And the delivery of a deed to the grantee's agent to enable him to determine whether or not he will accept it is not a valid delivery, where the agent decides to reject it. *Ford v. James*, 2 Abb. App. Dec. 159; *Carnes v. Platt*, 7 Abb. Pr. N. S. 42.

A delivery to a third person pursuant to an agreement between the grantor and grantee, or with the previous assent of the grantee, is equivalent to a delivery to the latter. *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153 (*obiter*); *Fewell v. Kessler*, 30 Ind. 195; *Hatch v. Bates*, 54 Me. 139; *Shaw v. Hayward*, 7 Cush. 170; *Ellis v. Missouri P. R. Co.* 40 Mo. App. 165; *Diehl v. Fowler*, 10 Tex. Civ. App. 558, 30 S. W. 1086.

Where the grantee saw the deed after it was drawn, and the parties came to an understanding that the same should be executed and left with the register to be recorded, the register, *pro hac vice*, may be considered as the agent of the grantor to receive it; and the title passes to the grantee as soon as the deed is delivered to the register in pursuance of such agreement, and is not subject to the lien of a judgment recovered after that time. *Cooper v. Jackson*, 4 Wis. 537.

The act of a chattel mortgagor in leaving the mortgage with the town clerk for transmission to the mortgagee, as well as for registration, will complete the delivery if done pursuant to a previous agreement between the parties. *Com. v. Cutler*, 153 Mass. 252, 26 N. E. 855.

The mortgagee's assent to the mortgage may be inferred where it was made in pursuance of a previous agreement between the parties, was drawn in the mortgagee's counting-room, and was, by his direction, taken to the home of the mortgagors, where it was executed and acknowledged before a justice of the peace, and, in the absence of the mortgagee, was handed to the justice who took the acknowledgment, to be

instructions given to the jury. The appellant claimed title as the only heir at law of her father, Samuel Bowles, deceased. The appellee claimed title through a warranty deed from said Samuel Bowles. The evidence tended to prove that the appellee was the illegitimate son of said Samuel Bowles, who, as it was shown, recognized appellee and brought him up as his own son. He was a man of wealth, and it clearly appeared that it had long been his avowed purpose to give the farm to appellee. On June 29, 1893, he called on his attorney at Moline, Illinois, and told him of his purpose to make such gift, and requested him to prepare a deed to his said son for the land. The attorney drew the deed as requested, the consideration expressed being natural love and affection and \$1. The deed was read to, approved and signed by,

Samuel Bowles, who took it away with him to a notary public, before whom it was duly acknowledged. The only question in the case is whether or not there was any effective delivery of the deed. When the deed had been prepared, and before the grantor took it from the office of his attorney, the attorney asked him if he was going to give it (the deed) to his son, to which Bowles replied, "Not during my lifetime." The attorney then said to him, "Do you know that if you should keep this deed in your possession, and it should be found among your papers after your death, it would be worthless?" Bowles replied that he did not know that. His attorney then informed him that such was the law, and advised him to deliver the deed to a third person, beyond his recall, with instructions to such person to deliver it, after the grantor's death, to the grantee.

carried by him to the registry of deeds. *Greene v. Conant*, 151 Mass. 223, 24 N. E. 44. It was said that the court might properly infer, in the absence of any objection by the mortgagee afterward, that he impliedly authorized the selection of the justice to receive the conveyance and carry it to the registry of deeds for him, and consented that the delivery should be made in that way. In this case it was held that the delivery took effect as of the time of the delivery to the justice, so as to cut off an attachment between that time and the time the mortgage was actually delivered to the mortgagee.

II. Delivery to person not previously authorized or designated by grantee; recording.

a. General rule as to delivery to third person.

1. In general.

It is well established that, under proper conditions to be hereafter discussed, a valid delivery of a deed may be made by delivering the same to a third person for the grantee, if the latter subsequently accepts it, notwithstanding that he has not previously authorized or designated the third person to receive it. The circumstances under which such delivery may be upheld, the manner in which, and the time when, the deed takes effect, and the respective rights of the parties and third persons, are discussed in subsequent subdivisions of this note. Most of the cases cited in such subdivisions, either expressly or by implication, recognize the truth of the foregoing proposition, in the restricted and qualified form in which it is here stated. The following cases illustrate some of the forms in which the proposition has been stated and some of the applications that have been made of it.

In order to constitute a valid delivery of a deed, it is not necessary that it should have been delivered personally to the grantee; it will be sufficient if delivered to some third person for the use of the grantee, although the latter was not present at the time, had no knowledge of the existence of the deed, and never gave any authority to the person receiving it to act in his behalf. *Woodward v. Camp*, 22 Conn. 457.

Delivery may be made to a stranger for and in behalf, and to the use of, him to whom it is made, without authority, under certain circumstances. *Hulick v. Scovil*, 9 Ill. 159; *Fisher v. Hall*, 41 N. Y. 416; *Chess v. Chess*, 1 Penn. & W. 32, 21 Am. Dec. 350.

Delivery of a deed, executed in behalf of an

infant for the consideration of love and affection, to a witness of the deed, for the benefit of the infant, is delivery to the infant. *Parker v. Salmon*, 101 Ga. 160, 28 S. E. 681. In this case the delivery was to the infant's father.

If a deed is delivered to a stranger who has no authority to receive it, the grantee may ratify the act of the stranger, and the delivery will be good, even in cases where the deed is made without the grantee's knowledge. *Morrison v. Kelly*, 22 Ill. 626, 74 Am. Dec. 169; *Cook v. Patrick*, 135 Ill. 499, 11 L. R. A. 573, 26 N. E. 658; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153; *Thatcher v. St. Andrew's Church*, 37 Mich. 264.

Where a grantor places a deed in the hands of a third person for the benefit of the grantee, and writes the latter that he has done so, there is a sufficient delivery. *Rawson v. Fox*, 65 Ill. 200.

In *Henrichsen v. Hodgen*, 67 Ill. 179, where the deed was relied upon by the grantee as color of title to support his claim of adverse possession, the court held that there was a sufficient delivery, it appearing that the deed, with the assent of the grantor, was left in the hands of a third person for the grantee.

The delivery of a deed to one person for the benefit of another is good. *Nye v. Lowry*, 82 Ind. 316; *Frank v. Helmer*, 117 N. C. 79, 28 S. E. 42.

A delivery of a deed to a third person for the benefit of the grantee is just as much a delivery as if made to the grantee or party himself, unless some other intent is evinced. *Hosley v. Holmes*, 27 Mich. 416.

An agreement to procure a conveyance and release of a dower right within six months is sufficiently performed to support an action for the consideration where a deed conveying such right to the other party is executed and delivered to a stranger, with or without previous authority, if the grantee within the six months directs the latter to retain the deed for him. *Turner v. Whidden*, 22 Me. 121.

A deed left with a third person unconditionally to be delivered to the grantee is sufficiently delivered if subsequently received by the grantee under circumstances indicating acceptance. *Campbell v. Kuhn*, 45 Mich. 513, 40 Am. Rep. 479, 8 N. E. 523.

An unconditional delivery to a third person will be good if assented to by the grantee either before or after the grantor's death. *Allen v. DeGroot*, 105 Mo. 442, 16 S. W. 494, 1049.

A delivery of a deed may be made either to the grantee or to a third person, without any special authority, for the use of the grantee.

We are satisfied that he undertook to carry out the instructions of his attorney, and, as found by the jury, intended to make, and did make, an effectual delivery of the deed as an escrow. He was living alone, except that he had a housekeeper. On the same day that the deed was drawn and executed, he returned home, and told his housekeeper, Miss Witherspoon, of his attorney's instructions for him to make a delivery of the deed. She testified, in substance: "He said he would give the deed to me to keep, and at his death that I should give it to Sam [the appellee], and I told him I would. He then handed me the deed, and I took it. It was in an envelope, with Sam's name on the back of the envelope. I asked him what I could do with it, and he told me I could keep it in his trunk, and he handed me the key. The trunk was locked. I went into his

room, and put the deed in the right-hand corner of the trunk, with a sewing-machine receipt which I had there. The trunk was the safest place in the house." A few months after the deed was made, Samuel Bowles fell unconscious while walking up the steps of his residence, and expired almost immediately after having been taken to his room. After he was dead, Miss Witherspoon, in whose hands the deed had been placed by Mr. Bowles, took from his vest pocket the key to his trunk, and then unlocked the trunk, and took therefrom the deed in question, and shortly thereafter delivered it to Samuel M. Bowles, the grantee, who filed it for record. She testified that the deed was in the envelope, in the same place in the corner of the trunk, with her machine receipt, where she had placed it

Verplank v. Sterry, 12 Johns. 536, 7 Am. Dec. 348.

The delivery of a deed to a third person for the benefit of the grantee is valid if afterwards assented to by the grantee. *Marsh v. Austin*, 1 Allen, 238.

That the delivery of a deed is to another than the grantee does not necessarily invalidate it; but delivery may be made to a stranger for the grantee's use. *Meeks v. Stillwell*, 54 Ohio St. 341, 44 N. E. 267.

It is not necessary to the validity of a deed that the delivery should be made to the grantee himself. It may be delivered to a stranger in his behalf and for his use, even without his precedent authority. *Eyrick v. Hetrick*, 13 Pa. 488.

Where tenants in common execute a deed of land which has been fully paid for by the purchaser, the delivery of the deed after the death of one of the tenants in common, by the other, or by some third person in whose hands it has been placed for that purpose, is a good and lawful delivery. *Holt's Appeal*, 98 Pa. 257.

A delivery sufficient to transfer the title to the grantee is shown where one, in anticipation of marriage, executed a deed to his intended wife, and delivered it for her to a third person, who, the same day, delivered it to her. *Turner v. Warren*, 160 Pa. 836, 28 Atl. 781.

The rule has been applied in the following cases where the actual delivery was to the person to be benefited by the deed, though another was named as grantee:

In *Richardson v. Clow*, 8 Ill. App. 91, a release of land, running to the mortgagor, was delivered to one who had purchased the land from the latter. The court held that the release could be sustained upon either one of two grounds, (1) that there was, in legal effect, a delivery to the mortgagor; (2) that a delivery to the owner of the land was sufficient, she being the party to be benefited by the release.

A delivery of a deed to the real beneficiary, or the person to whose benefit it will inure, is good without any delivery to the person named as grantee in the deed; therefore, when a deed to one person will inure to the benefit of another by reason of covenants of title in a deed from the former to the latter, a delivery to the latter of a curative deed running to the former will be good without any delivery to the latter. *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. 714.

A sufficient delivery of a deed executed to one person for the benefit of another is made by delivery to the latter, followed by the former's acquiescence in the use of his name by

subsequently executing a deed to the latter. *Kyte v. Kyte*, 8 Kulp, 1.

And the rule has been applied where the third person has purchased the property but procured the deed to be made out to another and delivered to himself; thus:

There is a sufficient delivery of a deed to the grantees where it is given by the grantors to a third person, who buys and pays for the property and retains the deed in his possession until his death, when it is recorded by the grantees, who take possession of the property. *Cook v. Patrick*, 135 Ill. 499, 11 L. R. A. 573, 28 N. E. 658.

Where a husband purchases land and directs a deed absolute in form to be made to his wife, and the grantor, with the intention of passing the title, makes the deed as directed and delivers it to an agent designated by the husband, it is a prima facie delivery to the wife, and the fact that the deed was afterward found in possession of the husband does not, considering the relation of the husband and wife, rebut the presumption of delivery to her. *Rumsey v. Otis*, 133 Mo. 85, 34 S. W. 551.

Where a father, without any request from his daughter, or any intimation to her of his intention, purchases a house and lot and procures the deed to be made to her, and receives the deed from the grantor, and subsequently informs her of what has been done, and she assents thereto, the title vests in her. *Shrader v. Bonker*, 65 Barb. 615.

Where a purchaser of land procures the deed to be made out to a third person, but has it delivered to himself, and the grantee ratifies such acts as soon as he learns of the deed, the legal title will be deemed to have passed to him as between him and the widow and heirs of the third person, whatever may be the equitable rights of the parties in the premises. *McPherson v. Featherstone*, 37 Wis. 632.

But where the equitable owner of property procures the holder of the legal title to make a deed to his (the equitable owner's) wife, and to deliver it to him, it is optional with him whether effect shall be given to it by delivering it to his wife or not, and he may, if he choose, suffer the legal title to remain in the grantor. *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84.

So, also, a delivery to one of the grantees, or persons interested in a deed, has been upheld as a delivery to the others; thus:

A deed conveying property in trust for the life of a person named, with remainder to his children, may be sufficiently delivered to the remaindermen by a delivery to the life tenant *que trust*. *Eyrick v. Hetrick*, 13 Pa. 488.

A delivery to a wife of a deed conveying

when it was put into her hands for delivery to appellee.

The evidence shows beyond all doubt that from what the grantor did and said he intended to make an effectual delivery of the deed. In *Hawes v. Hawes*, 177 Ill. 409, 53 N. E. 78, we reiterated what had been said, in substance, in many previous cases, that "no special form or ceremony is necessary to constitute a sufficient delivery. It may be by acts or words, or both, but something must be said or done showing an intention that the deed shall become operative to pass the title, and that the grantor loses all right of control over it. The delivery need not necessarily be made to the grantee, but may be made to another in his behalf and for his use; but it is indispensable that the grantor shall part with control over the deed, and shall not retain a right to reclaim

it." *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041; *Procart v. Harris*, 150 Ill. 40, 36 N. E. 958; *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007; *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800. It is contended in the case at bar that the grantor, Samuel Bowles, retained control of the deed, because, after he delivered it to Miss Witherspoon, she put it in his trunk, to which he carried the key, and that he virtually retained possession of the deed until his death. The argument is that what was done after the execution and acknowledgment of the deed was all one transaction, the effect of which was that the grantor retained full control of the deed, with the right and power to recall or reclaim it at any time, according to his pleasure. So far as the question of fact is concerned, the jury and the court below have found against this contention, and we think

property to her for life, with remainder to her children, or in case she dies without children to her husband, is a sufficient delivery as to the husband and children also. *Lambert v. McClure*, 12 Tex. Civ. App. 577, 84 S. W. 978.

A delivery of a deed, creating a life estate and a remainder, to the remainderman, is a sufficient delivery to the life tenant so far as delivery depends upon the acts of the grantor, and the fact that the life tenant is claiming title under the deed sufficiently indicates an acceptance of it on his part. *Stout v. Dunning*, 72 Ind. 348.

A mortgage purporting to have been given to three grantees, for three several sums, was delivered to one of them by the mortgagor, with words to the effect that he delivered it for her use only. The court decided that the delivery inured to the benefit of all, saying: "The instrument purports to be a conveyance of the whole property described to the three grantees and their assigns on one consideration moving from them all, but paid in different proportions. . . . Such a conveyance vested in them an interest in the goods, and whether this interest is technically a joint interest or an interest in common is wholly immaterial. It inures to their common benefit. . . . This being the character of the instrument signed and sealed by the plaintiff, the court are of the opinion that by the delivery of it to one of the grantees, to inure as his deed to such grantee, it thereby became the deed of the grantor for all the purposes expressed in it; and that it was not competent for the grantor to restrain the operation of it, as his deed, by the use of words, so as to give it effect as his deed to one of the grantees and prevent it from having that effect as to the others." *Hubby v. Hubby*, 5 Cush. 516, 52 Am. Dec. 742.

Delivery of a deed to one of two joint grantees is a delivery to both. *Eshleman v. Henrietta Vineyard Co.* 102 Cal. 199, 36 Pac. 579.

When a deed is delivered to a grantee who is named in the deed jointly with another grantee, both made by the instrument tenants in common, in the absence of facts tending to show differently, such delivery will be regarded as a delivery to both. *Minor v. Powers* (Tex. Civ. App.) 24 S. W. 710, affirmed in 87 Tex. 83, 26 S. W. 1071.

Where a father executed a deed to his two sons and handed the same to one of them, telling the latter that it was for him and his brother, there was a good delivery to both. *Benson v. Hall*, 150 Ill. 60, 36 N. E. 947.

But if one makes a deed to two persons, and delivers it to one of them only, and says nothing with reference to the other at the time of

the delivery, the deed is void as to the latter. *Hannah v. Swamer*, 8 Watts, 9, 34 Am. Dec. 442.

And if a deed to two grantees is delivered to one of them without the knowledge of the other, and the latter, upon learning of it, dissents therefrom, the deed is void as to him, and he cannot thereafter maintain ejectment. *Baxter v. Baxter*, 44 N. C. (Busbee L.) 341.

2. When not to be delivered to grantees until after grantor's death.

Postponing for the present the discussion of the conditions necessary to such a delivery, it may be said to be established by the overwhelming weight of authority that, in the absence of rights of third persons superior to those of the grantor (as to such rights, see II. §, *infra*), the fact that the third person is directed not to deliver the deed to the grantee until after the grantor's death does not defeat the delivery. *Doe ex dem. Guest v. Beeson*, 2 Houst. (Del.) 246; *Dinwiddle v. Smith*, 141 Ind. 318, 40 N. E. 748; *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515; *Hatch v. Hatch*, 9 Mass. 807, 6 Am. Dec. 67; *Latham v. Udell*, 88 Mich. 238; *Thatcher v. St. Andrew's Church*, 87 Mich. 264; *Howard v. Patrick*, 88 Mich. 805; *Jenkinson v. Brooks*, 119 Mich. 108, 77 N. W. 640; *Brown v. Stutson*, 100 Mich. 574, 59 N. W. 238; *Williams v. Latham*, 118 Mo. 165, 20 S. W. 99; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. 375; *Arnegard v. Arnegard*, 7 N. D. 475, 41 L. R. A. 258, 75 N. W. 797; *Studebaker Bros. Mfg. Co. v. Hunt* (Tex. Civ. App.) 38 S. W. 1134.

There is a good delivery where the grantor gives the deeds to a third person with directions to hand them after his death to the persons to whom they were made, or have such of them as were to minors recorded. *Stephens v. Huns*, 54 Pa. 26.

In *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35, a parent, in consideration of natural affection, executed deeds of part of his estate to his children, but retained the deeds in his custody giving directions to his wife to lodge them, after his death, with the town clerk for record, which was accordingly done. The court held that, as the deeds were never delivered, the putting them into the custody of the town clerk for record must be laid out of the question. It was said, however, that the case would have been different if the deeds had been delivered to the wife before the grantor's decease; for in that event the delivery of them to the use of the grantees to take effect on the death of the

their finding is sustained by the evidence. The evidence shows that he never did attempt to recall or reclaim the deed, or to exercise any control over it whatever, except that he permitted its custodian to keep it in his locked trunk, with a paper belonging to her which she kept in the same place. His intention to carry out the instructions of his attorney, and to make an effective delivery beyond his right of recall, is clear. Had Miss Witherspoon placed and kept the deed in a trunk or other place of deposit belonging to her, no question as to the delivery could have arisen. The question, then, is, Does the mere fact that she put the deed in his trunk, to which he carried the key, immediately upon its delivery to her, necessarily render such delivery, or alleged delivery, ineffectual? We think not. Such a fact, in connection with others, might cast suspicion upon the intention of the grantor, and give

rise to the conclusion that the attempted delivery was only colorable, and that he had no intention of parting with the control of the deed; but in the case at bar there was no evidence whatever that he did not intend in good faith to make a complete and final delivery of the deed as an escrow, but, as before said, the evidence was that he did so intend. So far as he was concerned, the act of delivery was complete, and no conditions were attached to it, except that the person to whom it was so delivered should, at his death, deliver it to the grantee. This condition was fulfilled, and we cannot say, as a matter of law, that because the custodian put and kept the deed in a receptacle belonging to him, where he could, by the exercise of mere physical power, regain the actual possession of the instrument as against such custodian, he did not part with all dominion and control over the

grantor would, by legal operation, have been a delivery to the grantees themselves.

That the person to whom a deed was delivered by the grantor with instructions to hold it until the death of the grantor and then deliver it to the grantee violated his trust, and gave the deed to the grantee before the grantor's death, does not defeat the delivery. *Wallace v. Harris*, 32 Mich. 380.

The cases just cited represent but a small part of those that support the proposition heretofore stated with reference to the delivery of a deed to a third person to await the grantor's death. Most of the cases, however, in which the question is involved, treat the general proposition as beyond dispute, and occupy themselves with the question as to the circumstances under which such delivery may be made, the manner in which, or the time when, the deed takes effect, or the respective rights of the parties and third persons, and for that reason are more appropriately cited in the following subdivisions.

The following cases seem to take the view that the direction to the third person not to deliver the deed to the grantee until after the grantor's death is necessarily fatal to the delivery.

In *Doe ex dem. Lloyd v. Bennett*, 8 Car. & P. 124, one made a deed of gift to his daughter, signed and sealed it in the presence of the attesting witnesses, and said: "I deliver this as my last act and deed." Afterwards, on the suggestion that the grantee might otherwise take his property from him in his lifetime, he requested a third person to keep the deed and not deliver it to the grantee until after his death. It was held that the delivery was completed by the declaration of the grantor. *Coleridge, J.*, said, however, that he doubted whether, if the instrument had been delivered on the condition that the grantee should not have it till the grantor's death, it could operate as an escrow.

Wellborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235, held that the delivery of a writing as a deed to a third person, as the agent of the grantor, to hold during the life of the grantor and to be delivered at his death to the grantees, does not operate as the deed of the grantor presently, or as an escrow, and a delivery by the third person to the grantee, after the grantor's death, is invalid. The court, in the opinion, seems to disapprove of the entire doctrine that an effectual delivery to the grantee may be made by a delivery to a third person with instructions to deliver it to the grantee after the grantor's death, and disapproves of *Wheel-*

wright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66, and the cases following that case. It is stated, however, in the statement of facts preceding the opinion, that the grantor delivered the deed to the third person (a subscribing witness) as his agent; and the opinion repeatedly states that the deed was subject to the grantor's control. If by this statement is meant that the grantor in the particular case, by constituting the third person as his agent, retained control over the deed, the case would, by the very terms in which the doctrine has been stated, be excluded from it. It may be, however, the court meant that the third person, under such circumstance, is to be deemed the agent of the grantor without any special agreement or understanding to that effect.

Gilmore v. Whitesides, Dud. Eq. 14, 31 Am. Dec. 563, is to the same effect as the last case. The court said that, although a delivery to one person for another may be good, that can be the case only where there is an unconditional delivery, or where it is upon a condition over which the grantor can have no further control; but in this case it is not pretended but that the grantor might at any time have resumed the paper and resumed the gift. This statement does not seem to have been made in view of any understanding or agreement that the grantor might recall the deed, but apparently because the court took the view that, as the deed was not to be delivered to the grantee or donee until after the grantor's death, it was necessarily within his control. This case, therefore, seems to be opposed to the general doctrine.

Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455, seems to practically deny that a delivery of a deed to a third person to be delivered to the grantee after the grantor's death may be upheld as a delivery to the grantee where the latter knew nothing about the deed until after the grantor's death. The opinion first states that it must be regarded as the established doctrine of the state that placing a deed in the hands of a third person is not a good delivery, unless the grantor parts with his dominion over the deed, and that if he continues till his death to have the right to recall the deed from the depository, there is no delivery, although such right was never exercised. It then apparently takes the position that until there is some privity between the depository and the grantee, the deed is necessarily within the control of the grantor, notwithstanding that he may have originally intended to part with all dominion over it. The court says the grantor has a right to change his mind and recall the deed at any time before the depository has entered into an

dead. Once parted with, it was gone forever, and he could not thereafter rightfully or effectually reassume a control which he had parted with, even if he had obtained possession of the deed; nor did he attempt to do so, but suffered the deed to remain undisturbed where Miss Witherspoon had placed it. We are disposed to agree with the findings below that the grantor did intend to make, and did in fact make, a delivery of the instrument. The instructions of the court to the jury were in harmony with these views, and no other error is pointed out.

The judgment will be affirmed.

Magruder, J., dissenting:

In my opinion there was no valid delivery of the deed. The deceased directed his housekeeper to take the deed, and put it in

arrangement with the grantee to hold it for him, or deliver it to him. It seems doubtful from the testimony with reference to the delivery to the depositary whether the grantor intended to part with the dominion and control over the deed, and it would seem that the decision might have been put upon the ground that he did not so intend, but the opinion itself seems clearly to put the decision upon the ground that, under the circumstances, the grantor did not part with all dominion and control over the deed, irrespective of what his original intentions may have been. The action was ejectment against the grantee, the plaintiff basing his title on the claim that the grantor died seised of the property. See also *Hale v. Joslin*, 134 Mass. 310, *infra*, II. b, 2, b, (2).

It is apparent from the citations previously made that the four cases last cited are opposed to the overwhelming weight of authority.

b. Requisites on part of grantor.

1. General statement.

Having stated in II. a, 1, the general proposition that a valid delivery may be made by delivering the deed to an unauthorized third person for the grantee, and in II. a, 2, the further general proposition that a direction to the third person not to deliver the deed to the grantee until after the grantor's death will not defeat the delivery, it is the purpose in this and the following subdivision to show what is requisite, on the part of the grantor, to uphold such a delivery. The question of acceptance by the grantee is discussed separately in II. c, *infra*.

The first requisite on the part of the grantor is that he shall deliver the deed to the third person for the benefit of the grantee and in some way express his intention to that effect; thus:

The mere leaving of a deed by the grantor with his agent, without any instructions as to what he desires to be done with it, does not amount to a delivery. The law does not presume, when a deed is handed to a third person, that it is done with the intention to pass the title to the grantee. In order to make such act a delivery, the intention of the grantor must be expressed at the time in an unmistakable manner. *Fitzpatrick v. Brigman* (Ala.) 30 So. 560.

A deed is good if delivered to a stranger to the use of the grantee. But if it is delivered to a stranger without any such intention (unless it be delivered as an escrow) it seems this is not a sufficient delivery. *Threadgill v. Jennings*, 14 N. C. (3 Dev. L.) 384.
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his trunk, which was in his bedroom. As soon as she placed it in his trunk, she gave him the key to his trunk. He put the key in his vest pocket, and carried it there for several months, until his death. It was found in his pocket after his death. It is evident that the deed never left his possession or control. Being in his trunk in his bedroom, the deed was all the time in his sight, and, having the key in his hands, he could get the deed and destroy it at any time. *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *Walls v. Ritter*, 180 Ill. 616, 54 N. E. 565; *Walter v. Way*, 170 Ill. 96, 48 N. E. 421; *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041; *Hawes v. Hawes*, 177 Ill. 409, 53 N. E. 78; *Provost v. Harris*, 150 Ill. 40, 36 N. E. 958; *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007; *Shultz v. Shultz*, 159 Ill. 654, 43 N. E. 800.

An unconditional delivery of a deed to a third person for the use and benefit of the grantee, where the grantor intends to divest the title, and to part with all control over the instrument, is ordinarily a sufficient delivery. *Wuester v. Follin*, 60 Kan. 334, 56 Pac. 490.

A deed need not necessarily be delivered directly to the grantee himself; a delivery to any other person for him and to his use is sufficient. If it has passed beyond the control of the grantor by his own act, accompanied with declarations that it is delivered for the use and benefit of the grantee, it has the same effect in the hands of the custodian, though a stranger, as if delivered to the party beneficially entitled. *Eckman v. Eckman*, 55 Pa. 269.

The act of a chattel mortgagor in placing the mortgage in the hands of a third person, not for the use and benefit of the mortgagee, but merely to have him place it on file for his own use, does not amount to a delivery. *Miller v. Blinbury*, 21 Wis. 676.

To uphold a delivery of a deed, there should be evidence, beyond delivery to a third person, of the intent of the grantor to part with his title and the control of the deed, and that such delivery is for the use of the grantee. *Osborne v. Fallinger*, 155 Ind. 351, 58 N. E. 439; *Mitchell v. Ryan*, 30 Ohio St. 287.

A delivery of a deed to a stranger having no authority to accept it, for the grantee, is a valid delivery, provided the grantee afterward accepts the deed; and such acceptance may be shown by implication. But to make a delivery to a stranger effectual, the intention with which the delivery is made must be expressed at the time. *McElroy v. Hiner*, 133 Ill. 156, 24 N. E. 435 (*obiter*).

A delivery to a third person does not authorize the presumption that it is done with the intention of passing the title. The facts and circumstances attending the transaction must be such as to show that the grantor intended that the deed should be delivered by the custodian to the grantee. Every such case must be determined by the intention of the grantor. *Trask v. Trask*, 90 Iowa, 318, 57 N. W. 841.

A bare delivery of a deed to a stranger without words of direction to deliver over to the grantee, either absolutely or conditionally, is merely void. *Hannah v. Swarner*, 8 Watts, 9, 34 Am. Dec. 442.

The mere leaving of a will in the custody of a third person without any instructions as to the delivery thereof to the grantee does not amount to a delivery to the latter. *Thompson v. Lloyd*, 49 Pa. 127.

But the authority of a notary, to whom a

mortgage is delivered by the mortgagor without special directions, to deliver it to the mortgagee, will be presumed, where the mortgagor executed the instrument with the intention that it should be delivered. *Adams v. Adams*, 70 Iowa, 258, 80 N. W. 795.

And the fact that the delivery of a deed by the grantor to a stranger was "for and in behalf and to the use of him to whom the deed is made" may be shown by either actions or words which evince the intent of the grantor. *Canning v. Pinkham*, 1 N. H. 353.

A delivers a deed made to J. S. to J. D., though he does not say to the use of J. S., yet it is a good delivery of the deed to J. S. if he accepts it. *Anonymous*, 13 Viner, Abr. 23 K, pl. 12 a.

It is also established by the great weight of authority, though there are a few cases to the contrary, that the grantor must part with all dominion and control over the deed at the time of its delivery to the third person. *Younge v. Guilbeau*, 3 Wall. 636, 18 L. ed. 262; *McCalla v. Bane*, 45 Fed. 828, Appeal dismissed 145 U. S. 646, 36 L. ed. 854, 12 Sup. Ct. Rep. 984; *Elisbury v. Boykin*, 65 Ala. 336; *Porter v. Woodhouse*, 59 Conn. 568, 18 L. R. A. 64, 22 Atl. 299; *Arnegaard v. Arnegaard*, 7 N. D. 475, 41 L. R. A. 258, 75 N. W. 797; *Fitzpatrick v. Brigrman* (Ala.) 80 So. 500; *Crocker v. Lowenthal*, 88 Ill. 579; *Stinson v. Anderson*, 96 Ill. 373; *Shults v. Shults*, 159 Ill. 854, 43 N. E. 800; *Morris v. Candle*, 178 Ill. 9, 44 L. R. A. 489, 52 N. E. 1036; *Crabtree v. Crabtree*, 159 Ill. 842, 42 N. E. 787; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; *Walter v. Way*, 170 Ill. 96, 45 N. E. 421; *Shea v. Murphy*, 164 Ill. 614, 45 N. E. 1021; *Provart v. Harris*, 150 Ill. 40, 36 N. E. 958; *Bennett v. Waller*, 23 Ill. 97; *Merritt v. Temple*, 155 Ind. 497, 58 N. E. 699; *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. 1090; *Osborne v. Eslinger*, 155 Ind. 351, 58 N. E. 439; *Farmers' & T. Bank v. Haney*, 87 Iowa, 101, 54 N. W. 61; *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490; *Pennington v. Pennington*, 75 Mich. 600, 42 N. W. 985; *Allen v. DeGroodt*, 105 Mo. 442, 16 S. W. 494, 1049; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497; *Abbe v. Justus*, 60 Mo. App. 800; *Hulser v. Beck*, 55 Mo. App. 668 (chattel mortgage); *Robbins v. Rascoe*, 120 N. C. 79, 38 L. R. A. 238, 26 S. E. 807; *Babbitt v. Bennett*, 68 Minn. 260, 71 N. W. 22; *Church v. Gilman*, 15 Wend. 656, 30 Am. Dec. 82; *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754; *Eckman v. Eckman*, 55 Pa. 269; *Elmore v. Marks*, 39 Vt. 538.

Bury v. Young, 98 Cal. 446, 33 Pac. 338, says: "There are well considered cases holding that, even though the grantor delivers the deed to the depositary, reserving the right to recall it, yet if he dies without recalling it, and the deed is then delivered, such delivery is complete and entire, and carries title. We are not disposed to indorse that doctrine, and think the principle recognized in this case goes far enough for all proper purposes. The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that, when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time."

Placing a bill of sale of personal property in the hands of a third person to keep or hold it subject to the order of the depositor does not amount to a delivery, actual or constructive. *Alsop v. Swathel*, 7 Conn. 500. The court said that if it had been deposited with a third person for the use of the grantee, it would have amounted to a delivery.

If a deed is placed in the hands of a third person as the agent, servant, friend, or bailee 54 L. R. A.

of the grantor for safe keeping only, and not for delivery to the grantee; if the fact that the instrument is a deed is not made known to such third person, either at the time it is handed over, or at any time before the death of the grantor; if the name of the grantee, or other description of him, is not given; and if there is no evidence, beyond the mere fact of such delivery, of the intent of the grantor to part with his control over the instrument and his title to the land, such transfer of the mere possession of the instrument does not constitute a delivery, and the instrument falls for want of execution. *Osborne v. Eslinger*, 155 Ind. 351, 58 N. E. 439.

A deed delivered by the grantor to a third person "for safe keeping and delivery," with an express reservation of the right to withdraw it at any time before the grantor's death, and with directions to hold the same until after his death, and if not recalled in the meantime, to deliver it to the grantees after that event, will not operate to pass the title, although the grantor never attempted to exercise the power of withdrawal, and the deed was delivered to the grantee by the third person after his death. *Brown v. Brown*, 66 Me. 316.

Where the grantor places in the hands of a depositary a deed to be delivered to the grantee upon the death of the grantor, reserving the right or power to recall the deed at any time before his death, there is no delivery, and the deed passes no title to the premises. In such case the depositary is the agent of the grantor, and holds the deed subject to his direction and control. *Ball v. Foreman*, 37 Ohio St. 132.

One of the requisites of the delivery of a deed is the intention of the grantor, and of the person to whom it is delivered, that it shall presently become operative and effectual. *Walter v. Way*, 170 Ill. 96, 48 N. E. 421; *Fisher v. Hall*, 41 N. Y. 416.

The deed must have been put into the hands of the third person under such circumstances as to make it the duty of the latter to refuse to surrender it to the grantor at his request. *Osborne v. Eslinger*, 155 Ind. 351, 58 N. E. 439; *Cook v. Brown*, 84 N. H. 460, Overruling *Shed v. Shed*, 8 N. H. 432; *Mudd v. Dillon* (Mo.) 65 S. W. 973.

The delivery of a deed to a stranger to be delivered to the grantee at the direction of the grantor, or with a reservation of the right in the grantor to countermand it, does not pass the title. *Trask v. Trask*, 90 Iowa, 318, 57 N. W. 841.

To give effect to a delivery to a third person when the assent of the grantee may be presumed from the beneficial nature of the conveyance, it must be placed beyond the control of the grantor, and not put into the hands of a third person merely to be delivered to the grantee, for then such third person is merely the agent of the grantor, who at any time before actual delivery to the grantee may recall it; but it must be delivered to such third person as agent of the grantee, and received by him in that capacity, and then, if the law will, from the beneficial nature of the conveyance, presume the assent of the grantee, the delivery is complete and the estate passes at once. *Johnson v. Farley*, 45 N. H. 505.

Where a deed of gift is placed by the donor in the hands of a third person with instructions to hold it for him till he calls for it, there is no delivery, because there is lacking the essential ingredient to a delivery, to wit, the putting the deed out of the possession of the donor without retaining any power or authority to control it. *Bailey v. Bailey*, 52 N. C. (7 Jones, L.) 44.

To make a delivery to the third person to be

delivered to the grantee after the grantor's death effectual, the grantor must divest himself of all power and dominion over the deed, and if he reserves the right to recall it, there is no valid delivery to the grantee, notwithstanding that after his death the third person places it on record. *Prutman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. In this case, it appears that the grantor revoked the deed and requested that it might be returned to him to be destroyed, but the opinion is undoubtedly broad enough to cover the case where such a right of control was reserved, even if never exercised.

Depositing a deed with a third person for safe keeping is not sufficient. *Roe v. Lovick*, 43 N. C. (8 Ired. Eq.) 88; *Morris v. Candie*, 178 Ill. 9, 44 L. R. A. 489, 52 N. E. 1036; *Barlow v. Hinton*, 1 A. K. Marsh. 97; *Guest v. Beeson*, 2 Houst. (Del.) 246.

The grantor must do some act putting it beyond his power to revoke the deed. *Duer v. James*, 42 Md. 492; *Hammerslough v. Cheatham*, 84 Mo. 13.

A deposit of a conveyance with a third person, to be delivered after the grantor's death to the grantee, operates as a delivery of the instrument to the latter, if the grantor intended it as an absolute disposition of the property. *Denzler v. Kleckhoff*, 97 Iowa, 75, 86 N. W. 147.

Where a grantor parts with the control of the instrument, and places it in the possession of another, with the intent and for the purpose of making it effectual and a binding contract, the delivery will be regarded as binding and conclusive upon the grantor. *Crocker v. Lowenthal*, 83 Ill. 579.

To constitute a valid delivery of a deed, it must pass into the hands of the grantee, or someone for him, in such a way as to be beyond the legal control of the grantor. If merely placed in the hands of a third person to be by him delivered to the grantee, it is obvious that the grantor may, at any time before the deed is actually delivered, countermand the order and prevent its taking effect. *Johnson v. Farley*, 45 N. H. 505.

In *Prutman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592, the court said that whether an instrument delivered to a third person to be delivered to the grantee was to be regarded as the deed of the grantor presently, or as an escrow, in either case the grantor must have divested himself of all power and dominion over it; in the first case, finally and forever, and in the second, until the time has passed for the performance of the condition, or the happening of the event, on which the second delivery is to be made.

An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession and with the power and control over the deed by the grantor for the benefit of the grantee, at the time of the delivery. *Williams v. Daubner*, 103 Wis. 521, 79 N. W. 748.

A conditional delivery is, and can only be, made by placing the deed in the hands of a third person, to be kept by him until the happening of the event upon which the deed is to be delivered over by the third person to the grantee. But it is an essential characteristic, and an indispensable feature, of every delivery, whether absolute or conditional, that there must be a parting with the possession of the deed, and with all power and control over it, by the grantor, for the benefit of the grantee, at the time of the delivery. *Porter v. Woodhouse*, 59 Conn. 568, 13 L. R. A. 64, 22 Atl. 209.

Even in the case of an escrow, the grantor must part with all dominion and control over

the deed until the expiration of the time for the performance of the condition, or the occurrence of the event upon which the delivery to the third person is made; and a deed deposited with a third person by the grantor to be delivered to the grantee upon the order of the grantor, is not an escrow, as it is deemed in law to be still in the possession of the grantor. *Fitch v. Bunch*, 30 Cal. 208.

A few cases have denied the necessity of the grantor's parting with all control and dominion over the deed, holding that notwithstanding the reservation by the grantor, at the time of the delivery to the third person, of a right to control or recall the deed, the delivery will nevertheless be effectual if such right is not exercised by the grantor during his lifetime; thus:

If a deed is delivered to a third person, to be by him kept, during the life of the grantor, subject to his order, and at his death, if not previously recalled, to be delivered over to the grantee, and the grantor dies without having recalled the deed, such delivery will become effectual, and the title of the grantee consummated, upon the death of the grantor. *Woodward v. Camp*, 22 Conn. 457.

In *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185, it was held that where deeds were delivered to a third person with directions to "take these deeds and keep them; if I never call for them, deliver one to . . . [person named], and the other to . . . [person named], after my death; if I call for them, deliver them up to me;" and the grantor died without recalling the deeds,—the legal operation of the delivery was that they became the deeds of the grantor presently; that the third person held them as trustee for the grantees; that the title became consummated in the grantees upon the death of the grantor; and that the deeds took effect by relation, from the time of the first delivery. The court said that the reservation of the power to countermand the deed made no difference, for it was in the nature of a testamentary disposition, and was revocable by the grantor during his life, without any express reservation of power.

Lippold v. Lippold, 112 Iowa, 134, 83 N. W. 800, holds that where a grantor, with intent to make the deed operative as such so as to pass the title, but postponing the time of enjoyment, delivered a deed to a third person to be delivered on the grantor's death to the grantee, and it was so delivered, the grantor never having recalled it, there was a good delivery to the grantee, notwithstanding that the grantor had the power to recall the deed during his lifetime. It does not appear that there was an express reservation of such power. It is apparently the view of the court that such power is necessarily implied. It appeared in this case that the grantee knew of and assented to the deed before the grantor's death.

In *Haydon v. Easter*, 15 Ky. L. Rep. 597, 24 S. W. 626, where a deed was delivered to a third person to await the grantor's death, the grantor afterwards conveyed a part of the premises, but indicated an intention to give other land, or money in lieu thereof. The controversy was between the grantee in the first deed and the representatives of the grantor, so the question as to whether the second deed was good or not did not arise, but it is apparently assumed that it was good. The court, however, seems to take the view that the reservation of the power to recall, if not exercised, is not fatal to a delivery.

In *Shed v. Shed*, 3 N. H. 432, where one made an instrument purporting to convey to his sons certain lands, with a reservation of the use of the lands to himself during his life, and deliv-

ered the instrument to a third person to be delivered to the grantees, as his deed, after his decease, in case he should not otherwise direct; and the deed was accordingly delivered to the grantees after the grantor's death, he not having given other directions in the meantime.—It was held that the instrument was to be considered as the deed of the grantor from the first delivery; and that the conveyance might operate as a covenant by the grantor to stand seised of the land to his own use during life, remainder to the grantees in fee. It was urged in this case that the grantor having reserved a control over the ultimate disposition of the instrument, it could not be regarded as an escrow; but the court said that if he might legally deliver the writing absolutely to take effect upon his decease, there was no reason why he might not deliver it conditionally, as an escrow, to take effect upon his decease, in case he did not change his mind and revoke it. It was also urged against the validity of the instrument that it required a relation by a fiction of law to the first delivery, but the court held that such fiction might be indulged as against tenants claiming the land in opposition to the intention of the grantor. This case, however, has been overruled by *Cook v. Brown*, 34 N. H. 460.

In *Canning v. Pinkham*, 1 N. H. 353, *infra*, II. b, 2, b, (1), also, it was held that the reservation of the power to recall was not fatal, if not exercised.

Where a deed is delivered to a third person to be delivered to the grantees in case the grantor shall die without having made a will, the deed takes effect from the first delivery, if the grantor dies without making a will, whether it is viewed as an escrow or not. *Ruggles v. Lawson*, 13 Johns. 285, 7 Am. Dec. 375.

In *Stephens v. Huss*, 54 Pa. 26, the trial court, in answer to a request to charge that if the grantor retained the right of recalling the deed at pleasure there was no delivery, and it was therefore inoperative, said that the retention of such power, if not exercised, and if the deeds were delivered over to the grantees after his death, would not render them inoperative. The supreme court said that the answer was immaterial, since there was no evidence that the grantor retained the right to recall the deeds, but expressed the opinion that the answer was correct in any aspect of the case.

In *Foster v. Mansfield*, 3 Met. 412, 37 Am. Dec. 154, the court said it was not material to inquire what would have been the effect if the grantor, who had delivered a deed to a third person to be delivered to the grantee after his (the grantor's) death, had recovered from his sickness and taken back the deed, but expressed the opinion, as the estate did not effectually pass till the second delivery, if that second delivery had been prevented it would probably have been held that the deed was wholly inoperative.

Where a deed is delivered to one in trust for the grantee, to take effect at the grantor's death, unless he shall otherwise direct in his lifetime, and he dies without giving any further direction, the deed at his death takes effect as his deed on the first delivery. *Morse v. Slason*, 13 Vt. 296.

These cases, as is apparent from the citations previously made, are opposed to the great weight of authority on the point in question. The case of *Shed v. Shed*, 3 N. H. 432, was expressly overruled in *Cook v. Brown*, 34 N. H. 460, which holds that, in order to make the delivery of a deed to a third person, to be delivered to the grantee after the grantor's death, effectual, the depository must have had such a dominion over the deed during the lifetime of

the grantor as the latter could not interfere with; and that a delivery to a third person to be delivered to the grantee upon the death of the grantor, provided it is not previously recalled, is not sufficient, though the power to recall the deed is never exercised.

The question whether the grantor parted with all dominion and control over the deed at the time of the delivery to the third person is to be determined by reference to his intention, which is to be ascertained from the facts and circumstances attending the execution of the deed and its delivery to the third person. *Alexander v. Alexander*, 71 Ala. 295; *Weber v. Christen*, 121 Ill. 98, 11 N. E. 893; *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338; *Trask v. Trask*, 90 Iowa, 318, 57 N. W. 841; *Davis v. Davis*, 92 Iowa, 147, 60 N. W. 507; *Jenkinson v. Brooks*, 119 Mich. 108, 77 N. W. 640; *Babbitt v. Bennett*, 68 Minn. 260, 71 N. W. 22; *Jones v. Swayze*, 42 N. J. L. 279.

The important question in determining whether there has been a delivery is the intent of the grantor that the instrument shall pass out of his control and operate as a conveyance. The existence or nonexistence of this intent, however, must be determined from his acts, and not from some secret state of mind inconsistent with his conduct. This intention may be inferred from a variety of circumstances, but the circumstances must be such as to satisfactorily indicate the grantor's intention to presently part with the property and to put the deed within the control of the grantee. There may be a handing over of the instrument into the manual possession of the grantee without any delivery, and, on the other hand, there may be a delivery, although the actual physical custody of the instrument remains with the grantor. *Babbitt v. Bennett*, 68 Minn. 260, 71 N. W. 22.

The question as to the existence of such intent is one of fact. *Babbitt v. Bennett*, 68 Minn. 260, 71 N. W. 22; *Jones v. Swayze*, 42 N. J. L. 279; *Dearmond v. Dearmond*, 10 Ind. 191.

Delivery is to a great extent a matter of fact, depending upon intent, and the intent must be found from the circumstances of the transaction, the *res gesta*; and while some general principles may be, and are, laid down in regard to it to ascertain such intent, the intent must be found as a fact, and cannot always be determined as a matter of law. There are some cases in which the intent is so plainly indicated by the *res gesta* that but one conclusion can be deduced. *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 728, 4 Pac. 473, 8 Pac. 46.

In *Vaughan v. Godman*, 94 Ind. 191, the court held that a complaint by a father against his daughter to set aside a deed and quiet title was not demurrable, notwithstanding that it alleged the making and recording of a deed from him to the defendant, then an infant, without her knowledge, where it also alleged the ultimate fact that the deed was never delivered to her, but always retained by the plaintiff. The court said that the ultimate fact that there was no delivery was properly averred, thus clearly showing that the question of delivery, under such circumstances, is one of fact, and not one of law.

In *Rogers v. Carey*, 47 Mo. 232, 4 Am. Rep. 822, the court makes the direct statement that when the facts with reference to delivery are undisputed, their legal effect is a question of law. If the court intended to include as one of the undisputed facts the ultimate fact as to the grantor's intention, the statement is undoubtedly correct, but if, as seems to be the case, the court, by "undisputed facts," meant merely what was said or done by the grantor,

and intended to lay down, as a general proposition, the rule that such "facts" being undisputed, the inference to be drawn from them with reference to the grantor's intention is a question of law, and not one of fact, the position is opposed to the great weight of authority. It will be observed that in many of the cases cited in the next subdivision, the ultimate question of the grantor's intention is regarded as a question of fact, or at least as a mixed question of law and fact—by which is meant, that the trier of the ultimate fact as to the grantor's intention is to be guided, in drawing the inference with reference to that intention from the admitted or established facts and circumstances, by certain general principles of law, but is to determine for himself whether the facts and circumstances, when ascertained, meet the requirements of those general principles, and is not absolutely bound, as he would be if the question were one of law only, to draw one predetermined inference from one state of facts, and another predetermined inference from another state of facts. It is true that the inference with reference to the grantor's intention that the trier draws from the subordinate facts in the case is subject to review, but the test to be applied on such review is that applied upon the review of an ordinary finding of fact, *i. e.*, whether such inference is so unreasonable that the trier has no right to draw it. This test leaves open a wide field for the exercise of the judgment and discretion of the trier of the facts, even if all the subordinate facts and circumstances from which the ultimate inference as to intention must be drawn are undisputed. In this view, the only value, as precedents, of the cases in which the appellate court upholds the finding of the trial court on the question of delivery, lies in the fact that they present varying sets of circumstances which have been held to be sufficient, or insufficient as the case may be, to support the particular finding of fact upon the question of the grantor's intention. It does not necessarily follow that an exactly contrary finding upon the same evidence would not also have been sustained. If, however, the decision is that the finding of the trial court upon the ultimate question as to the grantor's intention is not justified by the subordinate facts and circumstances, it would seem to be entitled to the same force, as a precedent, as if the inference of intention from that particular state of facts were purely one of law, and would undoubtedly be conclusive if another case should arise presenting exactly the same facts and circumstances.

The law makes a stronger presumption in favor of the delivery of voluntary settlements than in cases of ordinary bargain and sale. *Cline v. Jones*, 111 Ill. 563; *Winterbottom v. Pattison*, 152 Ill. 334, 38 N. E. 1050; *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577; *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; *Colee v. Colee*, 122 Ind. 109, 23 N. E. 687; *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346; *Rumsey v. Otis*, 133 Mo. 85, 34 S. W. 551.

Especially when made to infants. *Winterbottom v. Pattison*, 152 Ill. 334, 38 N. E. 1050; *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577; *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346. Or to wife, child, or near relative. *Rumsey v. Otis*, 133 Mo. 85, 34 S. W. 551.

The next case, however, seems to take exactly the contrary view.

The question of delivery of a deed is purely one of intention. With respect to the measure of proof required, a difference is recognized in the cases depending upon the character of the deed, whether it be voluntary, or made to give effect to a sale. In the former case the inten-

tion to part with the control of the deed is not presumed, and a delivery must be proved strictly. *Jamison v. Craven*, 4 Del. Ch. 311.

A delivery of a deed will be presumed from slight circumstances where there is proof of an intention on the part of the grantor to convey to the grantee. *Crabtree v. Crabtree*, 159 Ill. 342, 42 N. E. 787.

In determining the intention with which the grantor left the deed with a third person evidence of any declarations made, or conversations had, in relation to that subject by the grantor at that or any subsequent time is competent; but it is not competent for the depository to testify as to what he would have done if the deed had afterward been called for by the grantor. *Dean v. Parker*, 88 Cal. 283, 26 Pac. 91; *Corker v. Corker*, 95 Cal. 308, 80 Pac. 541.

Where the effect of a delivery of a deed made before the death of the grantor would be partially to revoke his will and change bequests therein, and, while leaving the will operative as to the grantees, would destroy a legacy to another heir, the son and appointed executor of the grantor, who would be left wholly unprovided for, the proof of delivery should be clear and explicit,—especially so where the legal effect of delivery would be to change the whole scheme of the grantor in the distribution of his estate. *O'Neal v. Brown*, 67 Ga. 707.

If the deed is delivered to the grantee, the natural presumption is that it is for his use, and no words are necessary. But if it is handed to a stranger, there is no such natural presumption; and hence, unless there is something besides the mere act of delivery to evidence the intent it is impossible to say that the grantor designed to part with his title. For the delivery may be by mistake, or for mere safe keeping, or for some other cause wholly independent of a purpose to transfer the estate. *Mitchell v. Ryan*, 3 Ohio St. 387.

Where the grantor delivers the deed to the wife of the grantee in his absence, with declarations to the effect that it is intended for his benefit, and without any intimation that it is to be retained by her for any purpose, it is presumed to have been delivered to the grantee. *Craven v. Winter*, 38 Iowa, 471.

2. Particular instances and illustrations.

a. Delivery without directions to await grantor's death.

(1) When held effective.

See also *infra*, II. b, 2, d.

The following cases present various combinations of circumstances which have been held either to require, or permit, a finding upholding a delivery made to a stranger without directions to await the grantor's death before delivering to the grantee.

A delivery of a mortgage from a daughter to her father is sufficiently shown where the mortgagor herself testifies that she handed the mortgage to her mother, who occupied rooms in her house with the father, and that she afterwards saw it in the bureau drawer in their room, and it further appears that it reached and was accepted by the mortgagee. *Ray v. Hallenbeck*, 42 Fed. 381 (decision of trial court).

A delivery of a grant of personal property to a third person, if unconditional, vests the title in the grantee, notwithstanding that the property remains in the grantor's hands until death, and that the deed remains with the third person. Those are circumstances which the jury may take into consideration in inquiring whether or not the delivery was unconditional. *McCutchen v. McCutchen*, 9 Fort. (Ala.) 650 (sustaining finding below).

Bryan v. Wash, 7 Ill. 557, makes the criterion of delivery, so far as it depends upon the acts of the grantor, his intention whether to place the deed in the hands of the third person merely as a convenient place of deposit, still intending to retain control over it and deliver it or not as he should subsequently think best, or to part with all dominion and control over it. The fact that at the time a deed from a grandfather to his infant granddaughter was placed in the hands of the latter's father the grantor instructed him to deliver the same to the grantee at his (the father's) pleasure, does not defeat the delivery (sustaining finding below).

In *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577, the finding by the trial court of the delivery of a deed to the grantees was upheld under the following circumstances: One executed a voluntary deed to his nephews and nieces and handed the same to his partner, instructing the latter to take the deed and take care of it—whether for himself or the grantees he did not say. The partner placed it in a safe, used both for the firm papers and for the private papers of the partners. The grantor exercised no control over it for fifteen years. One of the circumstances which was considerably emphasized as indicating an intent on the part of the grantor to pass the title at the time of the delivery to his partner was that the deed was expressly made subject to a life lease of the property executed contemporaneously, and that such life lease expressly recognized the grantees in the deed as the owners of the property. The controversy in this case was between the grantees on one side and the trustees under the will of the grantor and the depositary of the deed on the other side. Some of the grantees were infants and some were adults (finding below reversed).

A good delivery to the grantees is shown where a father having previously expressed his obligations to his children because of their remaining with him and aiding him to pay for the land, in contemplation of a remarriage executed and acknowledged a deed of land to the children and placed it in the hands of a third person, with the declaration that he never wished to see it again, the deed on his death being delivered to the grantees and recorded. *Crabtree v. Crabtree*, 159 Ill. 842, 42 N. E. 787 (finding below reversed). In this case, it appeared that the grantees knew before the grantor's death of the execution of the deed, accepted it, and cultivated the land.

There is a good delivery to the wife, where a deed in which she is named as grantee is delivered to the husband, who pays for the property and procures the deed to be made out in her name. *Pool v. Phillips*, 167 Ill. 432, 47 N. E. 758 (apparently so held as a matter of law).

In *Rodemeier v. Brown*, 169 Ill. 347, 48 N. E. 468, a delivery was held to have been effected under the following circumstances: A father executed a deed to his son, containing certain conditions. The grantor retained possession of the deed, but the son went into possession of the property and performed the conditions of the deed, and the property was treated as belonging to him. Shortly before the grantor's death, he said to another son in the absence of the grantee: "I will give you charge of Frank's deed; in that drawer (pointing to the drawer) is Frank's deed; take it and give it to him." The drawer referred to was in a bureau in the room where the deceased was lying. The son assented, saying the deed was "now" in his charge, and that he would give it to his brother. He told his mother that the deed was in the drawer, belonged to his brother, and was in his charge, and directed her to keep 54 L. R. A.

it locked up, which she consented to do. The deed remained in the drawer until after the grantor's death, when it was delivered to the grantee, who placed it on record (sustaining finding below).

In *Walter v. Way*, 170 Ill. 96, 48 N. E. 421, it was held that there was no delivery of a voluntary deed where the grantor during his last illness merely informed a third person that the deed was in a box in the adjoining room, and that the grantee, not the third person, could take it and record it (sustaining finding below).

A note and mortgage executed by a banker to replace a note and mortgage which had been left in his custody but had been misappropriated by an employee are sufficiently delivered where the banker hands them to an employee for record, informing the mortgagee thereof, and the latter assents to the arrangement, although they are not in fact recorded and are left in the bank vault until after an assignment for creditors by the mortgagor. *Knapstein v. Tinnette*, 156 Ill. 322, 40 N. E. 947, Affirming 57 Ill. App. 570 (sustaining finding below).

Where one brother sold land to another, executed a deed thereof, and delivered the same to his sister, there was a good delivery to the grantee, it appearing that the grantor received the purchase price from the latter, and that the latter entered into possession of the land and kept possession up to the time of his death, although the deed was never in his actual possession. *McCormick v. McCormick*, 71 Iowa, 379, 33 N. W. 648 (sustaining finding below).

The fact that the grantor, after delivery to the third person, expressed regret while on a trip to the place where the grantees resided, that he had not brought the deed along with him and given it to the grantees, does not tend to show that the delivery to the third person was not for their benefit, but rather that he regarded the transfer of the title to them as a fixed fact. 186d.

Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497 (reversing finding below), held that there was a good delivery to the grantees where a grandfather executed deeds to his infant grandchildren, reserving a life estate, and delivered them to his wife with directions to give the same to the grantees as soon as she saw them, notwithstanding that they were not handed to the grantees until after the grantor's death, and that the grantees did not know of them until after that event.

Where a man who had for months considered the matter, and consulted with friends, declaring his intention to convey lands to his minor son, executed a deed and delivered it to a neighbor, saying to him: "You take that deed and file it for record," and on the latter's suggestion not to file it just then he responded: "You take that deed and keep it safely," without either adopting the suggestion that the recording should be postponed or intimating any change in his purpose, or any desire that the deed should be held subject to his order or control,—the delivery of the deed must be held to have been absolute at that time, and a subsequent filing for record, whether before or after the father's death, to be merely the consummation of the delivery to the son as of the date of the delivery to the neighbor in trust. *Standiford v. Standiford*, 97 Mo. 231, 3 L. R. A. 299, 10 S. W. 836 (reversing finding below).

Where one who had partitioned his estate among his children, in order to preserve certain of his grandchildren from want on account of their father's dissipation, voluntarily executed a deed to them, having frequently declared his intention to do so, and handed the same to a third person with money to record it, there was a good delivery of such deed, and the title

passed to the grantees notwithstanding that there was a misdescription of the premises intended to be conveyed; and the first deed, on account of such mistake, having been returned to the grantor without being recorded, and a new deed executed to correct the mistake, it was held that the power conferred upon the third person to record the first deed attached to the corrected deed, nothing appearing to show that the grantor had changed his mind, and it appearing that the money which was given to the third person to record the first deed remained in his hands, and that he understood that he was to record the second deed and did so. *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346 (reversing finding below).

In *White v. Pollock*, 117 Mo. 467, 22 S. W. 1077, the court upheld a declaration of law of the trial court, that if the grantor, after signing and acknowledging a deed from himself to his son, said to his wife, in the grantee's presence: "Here is Dannie's deed. I want you to take it and take care of it for him;" and if, in compliance with such request, the wife took charge and control of the deed at the time,—there was a delivery, and the title passed, by virtue of the deed, to the grantee. The court alluded to the fact that the declaration of law did not expressly require that the grantor shall have parted with all dominion and control over the deed, intending it to take effect and pass the title as a present transfer, but said that the trial court doubtless regarded the language used as conclusive of such intention on the part of the grantor, there being no qualifying facts.

In *Frost v. Peacock*, 4 Edw. Ch. 678, a deed was executed by a husband and wife, in consideration of the grantee, who was the wife's mother, releasing dower in the daughter's land. The deed was left in the possession of the daughter for the mother; and it was held that the deed must be allowed the same effect as between the grantors and grantee as if it had always been in the actual possession and keeping of the latter (sustaining finding below).

In *Messelback v. Norman*, 46 Hun, 414, which was an action upon a policy of insurance in which the defense was that the plaintiff had conveyed the property to her husband and children before the property was insured, it was held that a finding by the referee that there was no delivery of the deed was not justified, where it appeared that she took the deed to the county judge and requested him to have it recorded and paid him the fees therefor, and that the deed was duly recorded, notwithstanding her testimony that she thought the deed was a will; that she had been in possession of the property ever since; that she never told her children of the deed; that she thought by making the paper her children would have her property after her death; that she meant to have such a paper drawn.

A delivery of a deed is shown where it was delivered to an employee of the grantee during the latter's absence, it appearing that the employee placed it in the grantee's safe until the latter's return home, when he delivered it to him, and that the latter thereafter kept it in his possession and assumed the management, and obtained and continued in possession of the property conveyed, thereafter. *Brown v. Danforth*, 29 N. Y. S. R. 420, 9 N. Y. Supp. 19 (sustaining finding below).

There was a good delivery of a deed of gift where the donor handed it to a third person for the use of the donee without any reservation whatever, requesting him to take it to the court-house and have it recorded, notwithstanding that he failed to do so, and that the deed was not registered until after the donor's death. *Phillips v. Houston*, 50 N. C. (5 Jones, L.) 302 54 L. R. A.

(sustaining finding below). The statement that the grantor reserved no control over the deed seems to be a deduction from its delivery to the third person to be recorded. It appeared that such person returned the deed to the donor, who shortly thereafter gave it to another person with the request that it should be taken to the court and recorded. The latter retained the deed until the donor's death, after which it was proved and registered.

Doe ex dem. Garnons v. Knight, 5 Barn. & C. 671, 8 Dowl. & R. 348, held that the finding of the jury that the mortgagor parted with all power and control over the mortgage was justified by evidence that he put a parcel containing it into the possession of his sister, saying, "Here, Bess, keep this; it belongs to Mr. Garnons" (the mortgagee), notwithstanding that she returned the parcel to her brother a few days later when he asked for it, it being subsequently returned to her and retained by her until after the mortgagor's death.

(2) When held ineffective.

See also *infra*, II. b, 2, d.

The following cases present various combinations of circumstances which have been held insufficient to uphold a delivery to a stranger, without directions to await the grantor's death before delivering to the grantee:

In *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983, one, in anticipation of his marriage, executed a deed of a house and lot in fee to his intended wife, and left the deed with his attorney to be delivered to the grantee immediately after the marriage. Two days after the marriage the attorney called at the dwelling house where the grantor and grantee had established their residence, and handed the deed back to the grantor, who, after the attorney had gone away, handed it to his wife, saying that whatever might happen the house and lot would be hers. In order to obviate the objection that the homestead character had attached to the property before the wife had acquired title, it was urged that the title passed at the time of the delivery to the attorney, but this contention was denied by the court (sustaining the finding below) upon the ground that, so far as appeared, the attorney held the instrument merely as the agent of the grantor, and his possession was, in law, the possession of the grantor, and that the latter did not part with the instrument with the intention of relinquishing all dominion over it.

In *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146 (sustaining the finding below), a delivery was denied under the following circumstances. A father executed a deed to his son, telling the magistrate before whom it was acknowledged that he wished to make some provision for his son, and requested the magistrate to take the deed to the register's office and get it recorded. The magistrate did so and informed the grantor thereof, who told him it was right and requested him to keep the deed until it was called for. The son died about a year afterwards, and the grantor then called upon the magistrate for the deed, which was given to him. It appeared that the son never knew of its execution. The court said that the facts testified to by the magistrate left no doubt of the intention of the grantor ultimately to pass the land to his son, but to keep the control over it until he should be more determined upon the subject; and that, whatever may have been his views, he retained an authority over the deed, and, having reclaimed and canceled it, the heirs of the son can claim no title under it.

In *Bettinger v. VanAlstine*, 79 Hun, 517, 29

N. Y. Supp. 904, it was held that the conclusion of law of the trial court that there was no delivery of deeds executed by a mother to her children was supported by findings of fact to the effect that the deeds were left with a third person in the absence of the grantees, without any intention on the grantor's part to convey a present irrevocable title to the grantees, and without any intention of depriving herself of the power to withdraw, or alter, the deeds at her pleasure. The action was by the grantor herself against the grantees to set aside the deeds. The finding of fact in this case, that the grantor did not intend to convey a present irrevocable title, was held to be justified by evidence that at the time she left the deeds with the third person she said that she might want to make a change, and was assured by the depository that she could change them if she desired, and that they should not go out of his hands.

b. Delivery with directions to await grantor's death.

(1) When held effective.

See also *infra*, II. b, 2, c.

The following cases present various combinations of circumstances which have been held either to require or permit a finding upholding a delivery made to a stranger with directions, express or implied, to await the grantor's death before delivering to the grantee:

Brown v. Brown, 1 Woodb. & M. 325, Fed. Cas. No. 1,994, held that where a father executes a deed to his son, and the latter executes to the former a life lease of the premises, and the two instruments are lodged with a third person in order that they may not be recorded or come to the notice of the grantor's prospective wife until after his death, there is a good delivery, notwithstanding that, such third person falling sick, the father takes the papers for safe keeping, and they are found among his papers at his death (original finding).

The testimony of a subscribing witness to a deed that immediately after its execution the grantor handed it to the mother of the grantees, who were infants and living with their mother, "and told her to keep it," is at least sufficient to carry the question of delivery to the jury. *Gregory v. Walker*, 38 Ala. 26.

Arrington v. Arrington, 122 Ala. 510, 26 So. 152, held that where a father executes deeds to his illegitimate children (infants) and delivers them to their mother in a sealed envelope, telling her to take the papers and if he dies first, to look after them for the children, and that if she dies first, he will look after them,—there is a good delivery to the grantees, and the title vests in them *eo instante*, if the delivery is unconditional, which is a question for the jury on the facts.

In *Douglas v. West*, 140 Ill. 456, 31 N. E. 403, one executed a deed to his grandchildren, reserving the use of the property during the life of himself and wife. He placed the deed in the hands of a friend, with whom it remained until after his death. He did not expressly instruct the custodian to deliver the deed to the grantees after his death, but it was manifest from the statements he made at the time that the delivery to her was for the grantees. It was held (reversing finding below) that there was a good delivery to the grantees, and that such delivery was not defeated by the fact that the wife of the grantor, after his death, obtained possession of the deed from the custodian and destroyed it.

In *Winterbottom v. Pattison*, 152 Ill. 334, 38 54 L. R. A.

N. E. 1050 (reversing finding below), a delivery was upheld under the following circumstances: A father, in accordance with his previously expressed intention, and during his last illness, executed a deed conveying a life estate to his daughter, and the remainder to her children. Some days afterward he called for the deed, speaking of it as his daughter's deed, and said to another daughter: "Put it away and give it to Mary [the grantee]; it is hers; I shall never want it any more; I would like to live a few years to see how Mary makes it on the old place, but Jake Williams' [the grantor] doom is sealed." The other daughter took the deed and put it away in a drawer in the grantor's house. She did not tell her father where she put it, and he never asked for it again, nor spoke of it again. She delivered it to the grantee after his death. The latter apparently did not know of the deed until it was handed to her. It was held that there was a good delivery.

The delivery of a deed to the husband of the grantee with the direction, "Give it to someone to keep while I live, then to be recorded,"—is a sufficient delivery. *Squires v. Summers*, 85 Ind. 252 (affirming finding below).

Where a father, shortly before his death, gave one of his sons a bundle of papers, among which was a sealed envelope containing deeds to his children, and directed him to deliver the deeds to the grantees after his death, which directions were carried out, there was a good delivery, it not appearing that any stranger acquired any right to, or interest in, or lien upon, the land between the dates of the first and second deliveries. *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678 (sustaining finding below). The court said that the case was a proper one for the application of the doctrine of relation, and that under that doctrine the delivery of the deeds to the grantees after the grantor's death related back to the delivery thereof to the third person for their benefit, and the deeds took effect as of that date.

A delivery was held to have been shown in *Hinson v. Bailey*, 78 Iowa, 544, 35 N. E. 626 (sustaining finding below), under the following circumstances: A mother had made a will devising the land to her two daughters. Afterwards she concluded to revoke the will and deed the land to the daughters. She went with one of them to a justice of the peace, signed and acknowledged a deed before him, and left the deed in his custody with instructions to keep it until she had died and then to file it for record. The justice told her that she could have the deed whenever she should want it, but she replied: "I don't want it. You must keep it until I die." She told the daughter who accompanied her that she had deeded the land to her. It does not appear that the other daughter knew of the deed.

In *Trask v. Trask*, 90 Iowa, 318, 57 N. W. 841, a father made a will and also executed a deed of a farm to his son, the wife joining therein. He enclosed both papers in an envelope and delivered the same to the cashier of a bank. Subsequently a misunderstanding arose between the grantor and his wife with respect to the conveyance of the farm, the wife claiming that she had not intended to execute a deed for it. They arranged an amicable settlement, and, in order to remove any question, the envelope containing the deed and will were taken from the bank and the deed was reacquired, after which the will and deed were replaced in the same envelope and returned to the bank. At the time the envelope was first delivered to the cashier the grantor stated the contents thereof to the latter and told him they were for his son if anything happened to him

(the grantor). The court conceded that the fact that the will was placed in the same envelope as the deed militated somewhat against the existence of an intention by the grantor that the title of the property should pass to the son, but held (sustaining the finding below) that the force of that circumstance was overcome by the other circumstances, and that the deed was delivered to the bank as a conveyance *in present*, and took effect upon the death of the father by relation from the delivery to the cashier.

In *Thatcher v. St. Andrew's Church*, 87 Mich. 264, the court held (sustaining the finding below) that there was a valid delivery and acceptance of a deed of trust under a finding of fact that the grantor left the deed with the attorney who prepared it, with whom it remained until after her death, when he left it at the register's office for record, at the request of one of the trustees; that during the time between its execution and the grantor's death she remained in possession of the property, exercising exclusive control over the same and conveying a part of the premises to a third person; that she had no conversation with the trustees after the execution of the deed, and that only two of them were aware of its existence before her death, one of them having requested the attorney to retain the deed, as it would probably be safer in his hands than elsewhere; and a further finding that the grantor did or said nothing more in the way of delivering the deed, but that it was her intention to do whatever was necessary to make the deed valid and effectual, and that the delivery to the attorney was intended by her to give the deed effect as a valid instrument.

Haeg v. Haeg, 53 Minn. 83, 55 N. W. 1114, recognizes that it is essential that the deed shall have been placed in the control, custody, or possession of the third person, and sustains a finding of fact that the deeds in question were so placed, where it appeared that the grantor executed deeds dividing the land among his children, and that his friend, who signed them as a witness, went with him and assisted to place them in a box in a safety-deposit vault where he kept his papers, the grantor at that time requesting his friend to see that the deeds were delivered to the children at his death, and the latter promising to do so, such request being repeated just before the grantor's death. Soon after the grantor's decease, the friend went with the widow and took the deeds out of the vault, and delivered them to the grantees as arranged. The court said that it was clear that the arrangement was understood beforehand by all the parties, and that the box in which the deeds were deposited for safe keeping was to be accessible to the third person to enable him to carry out his agreement with the grantor and make final delivery to the grantees. The court also said it was unnecessary to consider what would have been the effect if the grantor had recovered from his sickness and finally taken back the deeds, inasmuch as he did not change his mind. This case seems to go even further than *MUNBO V. BOWLES* in upholding a delivery.

In *Goodell v. Pierce*, 2 Hill, 659 (denying new trial), the grantor executed a deed to his grandson, and handed it to the draftsman with instructions to retain it during the grantor's life, and, in case of his death, to deliver it to some person to keep for the grantee. The draftsman accordingly retained it until after the grantor's death, and then went before an officer for the purpose of proving its execution as a subscribing witness, and left it with the officer for the grantee. In an action by the heirs of the grantor against a remote purchaser under the 54 L. R. A.

grantee, it was held that the circumstances were sufficient to show the deed to have come to the hands of the latter in the mode intended by the grantor, and that it was effectual to transfer the title.

In *Crain v. Wright*, 114 N. Y. 307, 21 N. E. 401, the court said that the question of delivery of a deed from a mother to her daughter was a question for the jury, where the deed was given to the husband of the grantee, with a request that it should be kept secret during the life of the grantor, from all who were not obliged to know of its existence, it further appearing that the grantee was in the house when the deed was prepared and executed, and was present at a conversation shortly before when the grantor announced her intention to convey the property to her. The court said that, in the absence of proof of express disavowance, acceptance would be presumed from such facts.

There is a good delivery to the grantee where a husband executes and acknowledges a deed to his wife and delivers the same to a third person, with instructions to retain it for his wife until after his death, and then have it recorded, in the absence of anything to indicate an intention on the grantor's part not to make the conveyance effectual immediately. *Diendorf v. Diendorf*, 182 N. Y. 100, 30 N. E. 375 (sustaining finding below).

In *Brown v. Austen*, 35 Barb. 341, a delivery of deeds to a third person, to be delivered to the grantees after the grantor's death, or before if he should so direct, was deemed to be an irrevocable and complete delivery for the use of the grantees, so that the deeds took effect immediately, even as against the intervening rights of creditors accruing between the dates of the first and second deliveries, under the following circumstances: A father, while solvent, executed separate deeds to his three daughters of houses and lots owned by him. Two of the houses had been built for, and were occupied by, the daughters, to whom they were respectively conveyed. One of the deeds was delivered directly to the grantee at the time it was executed. After retaining it about a week, she returned it to the grantor, requesting him to keep it for her. The grantor placed that deed, with the other two deeds, in the hands of a third person, taking from the latter receipts therefor, stating that the deeds were received in escrow, and were to be delivered to the respective grantees upon the death of the grantor, or at such earlier period as should be designated by him. The grantees were each informed by the grantor that the deeds had been so deposited for them, and that they could have them whenever they wished. Subsequently, the grantor became insolvent and judgments were recovered against him, and he then procured the depository to deliver the deeds to the grantees. The court said that the statement in the receipts that the deeds were received in escrow was not controlling on the question.

Where one executed a deed to her daughters, and at the same time received from them a lease for the term of her natural life, and deposited both deed and lease with a third person with instructions to deliver the deed to the grantees in the event of her death, there was a valid delivery to the grantees as of the time of the delivery to the third person, notwithstanding that it was never actually delivered to them until after the grantor's death. *Martin v. Flaherty*, 13 Mont. 96, 19 L. R. A. 242, 32 Pac. 287 (sustaining finding below). In this case it appeared, in addition to the foregoing facts, that the grantor died some months after the delivery of the papers to the depository, without ever having called for them, or attempted, or expressed any desire, to regain possession of them,

and that while the papers were with the depository, she spoke of the deed as "the girls' deed."

In *Canning v. Pinkham*, 1 N. H. 363, a delivery was upheld under the following circumstances: A grantor, desiring to make a final settlement of his estate among his children, executed a deed to them in their absence and made a formal delivery thereof to his brother. The deed was, however, immediately returned by the latter to the grantor's wife, who was requested to keep it safe. The deed, with other papers, was afterwards deposited with a third person, the grantor requesting him to keep the papers and informing him that as soon as he (the grantor) was gone, his wife would give instructions as to the disposition to be made of the papers. The deed was delivered by such third person to the grantees after the grantor's death. It is to be observed in this case that the reservation of the power to recall the deed was not deemed fatal to a delivery, if not exercised.

The delivery to a third person by the grantor, the grantees being present, of a deed bearing an indorsement to the effect that it is to be delivered to the grantee upon the order of the grantor, or at the death of the grantor, is a delivery *in present* to the grantee. *Wright v. Werden*, 7 Ohio N. P. 122. The question discussed was simply as to whether the grantor had surrendered all dominion and control over the deed, and it was held that he had, the only right retained by him with respect to it being to order its delivery before his death if he saw fit.

In *Gelsinger's Estate*, 11 Pa. Co. Ct. 168, where the grantor declared in his will that he had deposited certain deeds with his son-in-law to be delivered to the grantees after his death, such declaration was accorded great weight upon the question whether the grantor deposited the deeds during his lifetime without the right to recall or revoke them, and it was held that he did so deposit them, notwithstanding that they were found in a box that belonged to him, which was in a bank vault, it appearing that the depository lived in the same family with the grantor, and that their business relations were very intimate.

(2) When held ineffective.

The following cases present various combinations of circumstances which have been held insufficient to uphold a delivery to a stranger with directions to await the grantor's death before delivering to the grantee.

In *Harman v. Harman*, 17 C. C. A. 479, 84 U. S. App. 816, 70 Fed. 894, it was held that no delivery of deeds was effected where they were placed in a sealed envelope with other papers of the grantor, and the envelope handed to one of the grantees as executor of the grantor's will, to be opened after his death, and the deeds to be then finally delivered to the proper parties, having been afterwards recalled by the grantor (so held as a matter of law upon the facts).

There was no effectual delivery of a deed to the grantee where the grantor delivered it to a third person upon the condition that he should not deliver it to the grantee until, or unless, the grantor should die from the illness from which he was then suffering, notwithstanding that such third person, in violation of the condition, delivered the deed to the grantee. *Klose v. Hillenbrand*, 88 Cal. 473, 26 Pac. 352 (sustaining finding below).

In *Kenney v. Parks*, 125 Cal. 146, 57 Pac. 772 (reversing finding below), a husband and wife executed mutual deeds, and delivered them to a third person with the understanding that if the husband should die before the wife his deed to her should be recorded, and if she died first

her deed to him should be recorded. The husband died first, and it was held that the delivery of his deed to the third person was not sufficient to pass the title to the wife. This was upon the ground that it was the intention of the parties that the party surviving should have back his or her deed, and that such reservation was fatal.

In *Stinson v. Anderson*, 96 Ill. 373 (sustaining finding below), a delivery was denied under the following circumstances: The grantor executed a deed to his minor children, and left the same with the magistrate, saying: "I want you to take it and take care of this deed for me. If I want it, I will call and get it; if I die, or anything serious should happen to me, I want you to deliver it to my children if of age." The grantor afterward mortgaged the land to secure borrowed money. The decision is upon the ground that the grantor did not part with all future control over the deed. The controversy was between the grantor's widow and the grantees. The opinion, however, refers to the execution of the mortgage as a withdrawal of the deed. How much force was accorded to the fact that the deed was drawn is not entirely clear, though it does not appear that the decision was controlled by that fact. The opinion concludes: "All the acts of the grantor are inconsistent with the theory that there had been an absolute delivery of the deed in escrow to take effect upon his death. It was under his control all the time."

No delivery of a deed from a husband to his wife is shown where the husband, when about to start on a journey, gave the deed to a son, in a sealed envelope, saying that it was a deed to his wife, and that if anything happened to him the son should give it to her and have it recorded right away. The son, after keeping it from four to six years, returned it to the grantor at the latter's request, and he retained it until his death, when it was found among his papers, in a box in which were also papers of the wife, but of which he alone kept the key. *Fouts v. Bell*, 172 Ill. 345, 50 N. E. 198 (sustaining finding below).

In *Walter v. Way*, 170 Ill. 96, 48 N. E. 421 (sustaining finding below), it was held that the following circumstances did not show a delivery of a voluntary deed to the grantee: The grantor after inclosing the deed in an envelope, bearing the indorsement: "I hereby deliver the within deed to . . . [a named third person] and direct that in case of my death . . . [such third person] is to deliver said deed to . . . [the grantee]," placed it in a box in a safety deposit vault, handing one key to the grantee and one to the third person, stating to the latter that in case he, the grantor, should not come back, he should get the deed and deliver it to the grantee. The grantee kept the key delivered to him, but the third person returned his key to the grantor upon the latter's return from a journey. The grantor subsequently surrendered the box and took possession of its contents, including the deed, and placed them in a tin box in the room occupied by him, where they remained until his death.

In *Jones v. Loveless*, 99 Ind. 317, it was held that a cross complaint, in a proceeding by an administrator to subject certain real property to the debts of the intestate, showed conclusively that the intestate did not deliver a voluntary deed to his children, where it alleged that he placed the deed in the hands of a third person to be held by the latter for the grantees during the grantor's lifetime, and at his death to be delivered to the grantees therein. The decision is upon the ground that the facts alleged show that the intestate authorized the third person, as his agent, to do the things

mentioned, and that upon the death of the intestate the authority of such third person was revoked and he ceased to be the intestate's agent for any purpose, and, therefore, could not, for the deceased grantor, deliver the deed. In this case the court also laid considerable stress upon the fact that between the time of the delivery to the third person and the death of the grantor he became insolvent, and held that, that being the case, the doctrine of relation should not be applied.

In *Osborne v. Eslinger*, 155 Ind. 351, 58 N. E. 439 (sustaining finding below), a delivery was denied under the following circumstances: A mother executed deeds to her children, inclosing them in an envelope indorsed "Deeds to children." She handed the deeds to an aged sister-in-law who made her home with her, saying that she desired the latter "to take care of the papers and keep them until after her . . . [the grantor's] death, and then deliver them to the one who should settle her estate." Subsequently, because of the advanced age of the custodian, the grantor took back the papers and put them in a "press" in her home, and told the former custodian that she had placed them there, adding: "In case I get sick, you take care of these papers, and when I die give them to the one who settles my estate." The grantor subsequently became ill and her sister-in-law took the papers from the "press" and deposited them in a box of her own over which she had exclusive control and so kept them until after the death of the grantor, the latter having been informed of the facts and having expressed her approval. The deeds were delivered to the grantees after the grantor's death. The sister-in-law did not know that the package intrusted to her contained the deeds until after the grantor's death, but did know the person whom the grantor had selected to settle her estate. It further appeared that the will of the grantor was delivered to her sister-in-law at the same time as the deeds. The decision is upon the ground that the grantor never parted with possession and control of the deeds any more than of the will before her death.

In *O'Connor v. O'Connor*, 100 Iowa, 476, 69 N. W. 676, a father executed a deed to his children and left it with the justice before whom it was acknowledged. The latter forwarded it to the recorder's office for record. The father claimed that he did not instruct the justice to do so, but the court said that it was probable that he did. Before the deed was recorded, it was taken from the recorder's office by the grantor, and kept by him until his wife surreptitiously obtained possession of it and delivered it to the grantees, who, in the meantime, did not know of its existence. It was held (reversing finding below) that there was no delivery by the grantor sufficient to render the deed operative. The court said that the most that could be said in favor of delivery was that the father intended a delivery of the deed, but that before it was accomplished he changed his mind, and that there was nothing in the transaction which prevented his doing so. If the court meant that the grantor in any case may change his mind before acceptance, such holding seems opposed to the entire theory upon which a delivery to a third person is upheld as a delivery to the grantee, since that theory requires, under any circumstances, whether the grantor has attempted to recall the deed or not, that he shall have parted with all dominion and control over the deed at the time of its delivery to the third person.

In *Colyer v. Hyden*, 94 Ky. 180, 21 S. W. 868, it was held (reversing finding below), that where a grantor handed a deed to his children to his wife, and told her to take care of it or

put it away, there being no delivery to the grantees until after the grantor's death, there was no such delivery as to pass the title. The court said that it seems to have been the intention of the grantor to keep control over the instrument until fully determined whether ultimately to deliver it.

There is no delivery of bonds executed by a father in favor of his son where they are left with a third person with directions "to take care of them and deliver them to his son in case he dies without a will." *Carey v. Danna*, 13 Md. 19 (sustaining finding below).

In *Hale v. Joslin*, 134 Mass. 310, one executed a deed to his brother, and placed it in the hands of the magistrate who took the acknowledgment, saying: "I want you to take it and keep it as long as I live. Say nothing to Brother Calvin [the grantee] or anybody else about it, and when I am gone, give it to him." The deed remained in the magistrate's custody until the grantor's death. In the meantime, at the request of the grantor, he prepared a will for the latter, which purported to revoke all former writings whether in the shape of will, codicil, "deed," or otherwise, the grantor saying at the time that the word "deed" referred to the deed in the magistrate's custody, and that he meant to revoke and cancel it. The grantor also told the magistrate to hand the deed back to him (the grantor) sometime. The court held (original finding) that there was no delivery sufficient to vest the title in the grantee. It said that the grantor did not intend that the grantee should have any present interest in the deed, but intended to keep in himself the dominion and control of it; that it was in the hands of the magistrate as a depository for the grantor, and not as agent or trustee for the grantee; that the act was intended to be in the nature of a testamentary act which could be revoked at any time; and that as it was in fact revoked it was not necessary to consider what effect it would have had if there had been no revocation. This decision seems to be opposed to the doctrine that a delivery to the grantee may be effected by a delivery of the deed to a third person to be delivered to the grantee after the grantor's death. It does not appear, from the statement of facts, that there was any reservation of dominion and control over the deed, unless such reservation is necessarily implied from the circumstance that the deed is not to be delivered by the third person to the grantee until after the grantor's death. It may be, however, that the statement in the opinion that the grantor intended to keep in himself the dominion and control of the deed was based on the circumstances of the particular case, including the circumstance that the grantor did afterwards attempt to recall and revoke the deed. In a correct view, it would seem that the latter circumstance would be of no importance except as it bears upon the question of the original intention of the grantor, since, in order to make the delivery to the third person effectual as a delivery to the grantee, even in the absence of any attempt on the grantor's part to recall the deed, the grantor must have parted with all dominion and control over the deed.

In *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426, a delivery was denied under the following circumstances: A father, desiring to provide for his sons, executed a deed to them and placed it, together with a note to his daughter, in the hands of a third person to be delivered to the grantees after his death, on condition that they should sign the note. The court said that if the deed had been delivered to the third person irrevocably, on the simple condition that he should transfer it to

the grantees on the death of the grantor, it might have been valid upon the authority of previous decisions in the state; but that in the case at bar the delivery was in escrow; and that while the fiction of relation back may be indulged in case of an unintended or unexpected occurrence of some disability, without which the second delivery would have been the act, at its date, of the grantor, yet where, by the very condition of the escrow, the second delivery is not to take effect until after the grantor's death, the fiction cannot be indulged, as it might be in case of the delivery to a third person to await the happening of some inevitable event, without any further condition.

Burk v. Sproat, 96 Mich. 404, 55 N. W. 985, sustained the finding of the trial court from the evidence that a deed which was handed by the grantor to a third person with a statement that he knew what to do with it was never delivered to the grantee, but was intended by the grantor as a testamentary disposition which could be revoked, where the grantor did in fact take back the deed and afterward stated that it was never delivered, and the depository, when called upon to give it back, did so at once and without question, and never made any claim to its possession until after the grantor's death. The court said it was evident, from the whole transaction, that the grantor and the depository both understood that, in order to constitute a delivery, it would be necessary to put the deed into the grantee's hands, and that the grantor, not intending to make a delivery, left it with the depository so that she could recall and revoke it at pleasure.

There is no delivery to the grantee where the grantor, in anticipation of a journey, hands a deed to a third person with directions not to deliver or record the same unless the grantor never returns,—meaning unless he dies. *Wellsinger v. Cock*, 87 Miss. 511, 7 So. 495, (so held as matter of law). The court said that the facts disclosed no act or purpose of a present delivery, absolute or conditional, but were entirely consistent with the control of the deed by the grantor during his life, and inconsistent with his parting with any power over it.

A voluntary conveyance delivered to a third person with instructions to deliver to the donee in case of the donor's death passes no vested interest; and if, after the danger of the donor's death is passed, the conveyance is put on record by one who wrongfully obtains possession of it, it is not thereby made effectual to pass title, there never having been any delivery. *Boyle v. Boyle*, 6 Mo. App. 594, Appx.

In *Jacobs v. Alexander*, 19 Barb. 243 (sustaining a finding below), a deed was held to be inoperative for want of delivery, under the following circumstances: A mother, while sick, prepared two deeds to be executed to her daughters and handed them to a third person with instructions to deliver them to the grantees after her death, but added: "If I recover from my present sickness, I intend to retain the right to control the property myself as long as I live." She recovered, and lived nearly five years. Soon after her recovery, she received back the deeds from the depository, and never delivered the deed in question to the grantee, but the latter obtained possession of it after her death.

There was no delivery of a deed executed by a father to his son where the deed was executed while the grantor was seriously ill and was handed by him to a third person, with the remark: "Take this deed and keep it. If I get well, I will call for it. If I don't, give it to Billy," the grantee,—notwithstanding that the grantor died a few days thereafter of the same illness, without ever having attempted to

recall the deed, and that the same was handed to the grantee by the depository after the grantor's death. *Williams v. Schatz*, 42 Ohio St. 47 (sustaining finding below). The cases of *Crooks v. Crooks*, 34 Ohio St. 610, and *Ball v. Foreman*, 37 Ohio St. 132, are distinguished upon the ground that in these cases the grantors had parted absolutely with all dominion over the instruments, while in this case the grantor reserved the right to recall the deed if he recovered.

The delivery by a grantor to his own agent of a deed intended for one who had no knowledge that it was to be made, is not a valid delivery to the latter; and a delivery by the agent to the grantee after the grantor's death is invalid and ineffectual, although the agent was directed to keep the deed until after the grantor's death and then deliver it to the grantee. *Peck v. Bepa*, 7 Utah, 467, 13 L. B. A. 714, 27 Pac. 581. This is upon the ground that the grantor could have demanded and regained possession of the deed at any time during his lifetime.

Where one, believing herself on her death bed, executed a deed and delivered it to the scrivener, saying that if she recovered she wanted the deed back again, and that if not he should deliver the same to the grantees after her death, there was no valid delivery, although the grantor did not recover, and the deed remained in the hands of the depository up to the time of her death. *Williams v. Daubner*, 103 Wis. 521, 79 N. W. 748 (reversing finding below).

a. Deed remaining within physical power of grantor.

The position taken in *Munro v. Bowles*, that the fact that the deed, after its delivery to the third person, remained accessible to the grantor, and that it was within his physical power to have regained possession of it, is not, as a matter of law, fatal to a valid delivery, and that such fact has exhausted its force when, notwithstanding it, the ultimate fact has been found that the grantor intended to part with all dominion and control over the deed, has strong support in the five cases next cited.

The facts attending the delivery to a third person which may pass the title to the grantee are not required to be such as that it is beyond the mental power of the grantor to alter his intention, or that he has not the physical power to regain possession of the deed. The intention of the grantor is the polar star by which courts must be guided in determining the question. *Trask v. Trask*, 90 Iowa, 318, 57 N. W. 841.

Arnegard v. Arnegard, 7 N. D. 476, 41 L. B. A. 258, 75 N. W. 797, treats the question of the grantor's intent to part with all control over the deed as one of fact. It says that the trial judge found in favor of an actual delivery, and that his finding would not be disturbed unless clearly erroneous. In this case it appeared that after the grantor had delivered the deed to the cashier of a bank to be delivered to the grantee upon his (the grantor's) death, the latter called at the bank for some papers, but whether he called for the deed was not settled by the evidence. The deed, however, was handed to him with other papers, and remained in his possession until his death. The court said that it did not attach much importance to the circumstance. If the deed were once delivered to the third person for the benefit of the grantee, it was beyond the power of the grantor to divest the title of the grantee by regaining possession thereof, or even by destruction of the same.

Sneathen v. Sneathen, 104 Mo. 201, 16 S. W.

497, while insisting that the grantor must have parted with all dominion over the deed, said that that requirement did not mean that he must put it out of his physical power to procure possession. It is sufficient that the deed is delivered to the third person for the grantees without reservation, and with the intent that it shall take effect and from that time operate as a transfer of the title. It was held that the fact that the wife placed the deeds in a trunk with the grantor's other papers, where he could repossess himself of them if he so desired, did not prevent a delivery.

In *Ham'lon v. Armstrong*, 120 Mo. 597, 25 S. W. 545, a delivery of deeds of gift to the husband of one of the grantees was upheld as a delivery to the grantees, notwithstanding that they were placed by the depository in a bureau drawer in the house where the grantor and one of the grantees (not the wife of the depository) resided, and remained there until after the grantor's death, it appearing that after the delivery to the depository the grantor expressed his satisfaction, and never indicated the slightest desire to recall the deeds.

Where a deed of a slave is signed and sealed, but not delivered, in the presence of a subscribing witness, and is afterward delivered to the wife of the grantor for the benefit of the grantee, the delivery is good, and inures to the benefit of the grantee. *Gaskill v. King*, 84 N. C. (12 Ired. L.) 211. In this case it was urged that the husband had legal dominion over the wife, and might have compelled her to give up the paper, and, therefore, it remained subject to his disposition. The court said: "He might, it is true, by superior strength and his authority over the person of the wife, have forcibly compelled her to part from the paper. But he could not have done so rightfully if he parted from the instrument as his deed for one instant: for he would have no more authority, legal or moral, to take from his wife a deed made by him to his son and in her custody for the son, than he would have to take a deed made by a third person and left with her by the donor or donee to keep for the donee. . . . In this case by the act of delivering the deed to the mother for her son, the husband expressed in the strongest manner he could that she might act on behalf and for the benefit of their child in taking and keeping the deed as the son's; and it became at once as operative as if it had been put into the hands of the infant himself, and could not be recalled."

Warranty deeds made by way of gift, which are in a box with money and bank books, are not delivered by the grantor, when expecting to die, by giving the box to another, and saying: "On the deeds are the names of the persons who are going to have the houses. . . . If I live, I will talk further about the contents of the box. But don't you open it until after my funeral." *Porter v. Woodhouse*, 59 Conn. 568, 18 L. R. A. 64, 22 Atl. 299. This decision was upon the ground that the grantor never intended to, and never did, part with the legal control over the deeds. The person to whom the box was handed in this case, pursuant to the directions of the grantor, put it back into the closet from which it had been taken, the grantor telling her where the key could be found. The circumstances in this case were somewhat like those in *MUNRO V. BOWLES*; but it will be observed that there is in this case an important feature that was not present in *MUNRO V. BOWLES*. In this case, the grantor not only kept the deeds within her physical control, but also expressed an intention to reserve the right to withdraw them if she saw fit. This 54 L. R. A.

element would be undoubtedly sufficient to distinguish the case, but it is questionable, in view of the language of the opinion, whether the result would not have been the same if it had been absent.

In *Provart v. Harris*, 150 Ill. 40, 36 N. E. 958, the grantor during his last illness called in a scrivener to draw five deeds, one to each of his sons, and a will. After the deeds were drawn and executed, the grantor was too weary to proceed with the will, and the scrivener departed with the intention of returning the next day. Before leaving, he asked the grantor if he should take the deeds, and the latter replied: "No, they are all right; just leave them alone." About the same time, the grantor remarked to his pastor, while the deeds were lying on the table: "I want to make the deeds out to my boys: if I don't get along, I want you to take the deeds and have them recorded; if I get along, I will do that myself." The grantor died shortly afterward, without having done or said anything further with reference to the deeds. It was held that there was no delivery. This was upon the ground that the grantor's dominion and control over the deeds at the time of his death was such that, had he lived, he could have revoked or destroyed them. It will be observed that in this case, also, the grantor not only retained the physical control of the deeds, but his declarations evinced an intention to reserve the right to dispose of them as he saw fit if he recovered.

In *Fifer v. Rachels* (Ind. App.) 62 N. E. 68, the trial court's finding of a delivery was reversed under the following circumstances: The grantor having previously expressed an intention to give the property to the grantees, executed a deed, and placed it, together with a will, in an envelope bearing an indorsement that the papers belonged to the grantor and were a special deposit and "subject to call or his order." He handed the envelope to his attorney, who took the same to a bank and left it there without any other directions in regard to its keeping or delivery than those appearing on the back of the envelope. The package remained in the bank, sealed, until the death of the grantor, and was then, by the officers of the bank, in such sealed condition, delivered to the person named as executor of the grantor's will. The decision is upon the ground that the package remained subject to the grantor's control.

In *Mudd v. Dillon* (Mo.) 65 S. W. 973, it was held that the trial court erred in refusing to declare, as the law, that there was no delivery of deeds from a father to son under the following circumstances: The grantor executed a deed to his son and one to his grandchildren, inclosed them, together with his will, in a sealed envelope, bearing his name, which he delivered to a third person with directions to probate the will and deliver the deeds at his death. Afterward he made another deed of other land to the son, and delivered it to the third person with the same instructions as before. It appeared that upon one occasion before his death the grantor asked the depository for "my" papers, and that he then destroyed the deed to his grandchildren and substituted another for it, and that before his death he disposed of part of the land described in one of the deeds to his son. It further appeared that the depository recognized the papers as belonging to the grantor.

Other cases in which the fact that the deed remained within the physical power of the grantor appears, but is not particularly emphasized, will be found in the three preceding subdivisions.

d. Effect of grantor's purpose to avoid his obligations.

See also *infra*, II. b, 3, b.

In *Adams v. Adams*, 21 Wall. 185, 22 L. ed. 504, it was held that there was a sufficient delivery of a deed of trust executed by a husband to a third party in favor of his wife, and purporting to convey an estate *in present*, where it was signed, sealed, and acknowledged by both husband and wife, recorded by him, and afterward spoken of by him to the wife and other persons as a provision that he had made for her and her children against accident, notwithstanding that the husband averred, in an answer to a bill to enforce the trust, that he never "delivered" the deed, and that he caused the deed to be made and partially executed so that upon short notice he could deliver it and make it effectual, retaining in the meantime the control of the title; and that the deed was never out of his possession except for the time necessary to have it recorded.

In *Cannon v. Cannon*, 26 N. J. Eq. 319, where the grantor himself sought to avoid the deed, the court held that there was no delivery, it appearing that the grantor, with the avowed object of escaping liability to be drafted for military service, executed deeds to infants, one of whom was his cousin and the other a distant relative of his wife, and left them in his house, telling his wife to be careful of them, but without giving her any instructions as to their disposition, or authority to deliver them. The court said there was nothing in the case showing an intention on the part of the grantor to transfer the title, or to deliver the deeds, except that he signed and acknowledged them, delivered them to his wife, with the charge to be careful of them, and then went away.

Where one to whom a husband has conveyed property in order to put it beyond the reach of his creditors executed a deed thereof to the wife, at the husband's request, and delivered it to the latter, thus evidencing his intent that the deed shall take effect from that time as a conveyance, there was a good delivery to the wife, although the deed was made without her knowledge, and was not delivered to her by the husband, but came into her possession some months afterward. *Parker v. Parker*, 56 Iowa, 111, 8 N. W. 806. This was an action by the husband against the wife to quiet the title.

In *Tharp v. Jarrell*, 66 Ind. 52, the complainants in an action to recover the possession of land claimed under a deed executed to them by their father while they were minors. The special finding of the jury was to the effect that after the deed was signed and acknowledged the grantor caused it to be recorded without at any time actually delivering the same to the grantees, and without their acceptance or knowledge that the deed was so signed and recorded, with the intention to hinder, delay, cheat, and defraud the grantor's creditors, and not to save the lands for the children. The court held that in the face of such special verdict the complainants had failed to establish their title.

e. Reservation of life estate as illustrating grantor's intent.

The deeds involved in *Ball v. Foreman*, 37 Ohio St. 132; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497, and *Williams v. Latham*, 113 Mo. 165, 20 S. W. 99, reserved a life estate in the grantor; and such reservation is accorded considerable weight as an indication of an intent to make a present transfer. In *Colyer v. Hyden*, 94 Ky. 150, 21 S. W. 868, the court said that it might be inferred from the fact of such reservation that he thought the immediate de-

livery would be of no service to the grantees, and his intention was clear that they should have the property at his death; and yet (the court said) the fact remains that he did not deliver it, or authorize its delivery.

See also *Miller v. Meers*, 155 Ill. 284, *supra*, II. b, 2, a (1); and *Brown v. Brown*, 1 Woodh. & M. 325; and *Martin v. Flaharty*, 13 Mont. 96, 19 L. R. A. 242, 32 Pac. 287, *supra*, II. b, 2, b (1).

3. Recording or delivery for record.

a. In general; presumption from record.

It is the purpose in this subdivision to treat of the effect of the act of the grantor in recording the deed, or delivering it for record, as a delivery, so far as delivery depends upon his acts. The question of acceptance by the grantee, when the deed is thus recorded or delivered for record, is treated in another subdivision.

The general rule undoubtedly is that a presumption of delivery arises from the fact that a deed has been recorded. With the presumption arising from the bare fact that the deed has been recorded, when it does not appear at whose instance it was done, or when it appears that it was at the instance of the grantee, this note is not concerned; but treats only of the question presented when it appears that the deed was recorded at the instance of the grantor. The weight of authority establishes that the record of a deed, even when it appears that it was at the instance of the grantor, raises a presumption of delivery, so far as delivery is dependent upon his acts. *Bulkeley v. Buffington*, 5 McLean, 457, Fed. Cas. No. 2,117; *Younge v. Guilbeau*, 3 Wall. 636, 18 L. ed. 262; *Lewis v. Watson*, 98 Ala. 480, 22 L. R. A. 297, 13 So. 570; *Ellis v. Clark*, 39 Fla. 714, 23 So. 410; *Gordon v. Trimmer*, 91 Ga. 472, 18 S. E. 404; *Allen v. Hughes*, 106 Ga. 786, 32 S. E. 927; *Walton v. Burton*, 107 Ill. 54; *Masterson v. Cheek*, 23 Ill. 72; *Bovee v. Hinde*, 135 Ill. 140, 25 N. E. 694; *Vaughan v. Godman*, 103 Ind. 499, 3 N. E. 257; *Colee v. Colee*, 122 Ind. 109, 23 N. E. 687; *Somers v. Pumphrey*, 24 Ind. 243; *Bremmerman v. Jennings*, 101 Ind. 253; *Mallett v. Page*, 8 Ind. 364; *Hutton v. Smith*, 88 Iowa, 238, 55 N. W. 326; *Davis v. Davis*, 92 Iowa, 147, 60 N. W. 507; *Bunnell v. Bunnell*, 23 Ky. L. Rep. 800, 64 S. W. 420; *Cowell v. Daggett*, 97 Mass. 434; *Thayer v. Stark*, 6 Cush. 11; *Glaze v. Three Rivers Farmers' Mut. F. Ins. Co.* 87 Mich. 849, 49 N. W. 310; *Holmes v. McDonald*, 119 Mich. 563, 78 N. W. 647; *Babbitt v. Bennett*, 68 Minn. 260, 71 N. W. 22; *Metcalfe v. Brandon*, 60 Miss. 686; *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Messelback v. Norman*, 46 Hun. 414; *Ford v. McCarthy*, 61 N. Y. S. R. 363, 29 N. Y. Supp. 786; *Helms v. Austin*, 116 N. C. 751, 21 S. E. 556; *Frank v. Heiner*, 117 N. C. 79, 23 S. E. 42; *Mitchell v. Ryan*, 8 Ohio St. 387; *Wright v. Werden*, 7 Ohio N. P. 122; *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. 113; *Thomason v. Hays* (Tenn. Ch. App.) 62 S. W. 336; *Swiney v. Swiney*, 14 Lea. 816; *Thompson v. Jones*, 1 Head, 576; *Stevens v. Castel*, 63 Mich. 111, 29 N. W. 828; *Bjmerland v. Eley*, 15 Wash. 101, 45 Pac. 730.

Notwithstanding that the grantor himself was the register of deeds. *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957.

The fact that a deed from father to son was recorded at the request of the grantor, and is produced upon the trial by the grantee, is sufficient proof of delivery. *Wedel v. Herman*, 59 Cal. 515.

The delivery of a mortgage to the recorder and subsequent possession by the grantee are evidence of a delivery to him. *Foster v. Per-*

kins, 42 Me. 168; Ornard v. Blake, 45 Me. 602; Kuh v. Garvin, 125 Mo. 547, 28 S. W. 847; Wallis v. Taylor, 87 Tex. 431, 3 S. W. 321; McCourt v. Myers, 8 Wis. 236.

The registration of a voluntary deed from a father to his infant sons, reserving a life estate, is sufficient proof of delivery, though there was no manual delivery to them, where they knew of its existence and registration, and, in a general way, of its contents, and were allowed to occupy and cultivate part of the land free of rent. Horn v. Broyles (Tenn. Ch. App.) 62 S. W. 297.

As a general proposition, the making of a voluntary conveyance absolute in form and beneficial in effect by a father or mother to one who is not *sui juris*, and placing it upon record, although possibly not effectual without more as a delivery and acceptance between adults, is deemed to evince an unmistakable intention on the part of the grantor to give the deed effect, and pass the title to the grantee, the assent of the latter, if nothing further appears, being presumed from the beneficial character of the transaction. Colee v. Colee, 122 Ind. 100, 23 N. E. 687.

Where a grantee has assumed to convey the property covered by the deed, it is not material that it was recorded by the grantor without his knowledge, and not manually delivered to him. Jackson v. Cleveland, 15 Mich. 94, 50 Am. Dec. 266.

The intentional delivery of a deed to the probate judge for registration, although the grantee may never be in actual possession of the instrument, is a sufficient delivery to the grantee although he was at the time ignorant of its existence. Sheffield Land, Iron & Coal Co. v. Neill, 87 Ala. 158, 6 So. 1.

The recording by a father of a deed to his infant sons, reserving a life estate, is as effectual a delivery to infants as can be made, and no stronger evidence can be had that the father intended to convey an estate in fee to the infant children; and the title in fee, subject to the life estate, passed at once to the grantees. Compton v. White, 86 Mich. 33, 48 N. W. 635.

The delivery of a deed by the grantor for the purpose of having it recorded may, under proper concurring circumstances, be regarded as a delivery to the grantee. Major v. Hill, 13 Mo. 250; Pearce v. Dansforth, 13 Mo. 860.

In Jones v. Swayze, 42 N. J. L. 279, where a chattel mortgage was left with a third person and filed in the clerk's office by the latter without the knowledge of the mortgagee, it was held that it was clear, upon the whole case, that the mortgage was filed for the benefit of the mortgagee, notwithstanding that there was no express instruction to the third person to deliver it to the mortgagee, or to file it.

A deed of gift executed by a father to his infant son and handed by him to a third person, with directions to carry it to the clerk to be recorded, the deed having been actually delivered to the clerk for that purpose, but not recorded, will be regarded as delivered, where the grantor, after withdrawing the deed from the clerk, caused a suit to be commenced in the name of the donees to recover part of the property. Inlow v. Com. 6 T. B. Mon. 75.

But the presumption is not conclusive. Young v. Guilbeau, 3 Wall. 636, 18 L. ed. 262; Pennel v. Weyant, 2 Harr. (Del.) 501; Ellis v. Clark, 39 Fla. 714, 23 So. 410; Sullivan v. Eddy, 154 Ill. 199, 40 N. E. 482; Vaughan v. Godman, 54 Ind. 191; Hutton v. Smith, 88 Iowa, 238, 55 N. W. 326; Runnell v. Runnell, 23 Ky. L. Rep. 800, 64 S. W. 420; Stevens v. Castel, 63 Mich. 111, 29 N. W. 828; Metcalfe v. Bran- 54 L. R. A.

don, 60 Miss. 686; Thomason v. Hays (Tenn. Ch. App.) 62 S. W. 336.

The registry of a deed by the grantor might, perhaps, in the absence of opposing evidence, justify a presumption of delivery; but such presumption is repelled where the registry was made without the knowledge or assent of the grantee, and the property it purported to convey always remained in the possession and under the control of the grantor. Young v. Guilbeau, 3 Wall. 636, 18 L. ed. 262. In this case the controversy was between the heir of the grantor and one claiming through the grantee. The grantee testified that he never knew of the deed until after the death of the grantor, among whose papers it was found, and that he never claimed any interest in the property.

The mere act of recording a deed alone is but *prima facie* evidence of a delivery, and liable to be rebutted; and it is successfully rebutted when it is shown that the deed was not in the nature of a family settlement, or of a gift to a minor, but was intended to confer no benefit upon the grantee, and its execution and recording were wholly unknown to him until after the grantor's death. Union Mut. L. Ins. Co. v. Campbell, 95 Ill. 267, 35 Am. Rep. 166.

When the grantee is *sui juris*, there is *prima facie* no presumption of acceptance from unauthorized acts of the grantor. When the deed is for his benefit, under certain circumstances, acceptance may be presumed, but not necessarily. Even in cases which treat the act of recording as *prima facie* evidence of a delivery, it is held that such evidence is successfully rebutted by showing that the conveyance was intended to confer no benefit upon the grantee. Sullivan v. Eddy, 154 Ill. 199, 40 N. E. 482.

b. Grantor's intent.

Recording, however, does not of itself constitute a delivery. It depends upon the grantor's intention. Humiston v. Preston, 66 Conn. 570, 34 Atl. 544; Moore v. Giles, 49 Conn. 570; Jamison v. Craven, 4 Del. Ch. 311; Mastersson v. Cheek, 23 Ill. 72; Weber v. Christen, 121 Ill. 98, 11 N. E. 893; Hutton v. Smith, 88 Iowa, 238, 55 N. W. 326; Berkshire Mut. F. Ins. Co. v. Sturgis, 13 Gray, 177; Glaze v. Three Rivers Farmers' Mut. F. Ins. Co. 87 Mich. 349, 49 N. W. 310; Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22; Doorley v. O'Gorman, 6 App. Div. 591, 39 N. Y. Supp. 768; Hayes v. Davis, 18 N. H. 600; Thompson v. Jones, 1 Head, 576; Chess v. Chess, 1 Penn. & W. 32, 21 Am. Dec. 350.

Registration alone is insufficient without evidence showing that it was done with intent that it should operate as a delivery; but the intent may be implied from subsequent admissions or circumstances. Watson v. Ryan, 3 Tenn. Ch. 40.

Where one executes a deed to his brother, and files it for record, not, however, for the benefit of the latter, but with some vague purpose of having the land reconveyed after his (the grantor's) death to his wife and children, and the grantee knows nothing of the recording of the deed, or even of its existence, there is no delivery to him. Sullivan v. Eddy, 154 Ill. 199, 40 N. E. 482.

The fact that the grantor executed the deed and had it recorded does not amount to a delivery where it is proved as a fact that he never intended to make it his deed except under a contingency which never happened. Jones v. Bush, 4 Harr. (Del.) 1.

The registration of a deed by the grantor does not of itself operate as a delivery, nor does it supersede the necessity of proof of a delivery. Hawkes v. Pike, 105 Mass. 500, 7 Am. Rep.

654. In this case the grantor left the deed with the register to be recorded. The register had no authority from the grantee, who was absent, to receive or keep the deed for him, and did not undertake to act for, or to represent, him, and, after recording the deed, gave it back to the grantor at the latter's request. It was held that there was no delivery, apparently upon the ground that the grantor did not intend a delivery.

In *Barnes v. Barnes*, 161 Mass. 381, 37 N. E. 379, the delivery of a deed was held not to be shown, in a controversy between the grantor and the grantee, under the following circumstances: The plaintiff signed and sealed a deed to the defendant, and caused it to be recorded, intending at the time to pass the title to the defendant, but without doing or saying anything else to manifest that intention. He afterwards received the deed back from the recorder, and it was never in the possession of the defendant, or of anyone representing her, and, when requested by her counsel to surrender the deed, refused to do so. Before such request, but after he had received the deed back from the registry, he communicated its existence to the defendant, and spoke to her of the land described in it as hers, as he then supposed it was. The defendant assented, so far as she could, to the transaction. The ground of the decision is that there was no act or declaration on the part of the grantor manifesting his intention that the recording of the deed should be regarded as a delivery, the court holding that it was necessary that such intention be manifested by some act or declaration, other than the mere recording of the deed itself.

There was no delivery of a deed where it was left by the grantor in the hands of a lawyer with directions to have it recorded at the grantor's expense, but not to deliver it to anyone but the grantor, notwithstanding that, contrary to such direction, it was delivered to the grantee. *Armstrong v. Armstrong*, 19 N. J. Eq. 357.

In *Beckett v. Heston*, 49 N. J. Eq. 510, 23 Atl. 1014, where the grantor herself sought to set aside a deed to her son, the court held that there was no delivery, and that she was entitled to the relief sought, notwithstanding that, after having executed the deed in question, she left it with the conveyancer to have it recorded, and that it was recorded accordingly. It appeared in this case that after the deed was recorded it was sent to the grantor, and that, upon receiving it, she informed her son of its execution, but did not part with its possession or control at any time. The court said that when she sent the deed to be recorded it was not with the intention to have the registration operate as a delivery. This statement is clearly an inference of fact from the attending circumstances, including the circumstance that a declaration of trust was drawn up contemporaneously for execution by the grantee, who, however, refused to execute it.

In *Rivard v. Walker*, 30 Ill. 413, a father, in order to prevent his property from being squandered by his wife, made a deed of certain real estate to his children by a former marriage, and caused the deed to be recorded, but never delivered it to the grantees, or to any person for their use. The recorder testified that when the grantor called to pay the recording fee he told the witness not to deliver the deed to anyone but himself, except in the event of his death, when it was to be delivered to the grantees. His wife afterwards procured a divorce from him, and he brought a bill against the grantees to have the deed set aside as a cloud on the title, alleging, as a ground, that the deed had never been delivered, and that the motive for its delivery no longer existed. It was held that

the delivery to the recorder, without any species of reservation, and the direction to the latter to record the deed, constituted an absolute delivery for the benefit of the infant grantees, and the fact that the grantor afterward manifested to the recorder an intent not to part with all control over the deed could not relieve him from the effect of such absolute delivery. In determining the intent of the grantor in delivering the deed for record, considerable importance was attached to the fact that it was only by a transfer of the title to the grantees that the grantor could accomplish his ostensible purpose of preventing his wife from squandering the property.

A good delivery of a mortgage to the mortgagee was effected where the mortgagor, a few hours before killing himself, took the mortgage to the proper office with directions to record the same at his expense, although the mortgagee resided in another state, and did not know of the mortgage or that such a mortgage was contemplated. *Lee v. Fletcher*, 46 Minn. 49, 12 L. R. A. 171, 48 N. W. 456. The mortgage was in part to secure an indebtedness, and in part a gift. The court held that the intent to put the mortgage beyond control was the criterion; and such intent was inferred from the circumstances above set forth.

The sending of a deed by the grantor to a stranger, or the deposit of it in the clerk's office for record, is not a delivery to the grantee, unless it is so sent or deposited for his use. *Eisey v. Metcalf*, 1 Denio, 326.

A delivery of a deed is not effected by the fact that the notary before whom it was acknowledged placed it on record by mistake, without the authority, knowledge, or consent of the grantor. *Culmore v. Genove* (Tex. Civ. App.) 24 S. W. 83.

When a mortgagor sends the mortgage to the county clerk's office to be recorded, unless he leaves it with the clerk with such directions as would amount to a delivery to the mortgagee, he can at any time take back the mortgage from the clerk, and refuse to deliver it to the mortgagee, even without reason. *Commercial Bank v. Reckless*, 5 N. J. Eq. 430.

It seems that the fact that the grantor may have been prompted by a desire to put the property beyond the reach of his creditors is not necessarily fatal to a delivery.

In *Moore v. Giles*, 49 Conn. 570, an action by a father to remove, as a cloud upon his title, a deed executed by him to an infant and placed on record by him, the trial court found as a fact that the grantor, influenced by fear of a creditor, as well as by affection for the grantee, "with the intent and purpose of giving to the said . . . [grantee] his title to said land, . . . executed said deed and caused the same to be recorded." The appellate court held that such finding was determinative of the question of delivery, and that the proved facts that a month elapsed between the execution and delivery of the deed to the town clerk, that the grantor did not place it in the hands of the grantee, and that he retained possession of the land, of necessity exhausted their force upon the minds of the court below, and were not to be considered by the appellate court.

In *Stevens v. Castel*, 63 Mich. 111, 29 N. W. 528, it was held to be a question for the jury whether the presumption of delivery arising from the recording of deeds from a husband to a third person, and from the latter to the wife, was overcome by the fact that the husband had the deeds executed for the purpose of preventing his creditors from levying on the property; that the deeds were never out of his possession except while they were being recorded, and that at the time he left them for record he

stated to the register that they did not amount to anything, and directed the latter not to deliver them to anyone but himself.

But the sending of a deed by the grantor to be recorded does not amount to a delivery where it was coupled with the direct declaration that it was made to prevent the land from being taken to pay an unjust debt. *Barns v. Hatch*, 3 N. H. 304, 14 Am. Dec. 369.

In *Davis v. Davis*, 92 Iowa, 147, 60 N. W. 507, the presumption of delivery which the law raises from the act of a husband in filing for record a deed from himself to his wife was held to have been overcome by the facts that the deed itself reserved in itself the agency and control of the land during his lifetime, that, at the time of its execution, he said he had already provided for his wife, and she need know nothing about the matter, and that she would deed the property back to him whenever he wanted it, and that he did not mean they should have any money "on this blackmailing scheme;" that the wife never knew of the deed until after the grantor had taken it from the recorder's office, and had conveyed the property to a third person, the breach of promise suit having been settled in the meantime, notwithstanding that the wife, upon learning of the deed, executed a written acceptance of it.

Where a father executes a voluntary deed to his minor children and has it recorded, and then takes it and keeps it in his possession, there is no delivery to the children, and no estoppel against the father to deny a delivery, where he did not do such acts for the purpose of giving effect to the deed, but to protect himself against a threatened claim for alimony. *Koppelman v. Koppelman* (Tex.) 57 S. W. 570.

In *Elmore v. Marks*, 89 Vt. 538, it was held that there was no delivery, where the grantor, without the knowledge of the grantee, took the deed to the clerk's office to be filed, and directed that it should not be recorded, but returned to him when called for. It was, however, recorded by mistake. The grantor subsequently took it away, and it was accidentally destroyed. The grantee did not know of the deed until after it was destroyed, and the grantor then informed him that it had been recorded by mistake. It further appeared that the grantor executed the deed to prevent his creditors from attaching the property.

See also II. b, 2, *d*, *supra*, and *Weber v. Christen*, 121 Ill. 98, 11 N. E. 893, II. b, 3, *c*, *infra*.

Where a grantor, pursuant to the grantee's directions, delivers the deed to the auditor for record, the auditor, for the purposes of the delivery, becomes the grantee's agent, and the delivery to him (the auditor) gives the deed full force. *Prignon v. Daussat*, 4 Wash. 199, 29 Pac. 1046.

In *Palmer v. Palmer*, 62 Iowa, 204, 17 N. W. 463; *Holliday v. White*, 38 Tex. 447; *Newton v. Emerson*, 66 Tex. 147, 18 S. W. 348; *Ingram v. Porter*, 4 McCord, L. 193; *Myrover v. French*, 73 N. C. 609; *Alrey v. Holmes*, 50 N. C. (5 Jones, L.) 142; *Ellington v. Currie*, 40 N. C. (5 Ired. Eq.) 21; *Gorman v. Stanton*, 5 Mo. App. 585, Appx.; and *M'Neely v. Rucker*, 6 Blackf. 301,—the language used is susceptible of an interpretation that the recording by the grantor amounts to, or is equivalent to, a delivery. It is probable, however, that the courts merely meant that it was sufficient in the absence of anything to overcome the presumption of delivery arising from it. It is somewhat more difficult to thus explain the language used in the following cases. If in these cases it is meant to assert that recording by the grantor is conclusive of a delivery so far as it depends

upon his acts, they are opposed to the great weight of authority.

The recording of a deed at the instance of the grantor is of itself such a delivery as will enable the grantee to hold the property as against the grantor. *Kerr v. Birnie*, 25 Ark. 225.

The filing by the grantor of a deed duly signed and attested in the probate office for record constitutes a legal and efficacious delivery, completing the execution of the deed. *Elston v. Comer*, 108 Ala. 76, 19 So. 324.

Recording a deed is equivalent to a delivery. *Levy v. Cox*, 22 Fla. 546.

Where the grantor, in the presence of the grantee, hands the deed to the notary who took the acknowledgment, to send it to the county recorder for record, there is a good delivery to the grantee. *Adams v. Ryan*, 61 Iowa, 738, 17 N. W. 159.

Where a grantor signed and sealed a deed in the presence of witnesses, and it was afterward, at his instance, proved and registered, such facts are conclusive against the grantor, and those claiming under him, that there was a valid delivery, though the execution was in the absence of the grantee, and the instrument was never in his possession. *Snider v. Lackenour*, 37 N. C. (2 Ired. Eq.) 860, 38 Am. Dec. 683.

The act of the grantor in acknowledging a deed in the county court for the purpose of having it registered amounts to a delivery, making the deed operative as from that time. *Doe es dew*, *Newlin v. Osborne*, 49 N. C. (4 Jones, L.) 157, 67 Am. Dec. 269.

A deed is sufficiently delivered where the grantor delivers it, not as an escrow, to the witness for the purpose of recording it. *Cloud v. Calhoun*, 10 Rich. Eq. 358.

If a deed is made and delivered to the register for registry without more, there is no delivery; but if the grantor directs it to be recorded, or subsequently assents to it, such acts constitute the equivalent of an actual delivery and acceptance. *McEwen v. Troost*, 1 Sneed, 186.

c. Effect of return of deed to grantor.

The fact that after the deed was recorded it was returned to the grantor and retained by him is not necessarily fatal to a delivery. *Lewis v. Watson*, 98 Ala. 480, 22 L. B. A. 297, 13 So. 570; *Allen v. Hughes*, 106 Ga. 786, 32 S. E. 927; *Cole v. Cole*, 122 Ind. 109, 23 N. E. 687; *Vaughan v. Godman*, 103 Ind. 499, 3 N. E. 257; *Bunnell v. Bunnell*, 23 Ky. L. Rep. 800, 64 S. W. 420; *Lay v. Lay* (Ky.) 66 S. W. 371; *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Helms v. Austin*, 116 N. C. 751, 21 S. E. 556; *Tennessee Coal, Iron & R. Co. v. Wheeler*, 125 Ala. 538, 28 So. 38; *Thompson v. Jones*, 1 Head, 576; *Dawson v. Dawson*, Rice, Eq. 243; *Folk v. Varn*, 9 Rich. Eq. 303.

The question of delivery of a deed from a husband to his wife, recorded by him, is one of fact, where it appears that he got the deed back after it was recorded, and there is evidence tending to show that he retained it and never delivered it, and that she never knew of it during his lifetime, and denied claiming any interest in it. *Hendricks v. Ransom*, 53 Mich. 575, 19 N. W. 192.

In *Weber v. Christen*, 121 Ill. 98, 11 N. E. 893, however, it was held that the prima facie case made by the recording by the grantor, of a deed to his nephews, was overcome by the fact that he took the deed from the recorder's office and never parted with its custody or control, in connection with his declarations showing that the original intention was, not to part with the title, but to place the property beyond the reach of creditors.

There is no delivery where, after executing

and having recorded a deed to her daughter, the grantor placed it in a box in her own house from which it was removed without her consent by her son-in-law, there being no arrangement between the grantor and her daughter that the deed should be delivered to the latter unless the former's husband should sign it. *Hutton v. Smith*, 88 Iowa, 238, 55 N. W. 326.

In *Babbitt v. Bennett*, 68 Minn. 200, 71 N. W. 22, a finding that there was no delivery of a deed executed by man and wife to the former's sister was held to be justified, notwithstanding that the husband had the deed recorded, where it appeared that he took the deed from the register's office, and ever afterward retained it until it was taken out of his possession surreptitiously by the grantee's husband, and that the grantee did not know of the deed until she was advised of its execution by a letter from her sister, and was willing to reconvey to the grantor, but her husband refused to join with her, and the testimony of the husband that the sole purpose of the deed was to enable him to control the title of the property free from any claim or interest on the part of his wife, it appearing that they anticipated securing a divorce.

There is no presumption of delivery arising from a deed itself, or the record thereof, where it appears that the deed was kept in a locked box in the grantor's house, and that it never came to the possession of the grantee until after the grantor's death. *Jourdan v. Patterson*, 102 Mich. 602, 61 N. W. 64.

Where a father executed a voluntary deed to his infant daughter, four years of age, and retained possession thereof for a number of years, and then placed the same on record without any agreement that the deed was to be considered as delivered, there was no delivery under N. D. Rev. Code, § 8320, providing that a deed shall be deemed constructively delivered, (1) when the instrument is by agreement of the parties at the time of the execution understood to be delivered, and under such circumstances that the grantee is entitled to an immediate delivery; (2) when it is delivered to a stranger for the benefit of a grantee, and his assent is shown, or may be presumed. *McManus v. Commow* (N. D.) 87 N. W. 8.

Registration of a deed is prima facie evidence of delivery, but is not conclusive and may be rebutted; and where it appears that it was understood by all parties that the deed was not to be delivered and was not to take effect until after the death of the grantor, and she kept it in her possession from the date of registration until it was filed as an exhibit to her answer in a cause concerning the property, there was no delivery. *Thomason v. Hays* (Tenn. Ch. App.) 62 S. W. 336.

In *Alexander v. Alexander*, 71 Ala. 285; *Sheffield Land, Iron & Coal Co. v. Neill*, 87 Ala. 158, 6 Mo. 1; and *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957,—a doubt is expressed as to whether the fact that the deed was returned to, and retained by, the grantor would overcome the presumption.

c. Acceptance: how and when deed takes effect; status of title.

1. Necessity of acceptance.

Acceptance, actual or constructive, is as essential to this method of delivery as to any other. *Ferguson v. Miles*, 8 Ill. 358, 44 Am. Dec. 702; *Bryan v. Wash*, 7 Ill. 557; *Hullick v. Scovill*, 9 Ill. 159; *Moore v. Flynn*, 135 Ill. 74, 25 N. E. 844; *Bullitt v. Taylor*, 34 Miss. 741, 69 Am. Dec. 412; *Metcalfe v. Brandon*, 60 Miss. 685; *Rogers v. Carey*, 47 Mo. 232, 4 Am. Rep. 322; *Fonda v. Sage*, 46 Barb. 123; *Church* 54 L. R. A.

v. Gilman, 15 Wend. 656, 30 Am. Dec. 82; *Gatther v. Gibson*, 61 N. C. (Phill. L.) 530.

Delivery by the grantor and acceptance by the grantee are essential to the validity of a deed; a deed takes effect only from its delivery, and there can be no delivery without acceptance, either express or implied, delivery and acceptance being necessarily simultaneous and correlative acts. *Hullick v. Scovill*, 9 Ill. 159; *Church v. Gilman*, 15 Wend. 656, 30 Am. Dec. 82.

Dixon, Ch. J., in *Welch v. Sackett*, 12 Wis. 243, dissents from the view that the delivery and acceptance must occur at the same instant of time, and says that every case in which it has been adjudged that there may be a delivery to a stranger, and that subsequent ratification by the grantee will make the instrument effectual for the purposes intended, falsifies such notion, and proves that in every such case there may be, what there is in fact, a delivery by the grantor at one time to a third party, and an acceptance by the grantee from such third party at a subsequent and different time. Such is the common sense of the transaction; and it is better and more rationally disposed of without, than with, the aid of the fiction of relation back. But, he adds, if the fiction must be employed, it will not be allowed to operate when it infringes or violates the rights of strangers.

The act of registering a deed does not amount to a delivery of it where it does not appear that the grantee assented to, or even knew of, the deed. *Alexander v. De Kermel*, 81 Ky. 345; *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146.

The filing of a deed for record by the recorder cannot be considered as a delivery unless it was filed in pursuance of a previous agreement. *Deere v. Nelson*, 73 Iowa, 186, 34 N. W. 809; *O'Connor v. O'Connor*, 100 Iowa, 476, 69 N. W. 676.

Without such prior agreement, a delivery of a chattel mortgage to the recorder will not vest any title until actual acceptance by the mortgagee. *Day v. Griffith*, 15 Iowa, 104; *Cobb v. Chase*, 54 Iowa, 253, 6 N. W. 300; *Wadsworth v. Barlow*, 68 Iowa, 599, 27 N. W. 775; *National State Bank v. Morse*, 73 Iowa, 174, 34 N. W. 803.

In *Union Mut. L. Ins. Co. v. Campbell*, 93 Ill. 267, 35 Am. Rep. 166, a delivery was denied under the following circumstances: The owner of certain real estate, in anticipation of financial embarrassment and desiring to secure the property for the benefit of his family, asked a friend if he might convey the property to him, and the latter assented. Subsequently, the grantor executed a deed to such person, and after his (the grantor's) death it was found in the recorder's office, and it had been recorded, but it did not appear at whose instance. The grantee did not know of the deed until after the grantor's death, after which, at the request of the widow, he conveyed the property to her. The controversy arose between the grantor's heirs and the widow. The decision seems to be put upon the ground that there was no acceptance, but it would seem that it might have been equally well placed upon the ground that there was no intention of the grantor to part with his control over the deed.

In *Hill v. Barlow*, 6 Rob. (La.) 142, the court said that it was well settled in their jurisprudence that a mortgage executed and recorded by the mortgagor in the absence of the mortgagee has its legal effect, although not accepted by the mortgagee. It was accordingly held that the statute of limitations against an action to set aside such a mortgage began to run at the time the mortgage was recorded, and

not at the time of its actual acceptance by the mortgagee.

2. What sufficient to show actual acceptance; effect of assent or dissent.

The recording of a mortgage by the mortgagor is prima facie evidence of a delivery; and the bringing of an action by the mortgagee to foreclose the mortgage is sufficient evidence of acceptance. *Ford v. McCarthy*, 61 N. Y. S. R. 363, 29 N. Y. Supp. 780.

In *Kinney v. Wells*, 50 Ill. App. 271, a deed containing a covenant by the grantee to pay a mortgage on the property was recorded without the grantee's knowledge. He afterwards learned of the deed, and subsequently conveyed the estate to another. It was held that by so doing he had ratified the deed, and was bound by the covenant.

There can be no delivery of a deed without a surrender of the instrument, or the right to retain it; but where a deed has been executed and recorded without the knowledge of the grantee, but subsequently, upon the request of the grantor, the grantee executes a reconveyance to a third party, there is such a recognition by both parties of the transfer of the title as constitutes sufficient evidence that the deed has been delivered. *Gould v. Day*, 94 U. S. 403, 24 L. ed. 232. The court said the question was not as to when the deed was delivered, but as to whether it was delivered at all.

The recording by the grantor, without the knowledge of the grantee, of a deed containing a clause assuming the payment of a mortgage, does not make the deed operative for any purpose, certainly not for the purpose of charging the grantee with the payment of the mortgage, where he dissents and refuses to accept the deed as soon as he learns of it; and the fact that at the request of the grantor he executes a reconveyance to the latter does not put him in the position of having accepted the deed so as thereby to become liable under the assumption clause. *Best v. Brown*, 25 Hun, 223.

If a grantor, with or without any previous arrangement with the grantee, signs, seals, and acknowledges a deed, places it in the hands of a register to be recorded, notifies the grantee of the act, and the latter assents to receive it, by words only, this would be a good delivery, though the grantee dies before taking it into his actual possession; because the assent is the principal element, and taking the deed into possession is not indispensable, but only evidence of assent and acceptance. *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67.

In *Walton v. Burton*, 107 Ill. 54, one brother, in pursuance of a previous request from another who resided in another state, executed a mortgage to the latter and had it recorded. The mortgagee, upon being notified of such fact, requested the mortgagor to obtain the mortgage from the recorder and hold it for him, which the latter did, the mortgage being subsequently lost before any manual delivery to the mortgagee. It was urged that the proof failed to show that the mortgage was accepted while it was in the hands of the recorder. The court said that, assuming that point to be material, record of the mortgage was prima facie evidence of its delivery, and that the burden of showing that the acceptance came after the recorder had parted with the deed rested on the party denying the delivery.

Where a deed is executed and delivered to even a stranger to be delivered to the grantee without condition, it is a sufficient delivery to pass title; but the execution of a deed, and having it placed on record without the knowledge of the grantee, are not a delivery, though in such a case the subsequent assent of the grantee

will be sufficient. *Ryars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212. This is *obiter*, however, as in this case the grantee retained the deed himself.

The execution and recording of a deed by the grantor do not operate to pass the title to the grantee where the latter, upon learning of the deed, refuses to accept it. *McClain v. French*, 2 T. B. Mon. 148.

The act of the grantor in placing a voluntary deed to his son-in-law on record makes a prima facie case upon the question of delivery, but such prima facie case may be rebutted by showing that the grantee refused to accept. *Bremmerman v. Jennings*, 101 Ind. 253.

Any presumption of delivery and acceptance of a deed from a husband to his wife, arising from its registration by the former without the latter's knowledge, is overcome where the wife repudiated the deed as soon as she learned of it, preferring to retain her homestead rights in the property, rather than to take the risk of upholding the deed against the attack of the husband's creditors. *Stallings v. Newton*, 110 Ga. 875, 36 S. E. 227.

Where the grantee in a deed refused to accept it after it had been acknowledged and a certificate to that effect had been placed upon it by a competent officer, a delivery will not be presumed from its subsequent registration by the grantor, but the law will presume that the refusal continues, until it is rebutted by proof, either direct or inferential, of a subsequent acceptance. *Galthier v. Gibson*, 61 N. C. (Phill. L.) 530.

The putting of a deed on record by the grantor is strong presumptive evidence of delivery, and where it confers a substantial right on the grantee acceptance on his part will ordinarily be inferred from very slight evidence; but these are mere presumptions of law, liable to be overthrown by direct negative proof. *Metcalfe v. Brandon*, 60 Miss. 685. In this case property was conveyed to a certain person subject to a parol trust for the benefit of the grantor's daughter. The grantee in that deed, having become financially involved, for the purpose of saving the property for the beneficiary intended by the original grantor executed a deed in fee simple to a third person, and had it recorded. The latter knew nothing of the deed for several years thereafter, and when she learned of it repudiated the trust. She never had the deed in her possession at any time, and as soon as it was recorded it was returned to the grantor pursuant to his directions. It was held, in a suit by such grantee against the beneficiary to recover the possession of the property, that there had been no delivery.

The delivery of a voluntary deed of trust for the benefit of the grantor's wife and child to a third person, to be proved and recorded, which was done, is a sufficient delivery, though the grantee refused to assent when he heard of it. *Withers v. Jenkins*, 6 S. C. N. S. 122.

Creditors, on whose behalf their debtors' attorney has, without authority from them, taken a mortgage for their benefit from the debtor, may ratify the mortgage by a subsequent assent, and may enforce it. *Brown v. Platt*, 8 Bosw. 324.

It is not necessary that a deed be delivered to the grantee in person; it may be delivered to any stranger for and in behalf and to the use of the grantee, although such stranger possesses no authority from the grantee; all that is incumbent on the latter, in order to perfect the delivery, is that he accept or assent to what has been done by the grantor before the latter revokes his intention to convey. *Canning v. Pinkham*, 1 N. H. 353.

In *Davis v. Davis*, 92 Iowa, 147, 60 N. W.

507, in which it was held that the grantor, by recording the deed, did not intend to pass the title to the grantee, but that his motive was simply to protect himself against a breach of promise suit, the court said, with reference to a written acceptance by the grantee after the grantor had conveyed the property to a third person, that acceptance, to be valid, must have been of the thing offered, of what the grantor intended to convey, and that, as in this case there was no intention by the deed to pass the title to the grantee, there was nothing to accept; that she could not affect the intention of her husband in the execution of the deed.

3. Different theories with respect to acceptance.

a. In general; their relation to the time when, and manner in which, the deed takes effect.

Indissolubly connected with the question of acceptance, are the questions as to the mode of operation of the deed, and as to the time when it takes effect. When the requisites on the part of the grantor, explained in I. b, 2, c, and d, *supra*, have been performed so as to create the conditions upon which an acceptance may operate, and the grantee has learned of, and either expressly or presumptively expressed his assent to it, all of the elements of a complete delivery are present, and the question of acceptance presents no further difficulty. When, however, the question as to the status of the title between the time of the delivery of the deed to the third person and the time the grantee learns of, and accepts it, arises, it is apparent that a difficulty is encountered. There are two theories with reference to acceptance, which, though not always clearly differentiated by the courts, seem entirely distinct. One is that the actual acceptance by the grantee, even if not made until after the grantor's death, relates back to the time of the delivery to the depositary. The other is that immediately upon the delivery to the depositary of a deed, wholly beneficial to the grantee, a presumption of acceptance arises, even if he does not know of the existence of the deed. When the question of delivery arises between the grantee or his privies, and the grantor, his widow, heirs, personal representatives, or others whose rights depend upon the question whether the grantor was seized of the property at the time of his death, it is not a matter of practical concern which view is adopted. If the actual acceptance does not take place until after the grantor's death, the first view by the fiction of relation back avoids the objection that the delivery was not completed during the grantor's lifetime. From a theoretical point of view, however, this view seems inadequate in one respect. As was shown in I. b, 2, c, and d, it is essential that the grantor shall have parted with all dominion and control over the deed at the time of the delivery to the third person, otherwise the delivery is ineffectual, although he may have died without ever having exercised his power to recall the deed. Under the theory of relation back of the acceptance, it is difficult to see how this requisite that the deed shall be placed beyond the dominion and control of the grantor at the time of its delivery to the third person, can exist in case the deed is a purely voluntary one, and the grantee does not learn of or accept it until after the grantor's death. What is there, under such theory, to deprive the grantor of his right to recall the deed? The mere fact that when he deposited it with the third person he intended to part with all dominion and control over it can scarcely bind him, or prevent him from changing his mind until the grantee, or someone for him, has either actually, or presumptively, accepted it. To say

that the depositary holds the deed as the agent or the representative of the grantee, when the latter knows nothing about the transaction, is as difficult as to say that the grantee's acceptance is presumed. Possibly the depositary, by reason of the trouble to which he has been put by the grantor, and the embarrassment to which he might be subjected by surrendering the deed to the latter, would have a sufficient personal interest to resist the latter's demand for a return of the deed. But even in that case he might voluntarily surrender the deed; and the rule seems to require that it must have been put beyond the power of anyone but the grantee, himself, to surrender it to the grantor. The difficulty of reconciling the idea that the grantor parts with all dominion and control over the deed when he delivers it to a third person to be delivered to the grantee after the grantor's death, with the theory that the acceptance after the grantor's death relates back to the original delivery, seems to have been felt by the courts in *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Gilmore v. Whitesides*, Dud. Eq. 14, 31 Am. Dec. 563. This difficulty, however, instead of driving those courts to the adoption of the theory of presumed acceptance, drove them, as has already been shown, II. a, 2, *supra*, to the position that such a delivery cannot be upheld because the deed necessarily remains subject to the control of the grantor during his lifetime.

The theory of presumed acceptance had its origin in an opinion of Justice Ventris in the common pleas in the case of *Thompson v. Leach*, 2 Vent. 198. In that case a tenant for life (remainder to his first son, remainder in tail to a third person), before the birth of his first son, sealed and delivered to the use of such third person (but in his absence and without his knowledge) a deed surrendering his estate to the latter. The grantor continued in possession until after the birth of his son. The grantee did not know of the deed until after the latter event, after which he agreed to the surrender. The question was whether the deed could be taken as a good and effectual surrender before the birth of the son. If so, it seems to have been conceded that it would be good as against the son, for in that case there would be no estate left in the father to support the contingent remainder to him. Pollexfen, Ch. J., Powell and Rokeby, were of the opinion that there was no surrender until such time as the grantee had notice of the deed of surrender and agreed to it, and, so, held that the remainder was vested in the son, and was not defeated by the grantee's assent to the surrender after the birth of the son. Ventris, J., however, was of a different opinion. After holding that the surrender could not be upheld as against the son upon the theory of relation back of the acceptance, after the birth of the son to the time of the sealing of the deed, he took the position that upon the sealing of the deed of surrender the estate immediately passed to the grantee, and that the remainder, therefore, could not vest in the afterborn son, there being no estate left in his father to support it. In support of this position, he said that a surrender was a particular sort of conveyance that worked by the common law, and that at the common law a conveyance immediately, upon its execution on the grantor's part, divests the estate out of him, and puts it in the party to whom the conveyance is made, though in his absence and without his notice, till some disagreement to such estate appears. In reply to the argument that an assent is necessary to the operation of a surrender, he said: "An assent is not only a circumstance, but 'tis essential to all conveyances; for they are contracts, *actus contra actum*, which necessarily

suppose the assent of all parties. But this is not all to be compared with such collateral acts or circumstances that by the positive law are made the effectual parts of a conveyance, as attornment, livery, or the like, for the assent of the party that takes is implied in all conveyances, and this is by intendment of law, which is as strong as the expression of the party, till the contrary appears; *stabit presumptio donec probetur in contrarium*." He gives three reasons why a conveyance divests the estate out of the grantor before any express assent by, or notice to, the grantee: (1) Because there is a strong intendment of law for a man to take an estate that is for his benefit, and no man can be supposed to be unwilling to do that which is for his advantage; (2) because it would seem incongruous and absurd that when a conveyance is completely executed on the grantor's part, yet, notwithstanding, the estate should continue in him; (3) because the law will not suffer the operation of a conveyance to be in suspense. The judgment of the majority in this case was affirmed by the King's Bench, 3 Mod. 296, but was reversed by the House of Lords, Show. P. C. 150, for the reasons given in the argument of Justice Ventris. The reversal, however, was contrary to the opinions of all the judges except Ventris, Ch. J., and Atkins, Chief Baron. In the report of the case in 3 Lev. 284, it is said that Justice Ventris held that the estate vested immediately by the making of the deed of surrender, to be divested by the surrenderee's refusal to accept it afterward, but that until such refusal the estate was in the surrenderee.

The question as to the effect of a delivery of a deed to a third person, not previously authorized by the grantee to receive it, without the knowledge of the grantee, is discussed in *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. 714. The court says: There is much conflict of opinion upon the question as to when the deed takes effect under such circumstances; some of the authorities adopt the rule announced in *Thompson v. Leach*, 2 Vent. 198, that the deed takes effect and vests title the instant it is delivered to the third person, and that the subsequent rejection of it by the grantee reinvests the title in the grantor; some of the authorities, while admitting that an acceptance by the grantee is necessary, hold that such acceptance will be presumed from the beneficial nature of the grant, and that it is not a presumption of evidence that may be rebutted by merely showing that the grantee never in fact knew of the deed, but a presumption of law that cannot be overthrown except by affirmative proof that he did know of and reject it. On the other hand, many cases combat the doctrine that the deed takes effect immediately upon delivery to the third person, holding that an actual acceptance is essential to a delivery, and that the deed only takes effect as a grant from the date of such acceptance, until which the estate remains in the grantor, and is subject to his disposal; that while, when the deed is finally accepted, it may in some cases, in order to uphold it, be deemed, as between the parties, to have taken effect, by relation, as of the date of the first delivery, yet this can never be done where the rights of third parties have intervened.

As is shown by some of the cases hereafter cited, there are very serious, if not insuperable, objections to the adoption of the theory of presumed acceptance. It seems to the annotator, however, that it is the only theory that is reconcilable with the requirement that the grantor must, on the delivery of the deed to the third person, part with all dominion and control over it. Under this theory, the title immedi-

ately passes to the grantee, and for that reason the deed is beyond the grantor's recall.

b. Theory of relation back.

In the following cases the theory of relation back is expressly applied:

A deed can only take effect at and from its delivery, if at all, and consequently delivery and acceptance must be mutual and concurrent acts. Hence, proof of an acceptance subsequent to the delivery is not sufficient to give validity to the deed, and therefore, in such cases, judicial construction has sometimes been invoked to extend such subsequent acceptance by relation back to the date of delivery. *Hulick v. Scovill*, 9 Ill. 159.

Where a grantor deposits a deed with a third person to be delivered by him to the grantee at the death of the grantor, without reserving to himself any right to control or recall the instrument, and the same is afterwards delivered to the grantee, the title passes and the deed ordinarily takes effect by relation as of the date of the first delivery. *Goodpastor v. Leathers*, 128 Ind. 121, 23 N. E. 1090.

Where one executes and acknowledges a deed, and delivers it to a third person, with the request that he shall deliver it to the grantee after his (the grantor's) decease, which the third person does, the deed upon relation takes effect as at the time of the first delivery, and divests the estate of the grantor as from that time. *Foster v. Mansfield*, 3 Met. 412, 37 Am. Dec. 154.

A deed delivered by the grantor to any person in his lifetime, to be delivered to the grantee after his decease, is a good delivery upon the happening of the contingency, and relates back so as to divest the title of the grantor by relation from the first delivery. *O'Kelly v. O'Kelly*, 8 Met. 436.

Where a deed is delivered to a third person in the lifetime of the grantor to be delivered after his death to the grantee, it is a good delivery upon the happening of the contingency, and relates back so as to divest the title of the grantor by relation from the first delivery. *Haag v. Haag*, 53 Minn. 38, 55 N. W. 1114.

When a grantor delivers a deed to a third person without reserving any right to recall, or indicating any intention to reserve such right, there is a good delivery to the grantees, even if a third person was directed not to deliver it to the grantees until after the grantor's death. In such case the intention to pass title as a present transfer is evident. The third person immediately becomes a trustee for the grantees, and when she discharges the trust by delivering the deed to the grantees, such second delivery relates back to the time of the first and is a good delivery in the lifetime of the grantor. *Williams v. Latham*, 113 Mo. 165, 20 S. W. 99.

As between the parties to a deed beneficial to the grantee, it will be presumed to be delivered to the latter when the grantor has parted with it and all dominion over it, intending that it shall operate as a conveyance to the grantee, notwithstanding that the grantee has no knowledge of the transaction. The actual knowledge and acceptance of the deed will, as between the parties and their privies, relate back to the time of the act of the grantor, and the title will be in the grantee from that time. *Fischer Leaf Co. v. Whipple*, 51 Mo. App. 135.

Where a father executes a deed to his son, and places it in the hands of a third person with instructions to deliver it after the father's death but not before unless both parties call for it, and the deed is accordingly delivered after the father's death, the title of the son takes effect by relation from the time the deed

is left with the third person; and a quitclaim deed executed by the son, intermediate the leaving of the deed with the third person and the father's death, though importing a mere conveyance of "the son's right of expectancy," passes his title. *Tooley v. Dibble*, 2 Ill. 641.

The legal effect of a delivery of a deed to a third person for the grantee is to divest the grantor of her title, and transfer it to the grantee by relation, as of the date of the delivery to such third person. *Rousseau v. Bleau*, 131 N. Y. 177, 30 N. E. 56.

A deed may be delivered by a grantor to a stranger to be delivered to the grantee after the death of the grantor, such second delivery relating back to the first delivery. *Campbell v. Morgan*, 68 Hun, 490, 22 N. Y. Supp. 1001.

Where one executes, acknowledges, and delivers to the county clerk for record and for the use of the grantee, a deed unconditional in terms, and without any condition annexed to its delivery, there is a good delivery to the grantee, and upon acceptance by the latter the deed takes effect from the time of the delivery to the clerk. *Rathbun v. Rathbun*, 6 Barb. 98.

Where the grantor, without reserving, or intending to reserve, any control over the deed, delivers it to a third person, to be by him delivered to the grantee at the death of the grantor, and the depository accepts the deed for the grantee, and delivers it to him at the death of the grantor, there is a good delivery, and the title passes by relation as of the date when the deed was delivered to the depository. *Crooks v. Crooks*, 34 Ohio St. 610; *Bail v. Foreman*, 37 Ohio St. 132.

Where a deed is delivered to a third person to be delivered to the grantee after the grantor's death, and is so delivered by the third person, it takes effect by relation to the first delivery. *Stephens v. Rhehart*, 72 Pa. 434.

If the grantor delivers a deed to a third person with an absolute condition to hold it until his death and then deliver it to the grantee, the delivery from the third person to the grantee after the grantor's death relates back, as between the grantee and a purchaser from the heirs of the grantor, to the time of the delivery to the third person, and is equivalent to a delivery by the grantor directly to the grantee at that time. *Gish v. Brown*, 171 Pa. 479, 33 Atl. 60.

Where a grantee accepts and claims title under a deed acknowledged in open court by the grantor, such acceptance will relate back to the acknowledgment as against the heirs of the grantor or the state, seeking to have the land declared escheated upon the supposed failure of the heirs of the grantor. *Com. v. Seiden*, 5 Munf. 160.

When a mortgage is executed by the mortgagor and delivered to a third person, or the recording officer, for the mortgagee, and is subsequently adopted by the latter, it may be that such adoption will, as between the mortgagor and mortgagee, relate back to the delivery to the third person or the recorder; but the principle does not apply where the mortgagee, upon learning of the mortgage, refuses to accept it. *Foley v. Howard*, 8 Iowa, 56.

c. Presumption of acceptance.

(1) In general.

See also *Crain v. Wright*, 114 N. Y. 307, 21 N. E. 401, and *Brown v. Austen*, 35 Barb. 341,—*supra*, II. b. 2, b (1).

While few, if any, of the authorities refuse altogether to indulge the presumption of acceptance by the grantee of a deed beneficial to, and imposing no burdens upon, him, delivered

to a third person for his benefit, yet widely different views have been taken of the nature of the presumption and the circumstances under which it will be indulged. In one view, as shown, in II. c. 3, a, *supra*, the presumption obtains, even when the grantee does not know of the deed, and operates to complete the act of delivery so that the title vests immediately in the grantee, though subject to be divested out of him and reinvested in the grantor, if, upon learning of the deed, he refuses to accept it. In the other view, the presumption does not obtain, or is rebutted, if it appears that the grantee does not know of the deed. When the court merely states that acceptance will be presumed from the beneficial character of the deed, and it does not expressly appear that the grantee did not know of the deed, it is often difficult to determine which view of the presumption the court takes. It is probably safer, however, in such a case to attribute to it the second and narrower view. In the two cases next cited, it is clear that that view was taken.

In respect to a grantee who is not under legal disability, the rule is that when he is aware of the conveyance and does not dissent, and the conveyance is beneficial to him or her, acceptance will be presumed; but no such presumption will arise so long as the grantee is ignorant of the conveyance. *Moore v. Flynn*, 135 Ill. 74, 25 N. E. 844.

Ordinarily when a grantor makes a deed to a grantee which is plainly for the grantee's benefit, and puts it out of his control—loses dominion over it—by delivering it for record to the recorder of deeds, intending that it shall take immediate effect as a conveyance, there will arise, in the absence of intervening rights of third parties, a presumption of acceptance by the grantee. Such presumption may, however, be overcome by evidence showing no acceptance, and there is no room for the operation of presumption where the facts themselves are known. *Brownlow v. Wollard*, 61 Mo. App. 124.

Robinson v. Gould, 26 Iowa, 93, refrained from expressing an opinion whether the presumption could be indulged where it appeared that the grantee did not know of the deed, but held that it would, at least, be presumed in the first instance that he knew of and accepted the deed.

In the following cases in which it is stated generally that acceptance will be presumed from the beneficial nature of the deed, it is not clear which view the court took: *DeLevilain v. Evans*, 39 Cal. 120; *Ferguson v. Miles*, 8 Ill. 368, 44 Am. Dec. 702; *Thompson v. Candor*, 60 Ill. 244; *Rivard v. Walker*, 39 Ill. 413; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153; *Crabtree v. Crabtree*, 159 Ill. 342, 42 N. E. 787; *Ward v. Small*, 90 Ky. 198, 13 S. W. 1070; *Holmes v. McDonald*, 119 Mich. 563, 78 N. W. 647; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Rose v. Baker*, 13 Barb. 233; *Munoz v. Wilson*, 111 N. Y. 303, 18 N. E. 855.

The first view of the presumption, *i. e.*, that it obtains even when the grantee is not aware of the deed, is ably supported in *Mitchell v. Ryan*, 3 Ohio St. 387. In that case a father executed and recorded a deed to his infant daughter. The deed was returned to him from the recorder's office, and he subsequently undertook to convey the property to a third person by a warranty deed. The daughter died without ever having learned of the deed to her. It was nevertheless held, in a controversy between her husband and the grantee in a subsequent deed from the grantor, that there was a good delivery of the first deed, and that the title immediately passed to the daughter. The opinion carefully distinguishes between the two elements of delivery, *viz.*, the acts on the grant-

or's part indicating an intention to pass the title, and acceptance by the grantee. After holding that the existence of the first element had been established, it takes up the question as to the effect of the want of actual acceptance, and holds that the presumption of acceptance supplies the want. In reply to the argument that the presumption of acceptance is merely a rule of evidence, and is rebutted when it appears that the grantee never had any knowledge of the conveyance, it is said that if the argument were limited to cases in which an acceptance of the grant would impose some obligation upon the grantee, it might be admitted, even if the obligation fell far short of the value of the grant; but that where the grant was a pure, unqualified gift, the true rule was that the presumption of acceptance can only be rebutted by proof of dissent; and it matters not that the grantee never knew of the conveyance, for, as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he did know of and reject it. While the grantee in this case was an infant, the opinion does not limit the doctrine of presumed acceptance to infants, although it does, in support of the doctrine, argue that its adoption is essential in order to make a deed to an infant effectual. In reply to the argument that one cannot have an estate thrust upon him against his will, the opinion says that estates are every day thrust upon people by last will and testament.

So, also, Gibson, Ch. J., in *Read v. Robinson*, 6 Watts & S. 329, adopted the doctrine of *Thompson v. Leach*, 2 Vent. 201, that a common-law conveyance put in the hands of a third person for transmission to the grantee takes effect the instant it is parted with, and vests the title, though the grantee is ignorant of the transaction; and that the rejection of such a grant has the effect of revesting the title in the grantor by a species of remitter. He said that the difficulty was to comprehend how the remitter can take effect without replacing intermediate interests springing from the rejected deed, but that the authorities conclusively prove that it may. He applied the doctrine to an assignment for creditors which the assignor handed to his son to deliver to a third person. The latter called with it on the assignee named therein, and desired him to take it, but he refused to have anything to do with it. Subsequently a new assignee was appointed by the court, and he brought an action of trover and conversion against the executor of the assignor. The opinion says that the ordinary power of a chancellor extends no further than the execution of a trust sufficiently formed to put the legal title out of the grantor, or the execution of an agreement for a trust founded on a valuable consideration, and that equity cannot execute the assignment as an agreement because the creditors are volunteers; but the right of the assignee to maintain the action was sustained under the doctrine already alluded to. The opinion says that, by the transmission of the deed for acceptance to the assignee, the title instantly passed at law, and the trust took effect, and that, having once taken effect, equity would see to it that it did not fall for want of a trustee.

The following cases also adopt the view that acceptance will be presumed, even when the grantee is ignorant of the deed:

A deed is sufficiently delivered to the vendee who has paid the purchase price, as between the vendor and vendee, where, in her absence, it is left with the attorney who drew it, for the purpose of registration, or where the vendor himself takes it for the purpose of having it registered, notwithstanding that it is never re-

corded. *Burt v. Cassety*, 12 Ala. 734. The court says that the grantee is presumed to assent to the deed as it is for her benefit.

When a deed is for the benefit of the grantee, imposing on him no burdens or duties, the presumption is of his acceptance. If it is duly acknowledged and recorded, the presumption of delivery attaches, which can be repelled only by evidence of the actual dissent of the grantee. *Eisberry v. Boykin*, 65 Ala. 336.

Arrington v. Arrington, 122 Ala. 510, 26 So. 152, admits that there is a conflict among the authorities upon the question whether when a deed is made to an adult without his knowledge and assent, and delivered to a stranger, the title passes at once as an effectual delivery; but says that the rule in Alabama is: "When a deed is for the benefit of the grantee, imposing on him no burdens or duties, the presumption of delivery attaches, which can be repelled only by evidence of the actual dissent of the grantee." This is *obiter*, as in this case the grantees were infants.

Bury v. Young, 98 Cal. 446, 33 Pac. 338, which holds that the grantor, having delivered a deed to a third person with directions to deliver it to the grantee after his (the grantor's) death, at that time parting with all dominion and control over the deed (so found as a fact) could not recall it, said that the views of the courts are not uniform as to how and when the deed takes effect. Some hold that the title passes full and complete upon the first delivery, and that the depositary becomes the trustee of the grantee, and that the grantor holds a life estate in the property. Others hold that the deed becomes operative upon the delivery by the depositary after the death of the grantor, and that such delivery relates back to the first delivery. The court favored the former view.

When a deed beneficial to the grantee is made and placed on record by the grantor without the grantee's knowledge, the law presumes his assent, and the title will be deemed to have passed to him. *Treadway v. Hamilton Mut. Ins. Co.* 20 Conn. 71. In this case the deed was relied upon by an insurance company as falsifying a statement by the grantor, in an application for insurance on the property, that he was the owner of the same. The court says that the grantee ultimately assented to receive and hold the title to the property and reconvey it when the grantor should desire, the object being to put the property beyond the reach of the grantor's creditors. It does not appear whether such assent was before or after the application for the insurance was made.

It is essential to the validity of a deed that it should be delivered by the grantor and accepted by the grantee; but neither the presence of the latter, nor his previous authority to a third person to receive it on his behalf, nor his subsequent express assent to it, is necessary to make the delivery valid. When there is no such previous authority to receive, the law presumes his assent whenever the deed is beneficial to him, but his dissent may be proved. *Moore v. Giles*, 49 Conn. 570. The grantee in this case was an infant; but the decision does not seem to be limited to cases of infant grantees.

An actual delivery of a deed to a third person for the use and benefit of the grantee, and so declared to be, if intended by the grantor to take effect as a conveyance of the land presently, that is immediately, so as to divest his title, would be a sufficient delivery, inasmuch as the grantee is presumed to assent to that which is for his own benefit. But if the grantor did not mean or intend that the deed should take effect immediately, so as to divest the estate, but delivered it to such third person merely for safe custody and subject to his future control

and disposition, there is no delivery. *Doe ex dem. Guest v. Beeson*, 2 Houst. (Del.) 246.

It is not indispensable that the delivery be made to the grantee, or even to any person authorized by the latter to accept the deed, for if the deed is made to a stranger, for and in behalf of the grantee and to his use, it is a good delivery, although the grantee may in truth be entirely ignorant of the conveyance, for if the delivery is absolute, the assent of the grantee is presumed from the fact that the conveyance is beneficial to him. In such case, however, the delivery must be unconditional and for the express purpose of vesting the title in the grantee. *Bryan v. Wash*, 7 Ill. 567.

A deed may operate by a presumed assent until a dissent appears, and then it becomes inoperative on the principle that a person cannot be made a grantee against his will and without his agreement. *Dale v. Lincoln*, 62 Ill. 22, citing 4 Kent, Com. 447.

In *Dale v. Lincoln*, 62 Ill. 22, where a husband, having enlisted in the army, executed a deed to his wife to enable her to dispose of the property in case he should not return from the service, and caused the same to be recorded, the court said the assent of the wife must be presumed in the absence of proof of her dissent, it appearing that though she never saw the deed until after his death, she knew that a deed was to be made to her, and the deed was found among the grantor's papers which he had left in her possession, and she had received rents of the property and authorized an agent to sell it for her.

Where one purchases land and procures the deed to be made out to his daughter, and receives it from the grantor, the latter intending to part with all dominion and control over the deed, the title immediately vests in the grantee, her acceptance being presumed from the beneficial nature of the transaction. *Stewart v. Weed*, 11 Ind. 92. The grantee in this case was apparently an adult. At least, she was a married woman at the time the deed was executed. It appeared in this case that the grantee and her husband took possession of and improved and cultivated the land, claiming the deed as their own. The court, however, seems to have been of the opinion that acceptance might be presumed from the beneficial nature of the transaction alone, citing *Guard v. Bradley*, 7 Ind. 600, to that effect. It will be observed, however, that in the latter case the grantee was an infant.

An acceptance of a deed may be inferred from circumstances; indeed, may be presumed from the beneficial character of the grant. *Henry v. Anderson*, 77 Ind. 361. In this case, however, the facts disclose an actual acceptance.

Where the grant is clearly beneficial to the grantee, his acceptance of it is to be presumed in the absence of proof to the contrary; and it has been held that this presumption is not overcome by anything short of the grantee's actual dissent. *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490.

When a deed to a wife and beneficial to her is delivered to her husband and accepted by him for her, the law will presume an acceptance by her because of the beneficial character of the deed, and because the husband occupies a relation to her that would authorize him to accept the deed for her. *McGehee v. White*, 31 Miss. 41. In this case, however, the acceptance by the husband was held ineffectual because he did not know of the nature and extent of the deed.

In *Renfro v. Harrison*, 10 Mo. 411, the trial court charged the jury that a deed relinquishing a life estate being beneficial, the law would presume that the grantees accepted it, although ignorant of it, unless a dissent was proved. The 54 L. R. A.

supreme court said that if it could be shown that the relinquishment of the life estate would, under all circumstances, be beneficial to the grantees, there would be no objection to the instruction, but it was held erroneous, because the deed was not certainly beneficial to them and might prove unbeneficial.

A delivery of a deed for record by the grantor will be deemed a delivery to the grantee, and will operate by a presumed assent until a dissent is shown. *Eau Claire Lumber Co. v. Anderson*, 13 Mo. App. 429. The question in this case arose between the grantee and the predecessor of the grantor in an action on the latter's covenant of warranty.

A deed may be effectually delivered to a third party for the use of him who is to take under it; and it takes effect from such delivery, without awaiting the subsequent delivery to the grantee, and without any agency whatever of his. *Peavey v. Tilton*, 18 N. H. 151, 45 Am. Dec. 365.

The court in this case expressly adopts the doctrine that the acceptance of a voluntary deed will be presumed until the contrary appears, although the grantee does not know of it. It was held that the objection to a deposition upon the ground that the witness was interested in the estate which was a party to the litigation was removed by a quitclaim deed of his interest in the estate, delivered by the witness to the plaintiff for his (witness's) mother, although she did not know of the deed.

If a grantor executes and acknowledges a deed, and delivers it to the register to be recorded, intending thereby to part with his dominion over it, and that the title and the deed shall pass to the grantees, and the grantees assent, there is a sufficient delivery. *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210. The court said that the deed was delivered to the register for the benefit of the grantees, and that their assent to it, which was a legal presumption at that moment, had been established as a fact by their subsequent acts.

Delivery of a deed to a third person for the grantee, if the grantor parts with all control over it, makes it effectual from the instant of such delivery, even though the grantee is ignorant of its existence, for the law will presume, if nothing appears to the contrary, that a man will accept what is for his benefit. *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. 627.

The court in *Jones v. Swayze*, 42 N. J. L. 279, said that in the English law, when a deed is delivered to a third person for the benefit of the grantee, even if the latter does not know thereof, there is a presumption of acceptance until it is rebutted by proof of refusal to accept, but that in this country there is some diversity of view upon the question whether the delivery takes effect until an actual acceptance by the grantee. The cases of *Church v. Gilman*, 15 Wend. 856, 30 Am. Dec. 82; *Ernst v. Reed*, 49 Barb. 367; and *Brown v. Austen*, 35 Barb. 342,—are cited as authority for the position adopted by the court that the deed takes effect immediately on the delivery to the third person, the assent of the grantee being presumed from the fact that the deed is beneficial to him.

Lady Superior of Cong. Nunnery v. McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184, adopts the doctrine that a delivery of a deed to a stranger for the grantee, without any special authority from the latter to receive it, is valid from the time of the original delivery, the grantee's assent being presumed from the beneficial character of the deed, unless a dissent is proved, although he may not know of the deed.

Where a deed is delivered to a third person absolutely, for the grantee, the grantor not re-

serving any future control over it, the estate passes, the assent of the grantee to accept the conveyance being presumed from the fact that the conveyance is beneficial to him. *Church v. Gilman*, 15 Wend. 656, 30 Am. Dec. 82. In this case, however, as was said in the opinion, it was not necessary to presume assent, for it appeared that the deed was drawn by the grantee's agent and executed at his solicitation, and delivered to a third person to be transmitted to the grantee.

Where a deed is plainly beneficial to the grantee, accompanied by no trust imposed on him, his acceptance is to be presumed until dissent is shown. *Messelback v. Norman*, 46 Hun. 414. In this case the grantor testified that she did not inform the grantees of the deed, and it does not appear that they knew of it at the time the question as to delivery arose. The court says, however, in this connection that they may have known of the deed, although the grantor did not tell them of it.

There may be cases where a deed of property delivered to a third person for the grantee is so far encumbered with trusts or other obligations that the grantee would be injured by the transfer, and in such case there would be no presumption of his acceptance; but where the transfer is free from such conditions, and is manifestly in the interest of the grantee, something more than a mere lack of knowledge of the transfer on his part is necessary to overcome the presumption. *National Bank v. Bonnell*, 46 App. Div. 302, 61 N. Y. Supp. 521. So far as appears, the grantee in this case was an adult: at least, the statement with reference to presumption of acceptance, even when the grantee is ignorant of the existence of the deed, is not limited to deeds to infants.

A deed may be delivered to a stranger for the use of the grantee, or bargainee, and, as it may be to his advantage, his acceptance of it will be presumed until the contrary appears; but as it may also be to his prejudice, or whether to his prejudice or not, he is not bound to accept it; he may disagree to it and then it will become inoperative. *Baxter v. Baxter*, 44 N. C. (Busbee, L.) 341. This statement is clearly made upon the assumption that the grantee does not know of the deed.

The delivery of a deed is in fact its tradition from the maker to the person to whom it is made, or to some person for his use, and if the person receiving it for another is authorized to do so, it is not only immediately the maker's deed, but it cannot be rejected by the grantee. If he has not authorized the person to receive it, yet it is the maker's deed, until he for whose benefit it is made rejects it; it does not wait for the acceptance of this person before it becomes a deed, for his acceptance is presumed until the contrary is shown. It being for his interest, the presumption is, not that he will accept, but that he does accept. *Kirk v. Turner*, 16 N. C. (1 Dev. Eq.) 14.

When one delivers a deed to a third person in the absence of the grantee, the latter is presumed to accept it, so that it forthwith becomes a deed, and the legal effect is to pass the property. This presumption may, of course, be rebutted by proving that the party refused to accept it; but, until he refuses, his assent is presumed, for the purpose of giving effect to the instrument as a deed; *ut res magis valeat, quam pereat*. *McLean v. Nelson*, 46 N. C. (1 Jones, L.) 396. In this case it was urged that the presumption did not apply because the grantee, by the terms of the deed, was merely a trustee, and had no beneficial interest, but, on the contrary, was to be burdened with a trust. The court refrained from expressing an opinion upon the question whether the presumption rests

upon the ground of a personal benefit to the grantee, or upon the maxim, *Ut res valeat*, but said in either view the presumption could be given effect as the action was in a court of law, and such a court does not take notice of a trust.

As between the parties a deed will take effect from its delivery by the grantor to the town clerk for record, without a previous contract, or even the knowledge of the grantee. *Merrill v. Meachum*, 5 Day, 346. This decision is upon the ground that though it is necessary to give a deed validity that the grantee shall assent to it, yet the law will presume assent until the contrary appears.

In *Smith v. Bank of Washington*, 5 Serg. & R. 318, it was held that a stockholder of a bank made himself a competent witness for the bank by executing a transfer of his stock to his daughter without her knowledge, and delivering it to a third person for her use. *Gibson, J.*, said that, the grant being beneficial to her, her assent would be presumed. It does not appear that the daughter was an infant.

Acceptance by the grantee of a deed of gift recorded at the instance of the grantor will be presumed from the beneficial character of the deed. *Boardman v. Dean*, 34 Pa. 252 (editor).

When a conveyance is made to any person, his assent to it is presumed because there is a strong intendment of law that it is for his benefit to take, and no one can be supposed to be unwilling to do that which is for his advantage; and because it would seem incongruous and absurd that when a conveyance is completely executed on the part of the grantor the estate should continue in him; and because it is contrary to the policy of the law to permit a freehold to remain in suspense and uncertainty. *Dikes v. Miller*, 24 Tex. 417.

No person can be made a grantee against his will; but a deed may operate by a presumed assent, until a dissent or disclaimer appears. *Ibid.*

A delivery always implies an acceptance by the person to whom the delivery is made; and although where a deed, or mortgage, or an instrument purporting to be such, is properly acknowledged and recorded, the presumption is that it has been duly delivered to the grantee or mortgagee, and that it is, in legal effect, what by the record it purports to be, yet such presumption is only prima facie, and may be rebutted by parol or other evidence, and shown never to have been delivered. *Wilsey v. Dennis*, 44 Barb. 359.

When a grantor causes an acknowledged deed, conferring substantial benefits on the grantee, to be recorded, there can be no doubt that it will afford prima facie evidence, and even strong presumptive evidence, of a delivery to and acceptance by the grantee; but such presumption can be overcome by evidence that no delivery in fact was intended, and none made. *Ellis v. Clark*, 39 Fla. 714, 23 So. 410.

Dixon, Ch. J., in *Welch v. Sackett*, 12 Wis. 243, indulges in an extended criticism of the doctrine as declared by Justice Ventris in *Thompson v. Leach*, 2 Vent. 198. One point of criticism is that the presumption is drawn from a state of facts which absolutely negative the reality of the thing presumed. Another point of criticism is directed against what is characterized as the absurd result that follows from indulging such a presumption, namely, that in the event of the actual disaffirmance of the deed by the grantee when he learns of it the title, which, by reason of the presumption of acceptance, has passed to the grantee in the meantime, will be reinvested in the grantor by means of such disaffirmance, without any reconveyance. These criticisms are difficult to answer. It is to be said, however, that the

facts of the case were not such as to call upon the learned chief justice to explain how, if the theory of presumed acceptance when the grantee is not aware of the deed is repudiated, a grantor can effectually part with all dominion and control over the deed so as to support the delivery where the grantee does not learn of the deed until after the grantor's death. This case merely involved the question whether the property covered by a chattel mortgage was subject to the lien of an attachment levied upon it after it was delivered to a third person, but before it was actually accepted by the mortgagee. The validity of the mortgage as between the mortgagor and mortgagee was not questioned. It was said in the opinion, however, that by the delivery to the third person the mortgage passed beyond the reach and control of the mortgagor for a reasonable time within which to allow the mortgagee to assent to it. It is not explained why, the giving of the mortgage being a purely voluntary act, the mortgagor might not have effectually withdrawn it before acceptance by the grantee. As long as the mortgage remained in the hands of the third person unrevoked, it might undoubtedly be regarded that there was a continuing offer of it, and that, as soon as the mortgagee accepted it, it was binding as between the parties. But in such case the validity of the delivery does not depend upon the mortgagor's having parted with all dominion and control over the mortgage at the time of its delivery to the third person. See also *supra*, II. c. 3, § 6, for further discussion of this point.

In *Hulick v. Scovill*, 9 Ill. 159, the defendant in an ejectment action sought to show title out of the plaintiff by virtue of an auditor's deed to a third person, which the defendant's attorney, without authority from the grantee in such deed, and without even knowing who the grantee was, procured to be delivered to himself, concededly for the benefit of his client. It was not shown that the grantee ever accepted, or even knew of the deed. The court held that the defendant could not rely upon the deed: First, because it did not appear that it was the intention of the grantor to deliver the deed for and in behalf of the grantee; and secondly, even if he did deliver it with such intention, the deed would be inoperative for want of acceptance by the grantee, either express or implied. The court discusses at length the theory of presumed acceptance by the grantee of a beneficial deed delivered to an unauthorized third person for his benefit, and holds that there are four requisites of a presumption of acceptance by the grantee at the time of delivery: (1) That the deed be upon its face beneficial to the grantee; (2) that the grantor part entirely with all control over the deed; (3) that the grantor (except in case of an escrow) can deliver by a declaration, intention, or intimation, that the deed is delivered for and in behalf and to the use of the grantee; (4) that the grantee has eventually accepted the deed and claimed under it. It says that the presumption that the grantee will accept the deed because he is to be benefited thereby is never carried so far as to consider him as having accepted. This view of the presumption seems to strip it of any effect, except to support the fiction of the relation back of the actual acceptance to the time of the delivery; and that the court took this view of it is indicated by the ground upon which it distinguishes some of the cases upholding a delivery to a third person, namely, that in such cases the grantee had actually assented to, or accepted, the deed, and that he, or someone claiming under him, had been a party to the proceeding questioning its validity. *Purple and 64 L. R. A.*

Koerner, JJ., dissented from the opinion of the majority in *Hulick v. Scovill*, 9 Ill. 159, and expressed the opinion that when a deed has once been delivered to a stranger, and the grantor has relinquished all control over it, the grantee's acceptance will be presumed from the beneficial nature of the grant.

Where a grantee, who is under no disability, is aware of a conveyance positively beneficial to him, and does not dissent, acceptance will be presumed; but no such presumption will arise so long as he is ignorant of the conveyance. *Moore v. Flynn*, 135 Ill. 74, 25 N. E. 844.

The filing of a deed by the grantor for record does not of itself constitute a delivery. If the recorder is the agent of the grantee to receive the deed, his acceptance will be the act of his principal; but where the latter has no knowledge that such an instrument was contemplated, or that it was made, he can have no agent to receive it; and until after acquiring knowledge of its existence, he in some way signifies his approval of the act, there is no delivery of the deed.

The court in *McFadden v. Ross*, 14 Ind. App. 312, 41 N. E. 607, said that in some instances the law will presume an acceptance from the fact that the grantor has caused the deed to be recorded, where the grantees are infants or persons under legal disabilities; but such instances are exceptions to the general rule.

While, as to minors and others incapable of accepting a conveyance, the law will presume an acceptance, yet in case of an adult grantee who rests under no legal disability, the general rule is that there must be, not only delivery, but an acceptance of the deed. *Davis v. Davis*, 92 Iowa, 147, 60 N. W. 507.

If a grant is made to an adult without his knowledge or consent, it is no grant, because he cannot be made a grantee without his knowledge and consent, and when the knowledge is brought home to him, he may reject the grant. *Owings v. Tucker*, 90 Ky. 297, 13 S. W. 1078.

In *Watson v. Hillman*, 57 Mich. 607, 24 N. W. 663, it was held that where a husband conveyed property to a third person, under an arrangement that was subsequently abandoned, and procured such third person to reconvey the property to his (the first grantor's) wife, the deed could not be operative on behalf of her heirs after her death, without some evidence that she was cognizant of, and a party to, the delivery, by some act of approval.

In *Cravens v. Rosstter*, 116 Mo. 338, 22 S. W. 736 (record of deed), the court apparently adopts the view that the presumption of acceptance does not obtain where the facts with reference to acceptance are disclosed, but that the question must be determined from those facts. It also points out that in this case the deed was given in payment of a debt, and that it was for the grantee to say whether he would accept the deed on such terms.

An acceptance of a deed will not be presumed from its being made and recorded by others, without the sanction of the grantee. *Day v. Mooney*, 4 Hun, 134.

It is essential to the validity of a deed, if not actually delivered to the grantee or his agent authorized to receive it, to prove notice to him of its existence, and such additional circumstances as will afford a reasonable presumption of his acceptance of it. The presumption that a party will accept a deed because it is beneficial to him will never be carried so far as to consider him as having accepted it. *Bell v. Farmers' Bank*, 11 Bush, 34, 21 Am. Rep. 205.

A deed takes effect only from the date of its delivery, which may be either actual or constructive. It is essential to the operative force and validity of a deed, if not actually delivered

to the grantee, or his agent authorized to receive it, to prove notice to him of its execution, and such additional circumstances as will afford a reasonable presumption of his acceptance of it. The presumption that a party will accept a deed because it is beneficial to him will never be carried so far as to consider him as having accepted it. *Tuttle v. Turner*, 28 Tex. 773.

The following cases, while not denying that the presumption of acceptance may be indulged even when the grantee is ignorant of the deed, do not go the full length of the doctrine of *Thompson v. Leach*, but hold that if the grantee ultimately dissents, the title has never been out of the grantor:

"However true it may be, that when a deed is made to an infant or lunatic, incapable of an actual assent, or to any person who does not know that a deed has been executed to him, the law presumes an assent, yet this, in the last case, is the presumption of a fact liable to be removed out of the way, like all other presumptions; and when there has been proof introduced for the purpose of showing that there was no assent, which in itself implies a dissent, the jury only are the competent forum to decide this question." *Treadwell v. Bulkley*, 4 Day, 395, 4 Am. Dec. 225.

Even if while the grantee in a deed remains ignorant of the intended grant, or is incapable of binding himself to his own act or assent, his acceptance may be presumed for his benefit, still if, upon being apprised of it, or becoming capable of acting for himself, he dissents from and repudiates it, the same result follows, that there never was a grantee, nor a grant, and that the title never passed from the grantor. The presumption of acceptance does not operate to make the title pass by the deed until it is rejected, but only as evidence that it did pass by reason of the acceptance of the deed. And when the presumption is disproved and the nonacceptance of the deed established, then it is proved that the title did not pass by the deed because it was not accepted, and because, therefore, it could not vest anything in the grantee. *Davenport v. Prewett*, 9 B. Mon. 98.

While the delivery of a deed or mortgage by the grantor or the mortgagor, or by his direction, for record, is sufficient, in the absence of proof to the contrary, to justify a finding of its delivery by the mortgagor and acceptance by the mortgagee, yet the presumption of delivery and acceptance is not a conclusive one, but is *prima facie* only. It may be shown, if such be the fact, that the grantee, or mortgagee never accepted the instrument, but rejected it when apprised of its existence. Possibly upon the delivery of a deed or mortgage to a stranger for the use and benefit of the grantee or mortgagee, but without authority from him to receive it, acceptance of the mortgage may be presumed, where the grantor or mortgagor has parted entirely with all control over the instrument. There are authorities which so hold, but even in such case the presumption of acceptance, as of the date of delivery to the third person, may be rebutted. *Rogers v. Heads Iron Foundry*, 51 Neb. 52, 37 L. R. A. 433, 70 N. W. 527.

(2) Deed to person non sui juris.

In case of a beneficial deed to a person non sui juris, it is generally admitted that acceptance will be presumed, and it does not seem to make any difference whether the grantee actually knows of it or not.

Where nothing appears to show a contrary intention, if the grantor places the deed upon record without the knowledge of the grantee, the title will nevertheless pass, if the latter, on 54 L. R. A.

being informed of the transaction, assents to it; and where the conveyance is to one who is not sui juris, a formal assent need not be shown, as it will, if nothing further appears, be presumed. *Weber v. Christen*, 121 Ill. 98, 11 N. E. 893.

In *Vaughan v. Godman*, 94 Ind. 191, the court quotes from *Mitchell v. Ryan*, 3 Ohio St. 377, to the effect that acceptance will be presumed from the beneficial nature of the deed, and says: "It is not necessary for us, in this case, to express an opinion as to the correctness of the doctrine announced by the learned judge, so far as it may be applicable to adult grantees. So far as it applies to infant grantees, it commends itself to our judgment."

In the following cases, where a deed to an infant had been delivered to a third person or placed on record, it was held that the grantee's acceptance would be presumed from the beneficial nature of the deed: *Rhea v. Bagley*, 63 Ark. 374, 36 L. R. A. 86, 38 S. W. 1039; *Hulick v. Scovill*, 9 Ill. 159; *Winterbottom v. Pattison*, 152 Ill. 334, 38 N. E. 1050; *Masteron v. Cheek*, 23 Ill. 72; *Guard v. Bradley*, 7 Ind. 600; *Miller v. Meers*, 155 Ill. 285, 40 N. E. 577; *Vaughan v. Godman*, 94 Ind. 191; *Colee v. Colee*, 122 Ind. 109, 23 N. E. 687; *Owings v. Tucker*, 90 Ky. 297, 13 S. W. 1078; *Hacker v. Hoover* (Ky.) 66 S. W. 382; *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811; *Bjmerland v. Eley*, 15 Wash. 101, 45 Pac. 730.

So where the grantee is an imbecile, acceptance will be presumed. *Eastham v. Powell*, 51 Ark. 530, 11 S. W. 823; *Tate v. Tate*, 21 N. C. (1 Dev. & B. Eq.) 22; *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. 113.

The presumption is a rule of law. *Eastham v. Powell*, 51 Ark. 530, 11 S. W. 823.

When a deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, there is in law a sufficient delivery to the infant, and the title to the lands conveyed will pass thereby. In such case actual manual delivery and a formal acceptance are not necessary. *Cecil v. Beaver*, 28 Iowa, 241, 4 Am. Rep. 174.

The presumption, however, cannot avail where the infant upon attaining majority refuses to accept. *Owings v. Tucker*, 90 Ky. 297, 13 S. W. 1078. The court in the latter case does not say where the title was in the meantime. It appears in this case that there was a reconveyance.

In *Davenport v. Prewett*, 9 B. Mon. 98, it was held that if the infant upon attaining his majority refused to accept, the title must be regarded as having remained in the grantor during the whole time.

Strong circumstances are required to rebut the presumption. *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. 113.

(3) Trust deeds.

Deeds creating a trust, delivered to a third person or recorded by the grantor, have been upheld although there was no actual acceptance by the trustee.

In *Adams v. Adams*, 21 Wall. 185, 22 L. ed. 504, the person named as trustee never heard of or saw the deed until long after it was recorded, and then refused to accept the trust or in any way to act upon it. The court held that his refusal was immaterial, saying: "Although a trustee may never have heard of the deed, the title vests in him, subject to a disclaimer on his part. Such disclaimer will not, however, defeat the conveyance as a transfer of the equitable interest to a third person. A trust cannot fail for want of a trustee, or by the refusal of all the trustees to accept the

trust. The court of chancery will appoint new trustees.

It is not necessary that a deed of trust should be actually delivered to the grantee. A delivery to a third person for and on behalf of the grantee, for the benefit of and with the intent to protect and secure the creditors therein named, is sufficient. *Gunnell v. Cockerill*, 79 Ill. 79. It is not expressly so stated, but the circumstances indicate that the grantee knew that the deed was to be delivered to the third person.

In *Myrover v. French*, 78 N. C. 609, a debtor executed to one of his creditors a deed of land in trust for the equal benefit of himself and another creditor. At the time the deed was executed the trustee was absent and had no knowledge of it, and died without ever having learned of it. The grantor had the deed attested and delivered to one of the witnesses, whom he directed to prove it and have it registered, which was accordingly done. It was held that there was a delivery. The decision is upon the ground that the acceptance of the trust would be presumed as being made for the benefit of the creditor and trustee.

In *Wilt v. Franklin*, 1 Blinn. 502, 2 Am. Dec. 474, in which it was held that a deed of trust for creditors would take precedence of an execution levied upon the property between the time of the execution of the deed and the time the trustee learned thereof and accepted the same, the court said it was rightfully conceded that where the deed is for the benefit of the grantee it is reasonable that his assent should be presumed, and added that it was reasonable to make the same presumption where the grantee is required by the deed to do an act useful to his neighbor, and not injurious to himself. The presumption is liable to be rebutted by showing an express dissent; but in the present case the presumption was confirmed by subsequent assent of the grantee. The trustee in this case was not himself a creditor.

A trustee is presumed to have accepted the instrument creating the trust until the fact is disproved. *Kyrick v. Hetrick*, 13 Pa. 488.

A conveyance to a lunatic trustee for the life of another, and after his decease to the heirs of the *cestui que use*, is not void for want of mental capacity to accept the trust. In such a case where the acceptance of the trust is not injurious to the trustee, a conclusive presumption of acceptance by him may be indulged. *Ibid.*

The moment an assignment for the benefit of creditors is placed by the assignor, or anyone interested, in the office of the recorder of deeds of the proper county and within the prescribed time, the beneficial interests of the creditors, the *cestui que trust*, are certainly and completely vested, and it is immaterial when the assignee accepts the trust, or whether he ever accepts it at all. *Marks's Appeal*, 85 Pa. 231. In this case it was held that the assignment took precedence of an attachment levied upon the property between the time it was recorded and the time it was accepted by the assignee. The opinion cites and relies on *Read v. Robinson*, 6 Watts & S. 329, and the decision is apparently based on the same ground as the decision in that case.

A deed of trust need not be delivered to the trustee. A delivery to a third person for him will be good at all events until he shall dissent; but he will not be allowed to dissent to the injury of the *cestui que trust*. *Dawson v. Dawson*, Rice, Eq. 243.

In *Cloud v. Calhoun*, 10 Rich. Eq. 358, a deed of gift of slaves to a trustee for the benefit of certain persons was upheld notwithstanding that the trustee never accepted and never even

heard of the deed. This decision is not, however, expressly put upon the ground of a presumed acceptance, but upon the ground that equity never permits a trust to fail for lack of a trustee. It will be observed, however, that it was held in *Read v. Robinson*, 6 Watts & S. 329, *supra*, that this principle does not apply until the trust has been so far executed as to put the legal title out of the grantor; and to accomplish that result it is necessary to indulge the presumption of assent.

(4) Deed not beneficial to grantee.

Except in the cases of deeds of trust, the presumption of acceptance is never indulged where the deed imposes a burden upon the grantee.

In respect to *persona sui juris*, acceptance, as well as delivery, is a matter of intention. Acceptance will not be lightly presumed where the grant imposes a burden or obligation upon the grantee, and the recording of a deed by the grantor without the direction or knowledge of the grantee is not of itself to be regarded as evidence of acceptance. *Rittmaster v. Brisbane*, 19 Colo. 371, 35 Pac. 736.

The recording alone of a deed containing a clause assuming a mortgage cannot be held sufficient to prove a delivery of the deed, and thus establish a contract against the grantee, binding him to pay the mortgage. *Thompson v. Dearborn*, 107 Ill. 87.

Until the fact that the conveyance is for the interest of the grantee is established either by the instrument itself or other proof, his acceptance will not be presumed. And, therefore, it is not correct to say, in all cases, that a deed delivered to a third person, or to the recorder for the benefit of the grantee but without his knowledge, immediately divests the estate out of the grantor and casts it upon the grantee, in his absence and without his knowledge. *Day v. Griffith*, 15 Iowa, 104.

The mere fact that one executed and caused a deed to be recorded does not raise any presumption of acceptance in the absence of any fact showing that the deed was beneficial to the grantee, or that it was to his interest to accept it. *Jefferson County Bldg. Assn. v. Hell*, 81 Ky. 513.

The recording of a deed by the grantor does not raise a presumption of acceptance by the grantee save where a clearly beneficial interest is conferred. *Bunnell v. Bunnell*, 23 Ky. L. Rep. 800, 64 S. W. 420.

In *Derry Bank v. Webster*, 44 N. H. 268, it is said that while the assent of the grantee to a deed recorded by the grantor, or delivered by him to a third person without the grantee's knowledge, will be presumed from the beneficial nature of the grant, such presumption cannot be indulged where the acceptance of the deed would be attended with an obligation to pay the price of the land.

The mere sending of a deed to the registry for record, without the knowledge of the grantee, is not a delivery,—at least if it is not certainly beneficial to the grantee, even though the grantor intended it to take effect; for an acceptance by the grantee, express or implied, is necessary. *Ibid.*

If in any case there can be a valid delivery to a third person for the use of the grantee, when the latter has no knowledge of it and has given such third person no actual authority to receive it, it must be in cases where the law will pronounce the conveyance to be purely beneficial to the grantee, and, therefore, presume his assent to it. *Johnson v. Farley*, 45 N. H. 505.

It is essential to the validity of a deed that the grantee is willing to accept it; and while acceptance will be presumed from the beneficial

nature of the transaction, when the grant is not absolute, yet this presumption is very slight where the grantee derives no benefit under the deed, but is subjected to a duty or the performance of a trust. Jackson *ex dem.* Pintard v. Bodie, 20 Johns. 187.

d. Cases illustrative of the nature of the instrument and of the time when it takes effect.

The time when the deed takes effect—whether when it is delivered to the third person or placed on record, or when it is actually accepted—would seem to depend upon whether the court adopts the theory of presumed acceptance, or that of relation back. If the former theory is adopted, it would seem that the deed must be regarded as taking effect immediately; if the latter theory is adopted, it would seem that the deed cannot be regarded as taking effect until actual acceptance, though such acceptance will then relate back to the time of the original delivery. In the meantime, however, the title must actually have been in the grantor. In this connection confusion is likely to arise by reason of the distinction usually observed between “deeds presently” and “escrows,” and the view usually taken of the mode in which those instruments respectively operate. Chief Justice Shaw, in *Foster v. Mansfield*, 3 Met. 412, 37 Am. Dec. 154, makes the following distinction between a deed presently and an escrow: “Where the future delivery of a deed is to depend upon the payment of money or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor’s deed presently. Still it will not take effect as a deed until the second delivery; but when thus delivered it will take effect by relation from the first delivery.” This distinction seems to be well established; and, according to it, the instruments of the class to which this note is confined are “deeds presently,” and not escrows. Hathaway v. Payne, 34 N. Y. 92, explains the difference in the mode of operation of a deed presently and an escrow, as follows: In case of the delivery of a deed to a third person as an escrow, a second delivery is generally required before the title passes, but in the case of a delivery of a deed to a third person as the deed of the grantor presently, to be delivered to the grantee after the grantor’s death, the title passes at the instant of delivering the deed to the third person. The last statement seems to embody the view generally taken of the mode of operation of these two classes of instruments. As applied to a deed, the delivery of which, with the aid of the presumption of acceptance, is regarded as complete at the time of its delivery to the third person, this language can be accepted in its full force. But as applied to a deed, the complete delivery of which is deferred until actual acceptance by the grantee, the language needs some modification or explanation. The most that can be said of such deeds is that, after acceptance, the title will be deemed to have passed immediately upon the delivery to the third person; it cannot be said that it actually *did* pass at that time, or that it could have been so regarded if the question had arisen at any time before actual acceptance. It appears from other parts of the opinion in *Foster v. Mansfield* that the chief justice did not regard the deed as taking effect, or the title as passing, at the time of the delivery to the third person. After stating that where the deed is merely to await the happening of some contingency, and not the performance of any condition, it will

be deemed the grantor’s deed presently, he says: “Still it will not take effect as a deed until the second delivery; but when thus delivered, it will take effect by relation from the first delivery.” Again, speaking of a deed which came clearly within his definition of deeds presently, he says: “As the estate did not effectually pass till the second delivery, if that second delivery had been prevented, it would probably have been held that it was wholly inoperative.” According to this opinion, the only vital difference in the operation of a deed presently and an escrow is that the former will ordinarily, as between the parties, or persons having no rights superior to those of the parties, take effect by virtue of relation back to the time of the original delivery, while the fiction of relation back will not ordinarily be applied to escrows, though it may be so applied to avoid the effect of some unforeseen occurrence. This explanation of the sense in which the terms “deed presently” and “escrow” are used, and of the difference in their operation, is made in order to explain the apparent inconsistency of some of the courts in treating an instrument as a deed presently, and at the same time denying that the requisite element of acceptance (which is necessary to actually vest the title as of the time of the delivery to the third person) may be supplied by a presumption of acceptance. This apparent inconsistency is even more obvious when the court substitutes for the expression “deed presently” phrases expressive of the operation of a deed presently, such as “the deed takes effect and title passes immediately upon the delivery to the third person.” Unless such expressions are understood to mean merely that the deed will, after actual acceptance, be deemed, by virtue of the doctrine of relation, to have taken effect, and the title to have passed, immediately, and not that the deed *did* actually take effect, and the title *did* actually pass, immediately, they are inconsistent with the position that there can be no presumption of acceptance at the time of the delivery to the third person. In the case of *Stone v. Duvall*, 77 Ill. 476, *infra*, the court, evidently because it was not prepared to adopt the position that the deed actually takes effect, and that the title actually passes at the time of the delivery to the third person, treated an instrument delivered to a third person to be delivered to the grantee after the grantor’s death, not as a deed presently, but as an escrow. For the same reason, apparently, 1 Devlin, Deeds, § 280 says: “A delivery . . . [of a deed to a third person to be delivered to the grantees after the grantor’s death] may be considered in effect an escrow, but differs from that in the fact that a delivery in escrow is dependent upon the performance of some event, and not upon the lapse of time.”

The following cases are illustrative of the views that have been taken with reference to the nature of the instrument, and of the time when it takes effect:

A deed may be delivered to a third person as a deed, to be delivered to the grantee on the happening of some future event, *e. g.*, the death of the grantor. In such case the writing is a valid deed from the beginning, and the third person is the trustee of the grantee. The delivery to the third person for the grantee must be absolute, and no future control of the instrument can be reserved. *McCalla v. Bane*, 45 Fed. 828.

A deed left by grantor with a third person without authority, express or implied, to deliver it to the grantee, is not presently the deed of the grantor. *Carr v. Hoxie*, 5 Mason, 60, Fed. Cas. No. 2,438.

The delivery of a deed or mortgage may be

to a third person for the grantee, and he will hold it in trust for the latter, and in such case the deed is operative from the delivery to the third person, though it does not come to the knowledge or possession of the grantee until after the grantor's death. *Elisberry v. Boykin*, 65 Ala. 336.

The delivery of a deed may be absolute,—that is, to the grantee himself, or to a third person for him; or it may be conditional,—that is, to a third person, with directions to keep it till some condition is performed by the grantee. In the first case, the title presently passes, but in the second case, the instrument is an escrow, and no title passes until the condition is performed, and, generally, until the second delivery of the deed. *Fitch v. Bunch*, 30 Cal. 208.

Where one executes a deed conveying all his real estate to his children, and puts it into the hands of a third person to be delivered to them on his death, and the deed is so delivered after his death, the instrument is a deed taking effect from its delivery to the depositary, and not a testamentary disposition. The court said that it was not meant that the deed was consummate, but that it was efficacious to the passage of the interests conveyed where it was delivered to the trustee or agent. It was held that the deed was good as against the claim of dower of the widow of the grantor. *Stewart v. Stewart*, 5 Conn. 320.

The delivery of a deed, in a legal sense, consists in the transfer of the possession and dominion, and it is complete at the moment when the deed is in the hands, or power, of the grantee, with the consent of the grantor, and with his intent that it shall operate and inure as a muniment of title to the grantee. The grantee's presence is not necessary. It is sufficient that the deed goes out of the hands, or control, of the grantor, with his intent that it shall go to those of the grantee, and that it ultimately does so. It matters not though the grantor be dead at the time when the deed reaches the hands of the grantee, if it was previously left with a third person for his use. *O'Neal v. Brown*, 67 Ga. 707.

Bryan v. Wash, 7 Ill. 557, referring to *Verplank v. Sterry*, 12 Johns. 536; *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66, and other cases, says, with apparent approval of the position, these cases show that the deed takes effect from the first delivery, no matter when it comes to the hands of the grantee, or even if it never does.

Where a grantor delivers a deed to a stranger with instructions to the latter to deliver it to the grantee, thus putting it beyond his control, for the express purpose of having it take effect as a deed, and the grantee, when apprised of the arrangement, approves of and sanctions it by promising soon to call for the deed,—this constitutes in law a delivery and acceptance of the deed, and from that time the title is vested in the grantee. Thenceforth the stranger holds the deed, not as agent of the grantor, but of the grantee alone. *Bennett v. Waller*, 23 Ill. 97.

In *Kingsbury v. Burnside*, 58 Ill. 810, 11 Am. Rep. 67, the grantors, after executing the deed, sent it to a stranger, without the knowledge or assent of the grantee, with the simple direction to have it recorded. It was placed on file and there remained until after the death of the grantee. The grantee learned of the deed before his death and accepted it. The question as to the time the deed became effective, however, was important, it appearing that, under the circumstances, if the deed did not take effect until the time of the actual acceptance, it 54 L. R. A.

would be subject to a trust in favor of one of the grantors, but that if it went into effect as soon as it was delivered to the third person, or as soon as it was recorded, it would not be subject to the trust. The court held that it did not become effective until actual acceptance. The delivery to the third person was disposed of upon the ground that he was a mere medium through which the deed was to pass to the hands of the recorder. With reference to the recording, it is said that the act of recording a deed cannot amount to a delivery when there does not appear to be an assent or knowledge by the grantee of the act.

The delivery of a deed to a third party, to be retained until the death of the grantor and then to be delivered to the grantee, is not an absolute delivery, and will not operate to give to the grantee any immediate rights or interests in the premises, but will be good to pass the title, at the grantor's death, to the grantee or her heirs. *Stone v. Duvall*, 77 Ill. 475. This case regards an instrument delivered under such circumstances as an escrow, which will not take effect until the grantor's death. The controversy was between the grantor who sought to set aside the deed, and the heirs of the grantee. The court said that the grantee was probably not aware of the existence of the deed for a considerable time after its delivery to the third person, if it ever came to her knowledge.

Where a grantor makes a deed and delivers it to a third person to hold until his death, and then delivers it to the grantee, and parts with all control over it, and reserves no right to recall the deed or alter its provisions, the delivery will be effective, and the grantee, on the death of the grantor, will succeed to the title. Although the delivery of the deed to such third person to be retained until the death of the grantor, and then to be delivered to the grantee, is not an absolute delivery so as to vest an immediate estate in the land, yet it will be good to pass the title at the grantor's death to the grantee, or his heirs. *Walter v. Way*, 170 Ill. 90, 48 N. E. 421.

In *Hockett v. Jones*, 70 Ind. 227, it was held that an agreement by a discharged bankrupt, binding himself and his personal representatives to pay a creditor an indebtedness barred by his discharge, was sufficiently delivered, it appearing that it was given to a third person with directions to hold the same until the maker's death, and then to be delivered to the creditor, notwithstanding that the latter had no knowledge of the existence of the agreement until after the maker's death and the delivery of the agreement to him. The court said that it did not regard the depositary as the agent of the maker, but rather as the agent of the creditor, and that when he consented to receive the instrument and deliver it to the latter upon the death of the maker, he undertook to act in that behalf as trustee for the creditor, and that the latter ratified the agency by receiving the instrument from him. The controversy in this case arose between the creditor and the personal representatives of the maker of the instrument.

In *Squires v. Summers*, 85 Ind. 252, the court says, citing *Stewart v. Weed*, 11 Ind. 92, that when a deed is delivered to a third person for the use of the grantee, it will take effect from the instant of such delivery, if the grantor parts with all control over the instrument. In this case, however, as to the time when the deed took effect was not important, as the controversy was between the heirs and the grantee.

In *Smiley v. Smiley*, 114 Ind. 268, 16 N. E. 585, the doctrine that a deed delivered to a third person to be delivered to the grantee after the grantor's death takes effect as of the date

of the first delivery was applied for the purpose of defeating a claim of dower in the property conveyed, made by the grantor's widow, whom he married between the dates of the first and second delivery. In this case the court attached importance to the fact that the widow was advised before the marriage that the grantor did not own the land in question, though it was not decided that the result would have been otherwise if she had not been so informed.

Where a grantor executes a deed and delivers it to a third person, parting with all dominion over it, and reserving no right to recall it or alter its provisions, to hold until his death and then deliver the same to the grantee, the delivery is effectual, and the grantee, on the death of the grantor, succeeds to the title. *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515.

In *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490, a delivery of a deed to a third person to be delivered to the grantee, who was the grantor's niece, after his death, was upheld as against a devisee of the property under a will executed by the grantor after such delivery to the third person, but before knowledge or acceptance of the deed by the grantee. In this case the grantee did not know of the deed until after the grantor's death. The court said the delivery was deemed to be complete, and the acceptance to take effect from the original delivery to the third person for the use of the grantee.

Where a debtor executes and records chattel mortgages to different creditors at the same time, they will rank, as between themselves, in the order in which they are accepted by the several mortgagees. *Oxnard v. Blake*, 45 Me. 602.

If a grantor delivers any writing as his deed to a third person, to be delivered over by him to the grantee on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee; and if the latter obtains the writing from the trustee before the event happens, it is the deed of the grantor and he cannot avoid it by plea of *non est factum*, whether generally or specially pleaded. But if the grantor makes a writing, and seals it and delivers it to a third person as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his, the grantor's, deed, and it be delivered to the grantee accordingly, it is not the grantor's deed until the second delivery; and if the grantee obtains possession of it before the event happens, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*. *Wheelwright v. Wheelwright*, 2 Mass. 452, 3 Am. Dec. 66.

A writing delivered to a stranger for the use and benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67.

A covenant by a resident of one state to convey certain lands in that state to a resident of another state before a day named, is sufficiently performed where, in pursuance of a verbal agreement of the parties that the covenantor should record the deed before sending it to the covenantee, but so as to have it in the city of the latter's residence before the day named in the covenant, the former recorded the deed before that day, notwithstanding that it did not reach the latter's residence until after that day. *Shaw v. Hayward*, 7 Cush. 170. The decision is on the ground that the delivery was complete, and that the title passed as soon as the deed was delivered for record; and that the agreement with reference to transmission to the residence of the covenantee was separate and collateral, and its violation was no breach of the covenant.

eral, and its violation was no breach of the covenant.

Until a deed is accepted by the grantee, the title to the estate does not pass out of the grantor, for no man can make another his grantee without his consent, and a deed made to a man with all requisite formalities, and even entered in the public registry, will be null if not afterwards accepted by the grantee. But if the latter afterwards assents to the conveyance, it will be good to pass the title to him unless some other circumstances shall be shown to render it invalid. *Harrison v. Phillips Academy*, 12 Mass. 456.

A delivery of a deed by the grantor to the register of deeds to be recorded for the use of the grantee, and the grantee's subsequent assent to the same, constitute a sufficient delivery from the time of such assent. *Cowell v. Daggett*, 97 Mass. 434.

Where the facts show that it was the intention of a grantor, at the time he delivered a deed to a third person, to deliver it for the grantees absolutely, and not as an escrow, and the third person so received it and kept it till delivered by him to the grantees, though the grantor had died in the meantime, the deed took effect and vested the estate thereby conveyed in the grantees from the delivery to the third person; and the grantees may maintain an action against the executor of the grantor upon a covenant contained in the deed. *Mather v. Corliss*, 103 Mass. 568. In this case the grantees knew that a deed was contemplated, but did not know that it had been executed until after the grantor's death.

A deed which is put into the hands of a third person to be delivered to the grantee upon the happening of some future event, but where no conditions are to be performed, is not an escrow or conditional deed. Its delivery is not dependent upon any condition to be performed, but it is a valid deed from the beginning, and the holder is but a trustee or agent for the grantee. In such a case the grantor has parted with all control over the deed. *Cook v. Brown*, 34 N. H. 460.

In *Hathaway v. Payne*, 34 N. Y. 92, the question as to when a deed delivered to a third person to be delivered to the grantee after the grantor's death took effect became involved in determining the validity of a reservation of certain timber rights in a reconveyance from such grantee to the grantor during the latter's lifetime, it being contended that, unless the title had passed to the grantee at the time of the reconveyance by him, the reservation was invalid. The opinion of Potter, J., takes the view that the title passed to the grantee as soon as the deed was delivered to the third person. The opinion of Denio, Ch. J., while it admits that a deed may be delivered to a third person with instructions to be finally delivered to the grantee after the death of the grantor, holds that no title passes until the final delivery, and that then and thereafter the title is, by relation, deemed to have vested as of the time of the first delivery to the third person. It is difficult to determine from the report of the case whether the majority of the court concurred with the former, or with the latter, opinion on this point. In preparing the headnotes, it was evidently assumed that the majority concurred with the former opinion.

If a deed is delivered to a third person with instructions to be finally delivered to the grantee upon the grantor's death, the title will be deemed to have vested in the grantee at the time of the original delivery to the third person, and the deed will take precedence of a will executed by the grantor after such delivery to the third person, if the grantor intended to

part with all control over the deed at the time of delivery to such third person. *Ranken v. Donovan*, 46 App. Div. 225, 61 N. Y. Supp. 542, Affirmed in 60 N. E. 1119.

Where a deed conveying real property *in present* is executed and delivered to a third party in escrow, with intent that it shall be delivered to the grantee upon the death of the grantor, it is a valid and effectual conveyance, taking effect from the time of such death. *Nottbeck v. Wilks*, 4 Abb. Pr. 315.

A delivery of a deed to a third person for the use of the grantee makes it effectual from the instant of such delivery, although the person is not the agent of, but a stranger to, the grantee, provided the grantee assents to it. *Wesson v. Stephens*, 87 N. C. (2 Ired. Eq.) 557.

Where a deed is delivered to a third person with the express and unqualified direction to keep it in his possession as long as the grantor lives, and to deliver it to the grantee after the grantor's death, the deed operates as a deed *in present*, and vests the title in the grantee, as of the date of the delivery to the third person; and if the grantee dies before the grantor, the title vested in him will pass to his heirs. *Pence v. Blackford*, 11 Ohio C. C. 204.

When a deed is delivered to a third person to be delivered to the grantees after the grantor's death, the second delivery relates back to the first, and an award of damages for the condemnation of a part of the land, after the execution of the deeds, but before the grantor's death, belongs to the grantees, rather than to the personal relatives of the grantor. *Geisinger's Estate*, 11 Pa. Co. Ct. 168.

In *Morrow v. Alexander*, 24 N. C. (2 Ired. L.) 388, a deed of gift of a slave was executed by a father in South Carolina to his daughter in North Carolina, and delivered to a third person with directions to deliver it to the donee. The latter delivered it to the donee at her residence in North Carolina. It was held that the instrument was executed and delivered in South Carolina so as to become a complete deed there, and was accordingly governed by the laws of that state. The donee in this case was an adult. It does not appear whether or not she knew of the deed before its delivery to her in North Carolina.

Where the grantor, with the intention of parting with all control and dominion over the deed, places it in the hands of a third person to be recorded after his death, it is a good delivery, and the deed takes effect as of the time of the delivery to the third person. *Payne v. Hallgarth*, 33 Or. 430, 54 Pac. 162.

In *Kemp v. Walker*, 16 Ohio, 118, it was held that where a deed was executed and placed on record by the grantor, and was subsequently delivered to the grantee by the recorder at the direction of the grantor, there was an actual delivery of the deed so that it would take effect at least from the time of such actual delivery, whether it would take effect from delivery to the recorder or not.

Where a grantor delivers a writing as his deed to a third person to be delivered to the grantee at his death, or on some other future event, it is the grantor's deed presently, and the depositary becomes a trustee of the grantee. *Ball v. Foreman*, 37 Ohio St. 132.

A delivery of a bond to a stranger for the use of the obligee, who afterwards manifests his acceptance of it by maintaining an action thereon, takes effect from the time of the delivery to the stranger. *Goodrum v. Carroll*, 2 Humph. 490 87 Am. Dec. 564.

Delivery of a deed to a third person to be delivered to the grantee after the grantor's death is a sufficient delivery,—at least for the purpose of making the deed operative upon the grantor's 54 L. R. A.

death, if not before. *Studebaker Bros. Mfg. Co. v. Hunt* (Tex. Civ. App.) 38 S. W. 1134.

An obvious distinction exists between the case of delivering a deed to a third person without restrictions and simply for the use of the grantee, and a delivery to such third person upon some condition or with restrictions. In the former case, the depositary will be deemed a trustee or agent for the grantee alone; and as the assent of the grantee will be presumed until he dissents, the deed takes full effect between the parties immediately. But in the latter case, the operation of the deed is usually suspended until the condition is performed, or the restriction removed. *Ladd v. Ladd*, 14 Vt. 185. In this case the deed was delivered to a third person to be delivered to the grantee after the grantor's death. The court held that the case fell within the latter category, and that, in the absence of any express declaration indicating an intention on the part of the grantor that the instrument should take immediate effect as a deed, or at least importing a waiver of all right or design to control its operation, it would not take effect until the grantor's death. It was then held that, as against the heirs, the action of a relation back to the first delivery would be indulged, but not as against the wife's claim of dower.

When a deed is delivered to a third person to be delivered to the grantee upon the happening of an event which is sure to occur, *e. g.*, the grantor's death, without any reservation by the grantor of the right to control it, the assent of the grantee having been given, the grantor's authority over the deed and all his right to possess or control it, are forever gone the moment the first delivery is made, or when the deed is placed in the hands of the third person. As to the grantor, the delivery is absolute and final, and so is his conveyance of the land, the title to which passes at once to the grantee, qualified only by the right of the grantor to use and occupy, or take and receive the rents and profits during his life, or until the event shall have happened upon which the second delivery is to be made. The grantor in such a case converts his estate into a life tenancy, and makes himself the tenant of the grantee. These conclusions result unavoidably from the certainty of the event upon which the second delivery is made to depend, and from the impossibility, under the circumstances, that the grantor will ever be able to recall or repossess himself of the deed. He delivers the writing, therefore, as his deed, always so to remain and never to return to him, and it becomes presently operative, and the title vests immediately in the grantee. *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. It will be observed that the statement that the grantor's authority over the deed is gone the moment delivery is made to the third person, is made on the assumption that the grantee has assented (meaning undoubtedly actual assent). The opinion unfortunately does not discuss the question on the assumption that the grantee remains in ignorance of the deed until after the grantor's death.

Where a deed is duly executed and delivered by the grantor to a depositary in the presence of the grantee and without any reservation of control, with the intention and understanding that such depositary is to retain the custody thereof until the grantor's death, and then deliver the same to the grantee, it is such grantor's deed *in present* from the time of such deposit, and such depositary thereby becomes the trustee of the grantee. *Albright v. Albright*, 70 Wis. 533, 36 N. W. 254.

In *Alford v. Lea*, 2 Leon. 111, Cro. Ellis. pt. 1, p. 54, it was held that the condition of an award requiring a release to be delivered before

the feast of St. Peter was sufficiently complied with by a delivery to a third person to the use of the releasee without the latter's assent or knowledge, on the eve of the feast day, notwithstanding that the releasee, when he heard of it, disagreed to it.

If A makes an obligation to B, and delivers it to C to the use of B, this is a deed of A presently; but if C offers it to B, B may refuse it *in pais*, and thereby the obligation will lose its force (but perhaps in such case, A in an action brought on this obligation, cannot plead *non est factum* because it was once his deed). *Butler & Baker's Case*, 3 Coke, 26b.

In *Taw v. Bury*, And. 4, 2 Dyer, 167b, it was held that where A delivers a bond to B to deliver as his deed to C, and C refuses to receive it, but B leaves it, a plea of *non est factum* in an action on the bond is bad. The decision is upon the ground that by the first delivery the bond was good, and was in law the bond of A before any delivery over to C, and that the refusal of C could not undo it as the bond of A from the beginning.

If a bond is delivered to another for the use of the obligee, and it is tendered to him and he refuses it, the delivery has lost its force, and the obligee can never after agree to it, and, therefore, the obligor may say it is not his deed. *Whelpdale's Case*, 5 Coke, 119 b.

e. Right of the grantor to revoke.

See also *Hale v. Joslin*, 134 Mass. 310, *supra*, II. b, 2, b, (2).

It having been shown in I. b, 2, a, and b, that the parting by the grantor with all dominion and control over the deed is a requisite of this mode of delivery, it follows that if the conditions are such as to uphold a delivery, in the absence of any attempt by the grantor to revoke the instrument, no such attempt can operate to defeat a delivery; and it has been so held.

Arrington v. Arrington, 122 Ala. 510, 26 So. 152, did not expressly involve the question of the grantor's right to recall; but the court said that it would be beyond the grantor's power to recall.

Where one executes a deed, and delivers it to third person with instructions not to record it, but to deliver it to the grantees upon his (the grantor's) death, delivery to the grantees is effected; and the grantor cannot recall the deed, nor alter its provisions during his lifetime. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338.

In *Issitt v. Dewey*, 47 Neb. 196, 66 N. W. 288, a mother, after executing a deed to her son, and voluntarily placing the same upon record for the purpose and with the intent of passing title to the grantee, brought an action to have the same canceled and set aside, but such relief was denied upon the ground that the title had passed to the grantee.

Where a mother executed a deed of property to her minor daughter, and delivered the same to a third person for the use and benefit of the grantee, without any reservation of control, with instructions to keep it until after the grantor's death, and then to place it upon record, the delivery to the third person was sufficient to pass the title to the property to the grantee as of the date of such delivery; and the fact that after such delivery the custodian took the deed to the grantor and put it in a box where she kept her papers, but not with the intention of surrendering the deed, did not defeat the delivery. The title having once passed, it could not be divested in that way. *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439.

Where a purchaser of land, having procured the execution of a deed to his son, has the deed delivered to himself, and retains it, the title 54 L. R. A.

passes immediately from the grantor to the grantee, notwithstanding that the latter is ignorant of its existence; and the purchaser cannot, after the death of the son without ever having known of the deed, affect the title by destroying the deed and procuring the execution of a new one by the vendor to a third person. *Everett v. Everett*, 48 N. Y. 218.

If a grantor delivers deeds to third persons with instructions to deliver the same to the grantees after his (the grantor's) death, or sooner if the latter should so direct, with the intention that the deed shall take effect and operate as his deed presently and irrevocably, he cannot revoke or reclaim the deed without the consent of the grantee. *Brown v. Austen*, 35 Barb. 341.

In *Ellington v. Currie*, 40 N. C. (5 Ired. Eq.) 21, it was held that a delivery of a deed of gift of slaves from a father to his infant children was shown by a bill by the donor's heirs seeking to recover the slaves from the donees, alleging that the father executed the deeds by signing and sealing them, and had them attested and caused them to be registered, notwithstanding that it also alleges that the deeds were not intended to operate between the parties, but only to hinder creditors, and that neither of the deeds has been found among the papers of the donor, or elsewhere, since his death. The court says that the subsequent loss or destruction of the deeds did not affect their operation so as to vest the slaves again in the father, and that a deed to hinder creditors will only be declared invalid at the instance of creditors, and is good as against the grantor and those claiming under him.

The principle is that when the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction to hold it for him, and without in any way reserving the right to repossess it, the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor, or anyone else, can defeat the effect of such delivery. *Robbins v. Rascoe*, 120 N. C. 79, 38 L. R. A. 238, 26 S. E. 807.

Where one executes a deed of gift to his daughter, and delivers it to a third person to be delivered to the grantee thirty days after his death, and receives from the depository a receipt to that effect, which receipt is delivered to the grantee, who accepts it, the depository becomes the trustee of the grantee, and the estate passes at once to her, and the subsequent destruction of the deed by the grantor, without her knowledge and consent, is wrongful, and does not have the effect of reinvesting the title in him, or of defeating the title in her. *Chambers v. Stewart*, 2 Ohio N. P. 287.

In *Meeks v. Stillwell*, 54 Ohio St. 541, 44 N. E. 267, a husband joined with his wife in the execution, to an infant child, of the deed of a homestead, the title to which was in the wife. The wife subsequently, during her last illness, handed the deed to her attorney, with directions to place it on record for the grantee. A few days afterward, and while the deed was still in the hands of the attorney, she inserted therein a reservation of a homestead right in favor of her husband. The court held that even on the assumption that the delivery to the attorney was for the benefit of the infant, and that the wife had no power to recall or revoke the deed, yet the donee, in face of the reservation appearing in the deed, could not prevail without a reformation of the instrument, and that a court of equity would not, under the circumstances, reform the deed so

as to make it operate contrary to the intention of the donor.

1. Rights of third persons.

See also *Brown v. Austen*, 35 Barb. 841, *supra*, II. b, 2, b, (1).

It would seem that the right of third persons (except persons whose rights are not superior to those of the grantor, *e. g.*, non-lien creditors, personal representatives, heirs or devisees of the grantor) intervening between the time the deed was delivered to the third person, or was recorded, and the time it actually came to the knowledge of the grantee and was accepted by him, should depend upon which of the two theories, relation back or presumed acceptance, the court adopts. If the theory of presumed acceptance is adopted in its full force, as declared in *Thompson v. Leach*, 2 Vent. 198, *supra*, II. c, 2, c, (1), it would seem, since that theory places the title immediately in the grantee, the logical consequence would be that the deed would be superior to all such intervening rights. While, on the other hand, if the theory of relation back is adopted, such intervening rights should prevail, because, relation back being a mere fiction, it will not be indulged for the purpose of defeating the rights of third persons which have vested before the event (actual acceptance) upon which it is based. On the other hand, according to the theory of presumed acceptance, the title vests in the grantee before the rights of the third person have attached, and it is, therefore, not a matter of disturbing vested rights. Practically, however, the majority of the cases, without reference to which of these two theories is adopted, hold that the deed is subordinate to such intervening rights of third persons as are superior to those of the grantor himself. In some cases the courts seem to confuse the two theories, apparently treating them as but different statements of the same thing. Thus, the court in *Bell v. Farmers' Bank*, 11 Bush, 84, 21 Am. Rep. 205, says: "A deed delivered to the registering officer, or to an unauthorized third person, and subsequently accepted by the grantee, will take effect as between the grantor and the grantee from the time of the first delivery; and in such cases volunteers claiming under and through the grantor, and ordinary creditors who have acquired no lien upon nor interest in the estate conveyed, are entitled to no greater consideration than the grantor. Yet, until the grantee is informed of the execution of the deed, and does some act equivalent to an acceptance of it, it is manifest he may refuse to accept it, notwithstanding the fact that by a fiction of law the presumption of an actual acceptance had all the while existed for his benefit as against the grantor, his heirs, devisees, and ordinary creditors. But this fiction will not be allowed to prevail to the prejudice of persons who have acquired title to, and interest in, or a lien upon, the property before the date of the actual acceptance. As in the case of an escrow, whenever it becomes necessary for the purposes of justice that the true time of acceptance of a deed so delivered shall be ascertained, the legal fiction will be disregarded, and the intervening claimant, or lien holder, allowed to show the actual facts of the transaction."

There are authorities which hold that there is an absolute presumption of acceptance by the grantee of a deed delivered to a third person to be delivered to him, placing the title in him for all purposes, though he was an adult and had no knowledge of the deed at the time; and that if he rejects the deed after coming to a knowledge of it, the title is then, *ipso facto*, re-vested in the grantor. Placing the title in

the grantee as of the time the grantor parted with the deed, under the circumstances mentioned, the grantee being ignorant of the transaction, is one of the results of the doctrine of relation, and is founded on a fiction of the law. But it is well settled that the doctrine of relation should not cut out intervening rights. So that the true rule ought to be that this presumption of delivery and acceptance of a deed beneficial to the grantee ought not to, and will not, obtain, where the right of a third party has intervened between the time when the grantor acted and the time of the actual acceptance by the grantee. *Fischer Leaf Co. v. Whipple*, 51 Mo. App. 185.

A few cases, however, accept the logical consequences of the theory of presumed acceptance, and hold that the deed is superior to intervening rights of third persons; thus:

Delivery of a deed to a third party for the use of the grantee, if the grantor parts with all control over it, makes it effectual from the instant of such delivery, although the person to whom it was so delivered was not the agent of the grantee, and the latter did not know of the deed until after the grantor's death. *Doe ex dem. Garbons v. Knight*, 5 Barn. & C. 671, 8 Dowl. & R. 348. This was ejectment by a mortgagee in a mortgage delivered to a third person for his benefit, but which did not come to his knowledge until after the mortgagor's death. The defendant claimed under a mortgage given by the same mortgagor after the delivery of the first mortgage to the third person, but before the mortgagee in that mortgage had learned of it. It was held that the first mortgage was good as against the second mortgage unless the latter could show that it was void as against creditors, or purchasers under the statute of Elizabeth. The court said the law would presume, if nothing appears to the contrary, that a man will accept what is for his benefit, and that in this case there was the strongest ground for presuming the mortgagee's consent because of his declaration to the mortgagor that he expected the latter would secure him and the latter's answer importing that he would.

The recording by a guardian of a mortgage executed by him to his ward to secure his indebtedness to the latter, and a subsequent delivery of the same to the ward's mother for him, constitute a sufficient delivery to uphold the mortgage as against a mortgage subsequently executed by him to a third person. *Jennings v. Jennings*, 104 Cal. 150, 37 Pac. 794.

A mortgage deed executed by the grantor and lodged with the town clerk for record, without the knowledge of the grantee, is good until dissented to by the latter, and is superior to the lien of an attachment taken out against the grantor after delivery of the deed for record and before the grantee knew of it. *Hallock v. Bush*, 2 Root, 28, 1 Am. Dec. 60.

A delivery of a mortgage to a third person with instructions to record it for the mortgagee is a good delivery to the mortgagee as of the time of the original delivery to such third person so as to cut off an attachment intervening between such delivery and the actual acceptance by the mortgagee. *Merrill v. Swift*, 18 Conn. 257, 48 Am. Dec. 315. The court adopts the view that the grantee's assent will be presumed where the deed is beneficial, although his dissent may be disproved and the deed thereby rendered ineffectual. The court says if the deed had been delivered as an escrow, a different question would have been presented.

Neither the presence of the grantee nor his previous authority to the third person to receive the deed on his behalf, nor even his subsequent assent to it, is necessary to make a de-

livery of a deed to a third person for the benefit of the grantee valid; but where the deed is beneficial to him, his assent will be presumed unless it appears that he dissented. *Tibbals v. Jacobs*, 31 Conn. 428. In this case the delivery was upheld as against an execution under a judgment against the grantor. It does not appear when, with reference to the delivery to the third person and the subsequent acceptance by the grantees, the execution was levied; but the opinion seems to be broad enough to uphold the delivery as against an execution levied in the interval between the delivery to the third person and the time the grantees learned of and accepted it.

A delivery of a deed to a third person for the use of the grantee, if the grantor parts with all control over it, makes it effective from the instant of such delivery. Its acceptance by the grantee, if beneficial to him, will be presumed if nothing appears to the contrary, even before he knows of it. *Jones v. Swayze*, 42 N. J. L. 279. The doctrine was here applied to a case where a chattel mortgage to secure an existing debt was executed without the mortgagee's knowledge, and left with a third person to be filed in the clerk's office, and filed accordingly. Before the mortgagee learned of the mortgage, a new mortgage was executed to a third person. It was held that the first mortgage was superior to the second.

Where the grantor, in performance of a contract to convey property, delivers the deed to a third person, with instructions to deliver it to the grantee, the title passes as between the parties at the time of the delivery to the third person, and a mechanic's lien for work under a contract with the grantor, filed in the interval between the first and second delivery, will not attach to the property since such a lien attaches only to the legal right of the owner. *Ernst v. Reed*, 49 Barb. 367.

If the delivery of a deed to a third person for the grantee is absolute, the grantor not reserving any future control over it, the estate passes immediately to the grantee, notwithstanding that she is ignorant of its existence, her assent to accept the conveyance being presumed from the fact that the conveyance is beneficial to her; and the lien of a judgment recovered in the interval between the delivery to a third person and the time when the grantee became aware of the deed will not attach to the property. *National Bank v. Bonnell*, 46 App. Div. 302, 61 N. Y. Supp. 521.

The general rule is that where an instrument is executed in favor of a party for his interest, he will be presumed to assent thereto until he manifests his dissent, after being duly notified. *Ensworth v. King*, 50 Mo. 477. In this case a mortgage on real estate to secure an existing debt was executed and placed on record by the mortgagor without the knowledge of the mortgagee. The latter assented to it after learning of it, but in the mean time the property had been attached for a debt of the mortgagor. It appears to be held that the mortgage was superior to the attachment. This case, however, was overruled by *Kuh v. Garvin*, 125 Mo. 563, 28 S. W. 847, *infra*.

Some of the cases, like *Welch v. Sackett*, 12 Wis. 243, *supra*, II. c. 2, o. (1), while holding that the intervening rights will prevail over the theory of presumed acceptance would lead to a different result, and therefore combat and repudiate that doctrine.

In the following cases, the lien of an attachment or judgment for a debt of the grantor, or mortgagor, levied after a deed or mortgage of real property had been delivered to a third person or recorded, but before the grantee or mortgagee had learned of or accepted it, was

held superior to the rights of the latter. *Parmelee v. Simpson*, 5 Wall. 81, 18 L. ed. 542; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; *Knox v. Clark* (Colo. App.) 62 Pac. 334; *Loubat v. Kipp*, 9 Fla. 60; *Goodsell v. Stinson*, 7 Blackf. 439; *Woodbury v. Fisher*, 20 Ind. 387; *Deere v. Nelson*, 73 Iowa, 186, 34 N. W. 809 (attachment levied after deed recorded and mailed to grantee, but before he received same); *Com. v. Jackson*, 10 Bush, 424; *Bell v. Farmers' Bank*, 11 Bush, 34, 21 Am. Rep. 205; *Derry Bank v. Webster*, 44 N. H. 268; *Johnson v. Farley*, 45 N. H. 503; *Russ v. Stratton*, 11 Misc. 565, 32 N. Y. Supp. 767; *McKwen v. Bamberger*, 3 Lea, 576; *Kempner v. Rosenthal*, 81 Tex. 12, 16 S. W. 639; *Denton v. Perry*, 5 Vt. 382.

Where, in pursuance of an agreement for the sale of land at a certain sum per rod, a deed was signed but not acknowledged or delivered because the land had not been measured, and the owner afterward acknowledged the deed and sent it to the registry without the knowledge of the grantee, an execution against the grantor levied upon the land after the registry, but before actual acceptance by the grantee, will be a paramount lien. *Samson v. Thornton*, 3 Met. 275, 37 Am. Dec. 136. The court distinguishes *Hedge v. Drew*, 12 Pick. 141, 22 Am. Dec. 416, upon the ground that in that case the grantee expressed her assent, and thereby made the register her agent to receive the deed, whereas in the case at bar there was no agent to accept the deed, no delivery to give the deed effect as a conveyance, and no ratification until long after the attachment was made.

A delivery of a deed or mortgage to a county clerk, for the use of the grantee or mortgagee, to be recorded, and the subsequent assent to the same by the grantee or mortgagee, are equivalent to an actual delivery to the latter, and will prevail against a subsequent deed made after such assent, but not against one made before such assent. *Foster v. Beardsley Scythe Co.* 47 Barb. 513.

In *Brown v. Austen*, 35 Barb. 341, a father, while solvent, executed deeds, for the consideration of love and affection, to his daughters, and delivered them to a third person to be delivered to the grantees after the death of the grantor and his wife, or at such earlier periods as should be by either of them designated. After the grantor had become insolvent and judgments had been recovered against him, he procured the depositary to deliver the deeds to the grantees. The action was by the judgment creditors to have their judgments declared a lien on the premises. The court took the position that the determining question was whether the grantor, at the time of the delivery of the deeds to the depositary, intended that they should take effect and operate presently and irrevocably, or whether he intended to deliver the deeds in escrow, to be delivered by him to the grantees as his deeds on the death of the grantor and his wife, or upon their previous direction to deliver the deeds. If the former was his intention, it was held that the deeds took effect immediately upon their delivery to the depositary, and if the latter was his intention, the deeds could not take effect until the second delivery; and that while, in the absence of the intervening rights of third persons, the fiction of relation back may be indulged, even in case of a delivery in escrow, such fiction cannot be indulged to the prejudice of the rights of judgment creditors.

Of the foregoing cases, *Parmelee v. Simpson*, 5 Wall. 81, 18 L. ed. 542; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; *Knox v. Clark* (Colo. App.) 62 Pac. 334; *Goodsell v. Stinson*, 7 Blackf. 439; *Derry*

Bank v. Webster, 44 N. H. 268; and *Kempner v. Rosenthal*, 81 Tex. 12, 16 S. W. 639,—put the decision upon the ground that the fiction of relation back will not be indulged so as to cut off the vested rights of third persons. None of the cases expressly repudiate the doctrine of presumed acceptance. *Com. v. Jackson*, 10 Bush, 424, however, quotes with approval the statement in *Tuttle v. Turner*, 28 Tex. 773, *supra*, II. c. 2, c. (1), that "the presumption a party will accept a deed because it is beneficial to him . . . will never be carried so far as to consider him as having accepted it;" and *McEwen v. Bamberger*, 8 Lea, 576, said that the presumption of acceptance was overcome by the fact that the grantee was not aware of the existence of the deed until after the attachment. *Johnson v. Farley*, 45 N. H. 605, puts the decision upon the ground that the mortgage not being clearly beneficial, its acceptance could not be presumed, thus apparently recognizing the necessity of eliminating the presumption of acceptance. The decision in *Loubat v. Kipp*, 9 Fla. 60, is upon the ground that the delivery to the third person was subject to the orders of the mortgagor.

The delivery of a deed of trust by the grantor to the county recorder for record, for the grantees as their deed, is a sufficient delivery where the grantees, before the execution of the deed, had agreed to accept; and such deed, whether a deed of trust absolute, or in the nature of a mortgage, takes effect as from the time of such delivery to the recorder, and is superior to a judgment recovered against the grantor in the interval between the time the deed was delivered to the recorder and the time it was delivered by the latter to the grantees and trustees. *Hoffman v. Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637.

In the following case, the lien of an attachment or execution accruing in the interval between the delivery of a chattel mortgage to a third person, or the filing of the same by the mortgagor, and the time it came to the knowledge of the mortgagee and was accepted by him, was held superior to the mortgage.

When a bona fide mortgage is executed without the knowledge of the mortgagee, who, however, subsequently ratifies it, the ratification generally relates back to the execution of the mortgage; but if between the execution of the mortgage and the ratification thereof other creditors obtain judgments against the mortgagor, the liens of such judgments will take precedence of the mortgage lien. *Evans v. Coleman*, 101 Ga. 152, 28 S. E. 645.

The acceptance by the mortgagee of a chattel mortgage recorded without his knowledge will not relate back so as to affect an intervening purchaser at a sale under an execution against the mortgagor. *McFadden v. Ross*, 14 Ind. App. 312, 41 N. E. 607. It was admitted in this case that a delivery may be made to the third person for the grantee or mortgagee without the knowledge of the latter, and, when accepted by the mortgagee, it becomes valid.

Where a debtor executes a chattel mortgage, and files it for record without the mortgagee's knowledge, and the latter, upon learning of it, subsequently accepts it, such acceptance relates back to the filing of the mortgage as between the parties, but not as between the mortgagee and third persons whose rights have intervened. *Fleld v. Fisher*, 65 Mich. 606, 32 N. W. 838.

Where a chattel mortgagor, without the mortgagee's knowledge, files the mortgage for record in the recorder's office, its execution, so far as he is concerned, is complete, and nothing that he can thereafter do, without the consent of the mortgagee, can in any manner affect its validity; and the fact that the mortgagor

was not a resident of the state, and, therefore the mortgage was not entitled to record, and that the mortgage was subsequently returned to him, does not affect the result. *Kuh v. Garvin*, 125 Mo. 563, 28 S. W. 847. The requisite of acceptance in this case, as between the mortgagor and mortgagee, was supplied by the presumption of acceptance. The court held, however, that, as against attaching creditors, something more than a delivery to a third person for the benefit of the mortgagee and the presumption of acceptance by him because of its beneficial provisions, was required, and that, in order to cut off the lien of an attachment after the delivery of the mortgage to the recorder, it must be shown that such delivery had been assented to by the mortgagee, and that he had done something equivalent to an acceptance of it before the attachment. The case of *Ensworth v. King*, 50 Mo. 477, holding that the presumed acceptance of a deed by the grantee, because it is beneficial to him, will defeat the lien of an attaching creditor, was expressly overruled.

The recording of a chattel mortgage by the mortgagor without the knowledge of the mortgagee, though sufficient, when aided by the presumption of acceptance from the beneficial character of the mortgage, to effect a present delivery as between the mortgagor and the mortgagee, is not sufficient to cut off the lien of an attachment accruing between the time the mortgage is recorded and the time the mortgagee learns of and accepts the same; but the mortgagee's acceptance of the mortgage as of the time he learned of it will be presumed, in the absence of anything indicating a contrary intention. *Fischer Leaf Co. v. Whipple*, 51 Mo. App. 185.

A chattel mortgage delivered by the mortgagor unconditionally to an unauthorized third person, by whom, under the directions of the mortgagor, it was filed for record, and subsequently accepted by the mortgagee, takes effect, as between the mortgagor and mortgagee, from the time of the first delivery, but not so as to persons who have acquired title to, and interest in, or a lien upon, the property, before the actual acceptance by the mortgagee. *Rogers v. Heads Iron Foundry*, 51 Neb. 52, 37 L. R. A. 433, 70 N. W. 527. The opinion in this case quotes, with approval, part of the criticism of *Dixon, Ch. J.*, in *Welch v. Sackett*, 12 Wis. 244, of the theory of presumed acceptance.

The delivery by the mortgagor to the register of a chattel mortgage which he had executed in performance of a promise to give his creditors some security, the exact character of which was not indicated, does not constitute a delivery to the mortgagee as against execution creditors whose lien accrued before the mortgage was in fact accepted, but the mortgage is good as against an attachment levied after the mortgagor had learned of and accepted the security. *Keith v. Haggart*, 2 N. D. 18, 48 N. W. 482.

When a chattel mortgage is executed in the absence, and without the knowledge, of the mortgagee, and delivered to a stranger for the latter's use, the title to the mortgaged premises does not vest in the mortgagee as between him and another creditor of the mortgagor, who acquired an interest in it by attachment between the time of the delivery to the stranger and the time when the mortgagee received actual notice of, and accepted, it, until the latter date. *Welch v. Sackett*, 12 Wis. 243, *supra*, II. c. 2, c. (1).

The lien of an attachment is superior to a chattel mortgage executed before the levy where the mortgagee did not assent to or accept such

mortgage until after the levy. *Griswold v. Case*, 18 Wash. 623, 43 Pac. 876.

In the following case, it will be observed that priority was awarded to the attachment lien although the mortgagee knew of the mortgage before the levy:

An attachment levied on live stock after the filing of a chattel mortgage thereon, and after the mortgagee had learned of the mortgage but before he had accepted it, takes precedence of the mortgage, notwithstanding that the mortgage was executed in pursuance of a previous agreement by the mortgagor to execute a mortgage on some of his stock without, however, pointing out the particular stock. *Cobb v. Chase*, 54 Iowa, 253, 6 N. W. 300. The court said the mere knowledge of the mortgage could not be regarded as an acceptance of it; that acceptance involves the exercise of volition upon the part of the acceptor, and that mere knowledge does not involve the exercise of volition.

In *Wadsworth v. Barlow*, 68 Iowa, 599, 27 N. W. 775, an attachment levied upon a stock of goods after the execution and filing of a chattel mortgage thereon from the debtor to his wife, and after the latter had learned of the mortgage, was awarded priority over the mortgage. The decision was upon the ground that there was no declaration at the time the mortgage was recorded, that it was to be delivered to the mortgagee, or was for her use, and that such a purpose could not be presumed from the mere delivery of the mortgage for record. The court, while stating that the decisions were not uniform upon the point, conceded, for the sake of the argument, that where a mortgage beneficial to the mortgagee is left with the recorder or other person, with a declaration that it is to be delivered to the mortgagee, or is for the mortgagee's use, and the facts come to the mortgagee's knowledge, acceptance from that time may be presumed.

In *National State Bank v. Morse*, 73 Iowa, 174, 34 N. W. 803, the debtor, without the knowledge of the creditors, executed new notes extending the time of payment for one year, and executed and filed chattel mortgages to secure the same. After the mortgagees had learned of the mortgages, and had assented thereto, but before they knew of the new notes extending the time of payment, the property was attached by other creditors of the mortgagor. It was held that such attachment would take precedence of the mortgages. The decision is upon the ground that the assent of the mortgagees in ignorance of the facts in reference to the notes could not be regarded as an acceptance.

If, however, the mortgagee learns of and accepts the mortgage before the levy, the mortgage is superior. *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Hedge v. Drew*, 12 Pick. 141, 22 Am. Dec. 416; *Louden v. Vinton*, 108 Mich. 313, 66 N. W. 222; *Buffum v. Green*, 5 N. H. 71, 20 Am. Dec. 562; *Keith v. Haggart*, 2 N. D. 18, 48 N. W. 432; *Brown v. Platt*, 8 Bosw. 324.

A mortgage in favor of an absent person, executed by the mortgagor, although not accepted by the mortgagee, takes precedence of a posterior mortgage duly accepted and registered. *Millaudon v. Aillard*, 2 La. 551.

The assent of the mortgagees to a mortgage executed to secure pre-existing debts will be presumed from the beneficial character of the mortgage. *Kennaird v. Adams*, 11 B. Mon. 102. This case involved the conflicting rights of the mortgagees and creditors who had attached the property. The case does not, however, decide that the acceptance will be presumed in case of an intervening attachment, as the court had decided the attachment had failed for other reasons, and that the mortgagees were entitled 54 L. R. A.

to the property in pursuance of the mortgage, whether it was executed before or after the levy of attachment.

A chattel mortgage will take precedence of an attachment levied upon the property after the same was filed for record but before the mortgagee learned of the same, where it was given in pursuance of a previous agreement between the mortgagor and mortgagee that the former should secure the payment of the debt either by personal security or by a mortgage upon personal property to be selected by the former, and that, if a mortgage was executed, it should be delivered to the recorder. *Everett v. Whitney*, 55 Iowa, 146, 7 N. W. 487. The case was distinguished from *Day v. Griffith*, 15 Iowa, 104, and *Cobb v. Chase*, 54 Iowa, 253, 6 N. W. 300, by reason of the previous agreement that the mortgagor should deliver the mortgage to the recorder, and the agreement that the debtor should select the property to be included in the mortgage.

In *Sargeant v. Solberg*, 22 Wis. 132, it was held that a chattel mortgage filed by the mortgagor without the knowledge of the mortgagee was superior to an execution levied after the mortgage was filed, but before it was known to the mortgagee. The decision, however, is upon the ground that the mortgagor was the mortgagee's agent to accept the mortgage and file it in the clerk's office, it appearing that the mortgagee had sent money to the mortgagor to be invested at the latter's discretion, and that the mortgagor had used the money himself and executed the mortgage to secure its repayment. *Harrington v. Brittan*, 23 Wis. 541, is to the same effect.

In *McCourt v. Myers*, 8 Wis. 236, a debtor without any arrangement or understanding with or knowledge by the mortgagees, executed a chattel mortgage and placed it on file in the city clerk's office, without, however, declaring or intimating to the clerk that the mortgage was to remain under his charge for the use and benefit of the mortgagees, or doing anything to show that he regarded the filing of the mortgage as a delivery to the mortgagees, and that by that act he intended to part with possession and all power and control over the instrument. The mortgagees did not know that the mortgage had been filed until after it had been withdrawn from the files by the mortgagor, and the property had been sold to a third person, between whom and the mortgagees the question of delivery arose. The decision, however, is not put upon the ground of want of acceptance, but upon the ground that there was not sufficient evidence to authorize the conclusion that the mortgagor, by placing the mortgage on file, intended to part with all control and power over it. The court said that if such intention could have been established the case would have come within the doctrine of *Cooper v. Jackson*, 4 Wis. 537, *supra*, I.

In *Mull v. Dooley*, 89 Iowa, 312, 56 N. W. 513, a debtor had agreed to secure a creditor by executing a chattel mortgage, and to have the same filed for record. The mortgagee procured a notary to draft the mortgage and leave it with the mortgagor after it was executed. There had been no previous understanding as to what property the mortgage was to cover. The mortgage was executed, but the debtor neglected to file it, and the mortgagee did not know of its execution until it was delivered to him some time afterwards. It was held that the mortgage took effect only from the time of such delivery.

In *Jordan v. Farnsworth*, 15 Gray, 517, it was held error to charge, as a matter of law, that the delivery to the town clerk of a chattel mortgage by the mortgagor, who had agreed

more than a year before with the mortgagee to execute a mortgage on the property in question, amounted to a valid delivery to the mortgagee, so as to give the mortgage precedence over the lien of an attachment levied after such delivery to the town clerk, but before the mortgage had come to the knowledge of the mortgagee. The court said that it was for the jury, under proper instructions, to say whether, upon the evidence as to the previous agreement and the acts of the parties, they were satisfied that the making and delivery of the mortgage were authorized by the mortgagee, and were done in pursuance of a previous agreement and authority so to do.

In *Capital City Bank v. Hodgkin*, 24 Fed. 1, a debtor, in pursuance of a previous understanding with the mortgagees, executed two mortgages to different creditors. In order that one mortgage should have a preference over the other, he had it first recorded. The mortgagee named in that mortgage, however, did not learn of her mortgage or accept it until after the other mortgage had learned of and accepted its mortgage. It was held that the mortgage first recorded was entitled to priority over the other. This decision, however, seems to be upon the ground that at the time the other mortgage was accepted, the mortgagee knew of the first mortgage and of the intention of the mortgagor to give it a preference. The court says had the creditor refused to accept the second mortgage, and obtained a lien by attachment or execution on the property, it could then have presented the claim of its rights as against the other mortgage upon the theory that it had acquired a lien upon the property before a complete delivery of the first mortgage.

A chattel mortgage executed without the knowledge of the mortgagee, and kept by the mortgagor for a number of days, after which he put it on file and informed the mortgagee thereof, who accepted the same, does not take effect until acceptance by the mortgagee. *Merrill v. Denton*, 73 Mich. 628, 41 N. W. 823. In this case, the mortgagee was insisting on the later date in order to bring within the lien of the mortgage, which was on a stock of goods, property added to the stock in the interval between the execution of the mortgage and its acceptance.

A chattel mortgage is not valid as against a purchaser of the property under execution against the mortgagor if not accepted until after the levy under the execution. *Hemstreet v. Kutzner*, 58 Ind. 319.

In *Day v. Griffith*, 15 Iowa, 104, a debtor executed a bill of sale to secure a creditor, and filed the same for record without the knowledge of the creditor. The property was attached by another creditor in the interval between its recording and its acceptance by the creditor. It was held that the attachment was a prior lien. The decision seems to rest ultimately upon the point that a delivery to a third person, or to the recorder, is not sufficient unless such delivery was intended by the grantor to be for the benefit of the grantee, and that such intent could not be implied from the mere delivery of the bill to the recorder. The court, however, said that it was at least doubtful, when a deed was thus delivered to a third person for the use of the grantee but without his knowledge, whether his subsequent assent would relate back to the original deposit so far as to defeat intervening rights.

A bill of sale executed without the knowledge of the buyer and deposited in the postoffice directed to the latter is subject to an attachment levied upon the property before the bill of sale reached the buyer. *McCutchin v. Platt*, 22 Wis. 561.

An assignment of a claim under a policy of 54 L. R. A.

insurance for the purpose of securing a claim against the insured, delivered by him to a third person, not the agent of the assignee for any purpose, and accepted by the latter as soon as he learned of it, though good as between the assignor and assignee, is not good as against a garnishment served upon the insurance company by another creditor of the assignor in the interval between the delivery to a third person and its acceptance by the assignee. *Hart v. Forbes*, 60 Miss. 749.

The ratification by the principal of the unauthorized act of his agent in purchasing a stock of goods, partly in consideration of an indebtedness from the seller to the principal, and partly in consideration of a cash payment, does not relate back so as to cut off an attachment levied by a creditor of the seller between the time of the sale to the agent and its ratification by the principal. *Pollock v. Cohen*, 32 Ohio St. 525.

Rittmaster v. Brisbane, 19 Colo. 371, 35 Pac. 786, holds that the recording of a deed by the grantor without the knowledge of the grantee did not raise a presumption of acceptance so as to pass the title as against one claiming through a deed executed between the time of such record and the time the grantee expressed his intention to accept.

In *Davis v. Cross*, 14 Lea, 637, 52 Am. Rep. 177, a deed of gift of real and personal property containing the clause: "This deed will be delivered to a friend for safe keeping, with directions to deliver at such time as I may direct,"—was acknowledged for registration and delivered to a third person, inclosed in a sealed envelope, with a direction indorsed thereon to record the deed immediately after the grantor's death. The grantor subsequently, by a deed of gift, conveyed a portion of the premises to other persons. It was held that the delivery was not complete until the registration of the deed after the grantor's death, and that the subsequent conveyance was, therefore, valid.

The act of the grantor in recording a deed does not amount to a delivery where the grantee did not know of such recording, or even of the existence of the deed until after the death of the grantor. *Doe ex dem. Herbert v. Herbert*, *Breese* (Ill.) 278, 12 Am. Dec. 192. In this case the deed was found among the grantor's papers at his death. The decision, however, seems to be on the ground that there was no acceptance by the grantee during the lifetime of the grantor, and that he could not accept after the grantor's death. The controversy in this case was between the grantee and one who purchased the property at a sale by the administrator of the grantor.

In *Merritt v. Temple*, 155 Ind. 497, 58 N. E. 609, the maker of a promissory note which was about to become due authorized the holder to procure a loan for her from a certain person, and agreed to give her mortgage to secure the same, the proceeds of the loan to be retained by the holder of the note as a part payment thereon. She accordingly, a few days later, executed a mortgage to such person and delivered the same to the holder of the note, who thereupon entered a credit on the note for the amount of the mortgage. Immediately after executing the mortgage, and before it had been actually delivered to the mortgagee, the mortgagor executed a deed of the property to a person who knew of the mortgage. It was held that the mortgage would take precedence of the deed. It does not appear whether the holder of the note had been authorized by the mortgagee to receive the mortgage. Probably not, however, as in that case it would seem there could have been no question as to the priority of the mortgage. The court, however, does not

deal specifically with the question of acceptance of the mortgage by the mortgagee. It says that the transaction was not different in legal effect than if the holder of the note, in anticipation that the mortgagee would refund the money, had in the first instance advanced the money on the mortgage to the mortgagor, and she, in turn, had given it back to him in payment of her note.

In *Jackson ex dem. Eames v. Phipps*, 12 Johns. 418, it was held that there was no delivery of a deed under the following circumstances: The grantor residing in New York state, agreed with the grantee in Massachusetts, to give the latter a deed of the former's farm as a security for a debt, and upon the former's return home he executed and acknowledged a deed, and left it in the clerk's office on the same day to be recorded, neither the grantee, nor any person in his behalf, being present to receive the deed; the grantee died without having received the deed, and afterward the grantor sent the deed to the grantee's son and heir. The decision is upon the ground that acceptance is essential to the delivery of a deed, and that in this case there was no acceptance by, or for, the grantee during his lifetime. The court admitted that a deed may be delivered to a stranger for, and in behalf, and to the use of, the grantee, without authority, saying, however, that if it is delivered to a stranger without any declaration that it is for the use of the grantee, it is not a sufficient delivery unless delivered as an escrow. The controversy was, in this case, between the heir of the grantee and one claiming under a mortgage executed between the time the deed was recorded and the time of the grantee's death.

In *Verplank v. Sterry*, 12 Johns. 536, 7 Am. Dec. 348, the grantor, after the delivery of a deed in trust to one of the *cestui que trust*, deeded the property to a third person. The contest was between the grantor and such third person on one side, and the *cestui que trust* on the other. It was held that the deed of trust was in consideration of marriage, and was good as against a subsequent purchaser.

In *Partridge v. Chapman*, 81 Ill. 187, where the question was as to the relative rank of a deed and mortgage, the mortgage having been recorded by the mortgagor without the mortgagee's knowledge, and afterward sent to and accepted by the mortgagee, the court held that there was no delivery until the mortgagee received the mortgage through the mail and accepted it.

In *Grugeon v. Gerrard*, 4 Younge & C. Exch. 119, a debtor executed a mortgage to a creditor and delivered it to his own attorney, who retained it in his possession till after the mortgagor's bankruptcy, which occurred about a month afterward. The attorney then delivered it to the mortgagees. It was held that there was a good delivery by the mortgagor to the mortgagees as against the assignees in bankruptcy.

The execution and filing of a chattel mortgage by the mortgagor pursuant to an agreement with the mortgagees to give them a mortgage whenever it became necessary to protect their interests, constitute a delivery, the consent of the mortgagees being presumed. The mortgage was upheld as against an assignment for creditors by the mortgagor, which was not effectively delivered until after the mortgage was filed. *Day v. Sines*, 15 Wash. 525, 46 Pac. 1048.

In *Re Guyer*, 69 Iowa, 585, 29 N. W. 826, a merchant, having previously agreed with one of his creditors to give him a chattel mortgage on the stock in case of financial embarrassment, executed such a mortgage and delivered it to a third person, not the agent of the mort-

gagee, who caused it to be recorded the day of its execution. The next day the mortgagor made an assignment for creditors. It was held that the mortgage was good as against the assignee. The court said that the law would presume that the mortgagee assented to the mortgage, but that the agreement established the assent without the aid of the presumption; that the assent expressed in the agreement was intended to and did continue up to the execution of the mortgage.

The ratification of a mortgage made and filed without the knowledge of the mortgagee will not avail against an intervening assignee of the mortgagor. *Dole v. Bodman*, 3 Met. 139.

Where a grantor delivers the deed to the officer, taking the acknowledgment, with unqualified instructions to deliver it to the grantee whenever he calls for it, and the grantee is informed of the deed and accepts it, but allows it to remain in the hands of the officer, the legal title vests in him, and the dower right of the widow of the grantor whom he subsequently married will not attach to the property. *Black v. Hoyt*, 33 Ohio St. 203. In this case the court said that the title vested in the grantee on the day the deed was delivered to the third person. It appears, however, that the grantee learned of and accepted the deed the next day, and that the marriage did not take place until some three months thereafter, so that it was immaterial whether the deed took effect on the day of its delivery to the third person, or the day of its actual acceptance by the grantee.

G. Grantor's interest in, and rights respecting, the property.

See also *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592, *supra*, II. d.

In *Loudon v. Todd*, 5 J. J. Marsh. 182, the grantor, after executing the deed and forwarding it to the grantee for acceptance, but before the latter had accepted it, instituted a bill to enjoin a tenant from removing wood, etc. The court held that he could not maintain the bill because, it appearing that the grantee had finally accepted the deed, the title had already passed out of the grantor before the suit was instituted.

In *Parker v. Dustin*, 22 N. H. 424, a grantor executed a deed to his son, and delivered it to a third person to be delivered to the grantee after the grantor's death. The grantor afterward informed the grantee of the deed, and the latter, with his permission, took possession of the property. Subsequently the grantor agreed with a neighbor upon a boundary line. After the grantor's death the deed was delivered to the grantee as directed. The question involved was as to whether the agreement of the grantor as to the boundary line was binding upon the grantee. The following instructions were held to be correct: If it was the intention and understanding of the grantor to deposit the deed in the hands of the third person to be delivered to the grantee at his decease without any condition, and without reserving any control of the deed, or of the property during his life, the property passed at once to the grantee, and he was not bound by the agreement; but if it was the intention of the grantor to reserve control over the deed and the property during his life, the deed did not, so far as the point in question was concerned, take effect during his life, and, therefore, his agreement would be binding upon the grantee.

When a deed is delivered to a third person with instructions to deliver it to the grantee after the grantor's death, the grantor parting with all control over it, the grantee does not

take a present fee in possession, but only a fee in remainder after the life estate of the grantor, which, by implication, is carved out of the fee, has terminated. Some of the cases proceed on the theory that the fee does not pass to the grantee until the delivery of the deed to him, and that his title then relates back to the original delivery. But the better rule is that the deed is immediately operative as against the grantor, and that the condition that the delivery to the grantee shall not be made until after the grantor's death is equivalent to reservation of a life estate in his favor in the land itself. The distinction, however, is not important for the purposes. *Arnegaard v. Arnegaard*, 7 N. D. 476, 41 L. R. A. 258, 75 N. W. 797.

A deed of conveyance in present terms is inconsistent with the retention of a life estate, and from the time when a deed is delivered as a conveyance the whole title goes with it and becomes irrevocable. *Taft v. Taft*, 59 Mich. 155, 60 Am. Rep. 291, 26 N. W. 426.

III. Summary.

The foregoing review of the authorities seems to warrant the following propositions: That delivery to a person previously authorized or designated by the grantee is equivalent to a delivery to the grantee himself (I.); that a valid delivery may be made by delivering the deed to a third person for the grantee with (II. a, 2) or without (II. a, 1) directions to deliver

the deed to the grantee after the grantor's death, if the grantor parts with all dominion and control over the deed at the time of its delivery to the third person (II. b, 1 and 2); that the recording of a deed by the grantor, or its delivery for record by him, while not in itself the equivalent of a delivery (II. b, 3, b) will nevertheless raise a presumption of delivery (II. b, 3, a) which will prevail in the absence of evidence showing that the grantor did not intend a delivery; that the return of the deed to, and its retention by, the grantor after record, is not necessarily fatal to the presumption of delivery from the record (II. b, 3, c). The courts, while insisting upon the necessity of acceptance (II. c, 1), adopt different theories with reference thereto (II. c, 3). Each theory, however, seems to be regarded by the courts which adopt it as sufficient to uphold the delivery as between the grantee, or his privies, on the one side, and the grantor, or persons having no rights superior to his, on the other (II. c, 3, a). The majority of the cases, however, without reference to which theory as to acceptance is adopted, seem to hold, when the express question is presented, that the rights of third persons, if superior to those of the grantor, *e. g.*, subsequent grantees or lien creditors, intervening between the delivery to the third person and actual acceptance by the grantee, are paramount to the deed (II. f).
G. H. P.

KANSAS SUPREME COURT.

STATE of Kansas

v.

Balfe H. STARK, Appt.

(.....Kan.....)

- *1. All places where intoxicating liquors are sold or kept for sale, or places where persons are permitted to resort for the purpose of drinking the same, are declared by statute to be common nuisances. This fact, however, does not justify their abatement by any person or persons without process of law. They can be abated only by a prosecution instituted in behalf of the public by the proper officer. The destruction or injury to property used in aid of the maintenance of such nuisances, except in the manner provided by the statute, is a trespass.
2. A change of venue in a criminal prosecution is a wrong to the public unless the necessities of justice to the accused require it. Prejudice on the part of a judge must clearly appear. A prima facie showing of prejudice is insufficient. The case of *Emporia v. Volmer*, 12 Kan. 622, followed.
3. In the commission of a misdemeanor there are no accessories. All persons aiding or counseling are principals.

(October 5, 1901.)

*Headnotes by SMITH, J.

NOTE.—The above case denying the right of private persons to destroy the property of another merely because it is used in aid of a public nuisance seems to be a novel one so far as it relates to the right to destroy such property summarily without any process of law.

That private persons have no standing to maintain an action to abate a merely public nuisance, see *Innis v. Cedar Rapids*, 1 F. & N. W. R. Co. (Iowa) 2 L. R. A. 282; *Henry v. Newburyport* (Mass.) 5 L. R. A. 179; *Swan*

A PPEAL by defendant from a judgment of the District Court for Shawnee County convicting him of malicious trespass. *Affirmed.*

Statement by Smith, J.:

The appellant, with Carrie Nation and six others, was charged by information with malicious trespass, under § 2053 of the General Statutes of 1899. The offense alleged was that defendants did, on or about the 17th day of February, 1901, wilfully, unlawfully, and maliciously break, destroy, and injure the door and windows of a building at No. 111 East Sixth street, in the city of Topeka, used as a cigar store and billiard hall by F. H. Murphy. Having obtained a separate trial, the appellant moved the court for a change of venue on the ground of the prejudice of the presiding judge against him. This application was based on language used by the judge towards Carrie Nation and three others, who were brought before him upon proceedings wherein they were held to give bond to keep the peace, the charges against them being substantially the same as those contained in the information against the appellant, to wit, the destruction of property. The latter, however,

son v. Mississippi & R. River Boom Co. (Minn.) 7 L. R. A. 673; *Melners v. Frederick Miller Brewing Co.* (Wis.) 10 L. R. A. 586; *Jacksonville, T. & K. W. R. Co. v. Thompson* (Fla.) 26 L. R. A. 410; *Mahler v. Brumder* (Wis.) 31 L. R. A. 693; *South Carolina S. B. Co. v. Wilmington, C. & A. R. Co.* (S. C.) 83 L. R. A. 541; *Miller v. Hare* (W. Va.) 39 L. R. A. 491; and *Griffith v. Holman* (Wash.) 54 L. R. A. 178, and footnote thereto.

was not a party to that prosecution. In addressing Mrs. Nation and the three others, the judge stated that the action of the parties was wholly unwarranted by any construction to be placed on the law, and further said: "I want to say to you people who appear charged with having aided and abetted her, that this is a court of law, and not one of sentiment. Having broken the law, you have no more rights in this court than the jointist. Your contempt of the law is as great as his. Mrs. Nation and her followers made an attack Sunday upon a perfectly legitimate business in which \$100,000 is invested. They have repeatedly broken the law, and destroyed property, and gone unhindered and unpunished. The time has come in this community when people are demanding that something be done. I want to say to you that this unwarranted destruction of property must stop. Have people no rights that a crazy woman and her deluded followers are bound to respect? There is not a lawyer in this room who will not tell you that you have no right under the law to do these things. . . . You have no right to attempt to abate a nuisance except through the regular channels. Reputable men in this community have given sanction to a movement that has led to riot, and may lead to bloodshed. I want to say to you people who have been placed under bond that if you go out on any more raids your bondsmen will be compelled to forfeit the amount to the last penny. I want to make this proposition clear to you. Property must and will be defended." The information was filed February 17th, and the case called for hearing February 20th, and thereon passed until February 25th. A motion was then made by appellant for a postponement on account of the sickness of Mr. Stone, one of his counsel, and for the reason that Mr. Martin, his other attorney, had been unable to prepare for trial. The application was made by Mr. Troutman and Mr. Bain, who appeared on behalf of the appellant, and showed that they had made no preparation for the trial. The application was overruled, a jury impaneled, and a verdict of guilty returned, followed by a fine imposed on the defendant of \$25, with the costs of the prosecution.

Messrs. Troutman & Stone, D. H. Martin, and Thomas H. Bain, for appellant:

Section 173 of the Code of Criminal Procedure provides that any criminal cause "shall be removed" to some other district, "where the judge is in anywise interested or prejudiced, or shall have been of counsel in the cause."

While the granting of a change of venue on the ground of local prejudice is discretionary with the trial court, if the application is based on the prejudice of the trial judge, he has no discretion to refuse it.

Goldsbey v. State, 18 Ind. 147; *Mershon v. State*, 44 Ind. 598; *Manly v. State*, 52 Ind. 215; *Duggins v. State*, 66 Ind. 350; *State v. Henning*, 3 S. D. 492, 54 N. W. 536; 54 L. R. A.

Smith v. State, 1 Kan. 366; *Re Peyton*, 12 Kan. 399.

When and where did the legislature prescribe a punishment for the offense of "advising, counselling, or encouraging" the breaking of doors and windows?

State v. Lewallen, 55 Kan. 690, 41 Pac. 948; *State v. Shenkle*, 30 Kan. 43, 12 Pac. 309; *State v. Cassady*, 12 Kan. 550; *State v. Douglass*, 44 Kan. 618, 26 Pac. 476; *State v. Horacek*, 41 Kan. 87, 3 L. R. A. 687, 20 Pac. 204; *State v. Nield*, 4 Kan. App. 639, 45 Pac. 623.

In the absence of prohibition by law no act is a crime however wrong it may seem to the individual conscience.

Clark, Crim. Law, 3.

Wherever a statute creates an offense, and expressly provides a punishment, the statutory provisions must be followed strictly and expressly.

Wharton, Crim. Law, § 10.

Mr. Galem Nichols, for appellee:

A change of venue is a wrong to the public unless the interests of justice to the defendant require it.

Emporia v. Volmer, 12 Kan. 627; *State v. Bohan*, 19 Kan. 53; *State v. Furbeck*, 29 Kan. 533; *Gray v. Crockett*, 35 Kan. 71, 10 Pac. 452; *State v. Knadler*, 40 Kan. 360, 19 Pac. 923; *Kansas Protective Union v. Gardner*, 41 Kan. 401, 21 Pac. 233.

Anyone who is personally aiding, abetting, or encouraging in the commission of an offense is equally guilty with those who actually commit the offense in person.

4 Bl. Com. 34; Crim. Code, § 115, Gen. Stat.; *State v. Gurnee*, 14 Kan. 120; *State v. Shenkle*, 30 Kan. 45, 12 Pac. 309; *State v. Cassady*, 12 Kan. 550; *State v. Brown*, 21 Kan. 50; *State v. Mosley*, 31 Kan. 355, 2 Pac. 782; *Sharpe v. Williams*, 41 Kan. 65, 20 Pac. 497.

Smith, J., delivered the opinion of the court:

The court did not err in overruling the application for a change of venue. The remarks of the judge were made to Carrie Nation and others in a proceeding to which the appellant was not a party. No personal prejudice towards Stark was shown. From all that appears, the judge might have been kindly disposed towards the defendant. The attack on Sunday, referred to by the judge, related to the conduct of other parties, with whom the appellant was not connected. Had the language coming from the bench been directed to Stark, he might have had reason to complain. His case was not, however, before the court at that time. It has been held that a change of venue is a wrong to the public unless the interests of justice to the defendant require it, and that prejudice on the part of a judge towards a defendant must clearly appear. It is not sufficient that a prima facie case only be shown. *Emporia v. Volmer*, 12 Kan. 622, 627. The record shows that the district judge tried the case with fairness, and the punishment imposed was exceedingly moderate, considering that the maximum for such offenses

is imprisonment in the county jail not exceeding one year, and by fine not exceeding \$500, or by both such fine and imprisonment.

The granting a continuance was largely a matter within the discretion of the court. The offense charged was a misdemeanor. We do not think any of the rights of the defendant were prejudicially affected by the absence of attorneys who had prepared for the trial. He was represented by counsel of high standing and ability, and we find nothing in the record to indicate that any point favorable to him was overlooked.

There was some confusion in the answers made by the juror Hale Ritchie touching his opinion of the guilt or innocence of the defendant, but his whole examination, taken together, does not show him to have been disqualified.

Complaint is made that several of defendant's witnesses on cross-examination were subjected to rigid inquiries as to the existence of a certain organization formed for the purpose of destroying property. Nothing more was extracted by the state from such witnesses than the defendant himself confessed concerning such organization. He admitted that he was a member of a company which assembled on the state house steps, and from there moved to the place where the property in question was injured, and that he took an ax along because he thought he might be called on to use it.

There was no error in the instruction that, if the defendant was present, advising counseling, or encouraging the breaking of the doors and windows, he was equally as guilty with those actually committing the offense, although he may not in person have injured said property. In misdemeanors all concerned, if guilty at all, are principals. *State v. Gurnee*, 14 Kan. 111; *Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497.

The appellant offered to prove that the prosecuting witness, at the time the trespass was committed and his property injured and destroyed, was the keeper of a place where intoxicating liquors were sold as a beverage in violation of law, and that the property in question was unlawfully used as an accessory thereto. This offer was rejected by the court, and the testimony excluded. Upon this ruling the question arises whether, the owner of the property having employed it as an aid to the maintenance of a common nuisance, the appellant was justified in being a party to its destruction without process of law. Under our statutes all places where intoxicating liquors are sold, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where such liquors are kept for sale, barter, or delivery in violation of the prohibitory liquor law, are declared to be common nuisances; and upon the judgment of a court having jurisdiction that such places are nuisances the sheriff or constable or marshal of any city where the same are located shall be directed to shut up and abate such places by taking possession thereof, and of all intoxicating liquors found therein, together with all

signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisances, and the same shall be forthwith publicly destroyed by such officer. It is further provided that the attorney general, county attorney, or any citizen of the county where such a nuisance exists may maintain an action in the name of the state to abate and perpetually enjoin it. Here is a complete legal remedy, easy to obtain, which was open to the appellant or any of his associates. Indeed, we believe it to be more drastic and summary in its application to the subject than the law of any other state in the Union. The existence of such common or public nuisance as appellant offered to show was kept by the prosecuting witness, in violation of law, injuriously affected all other persons in the city of Topeka equally with himself. It is not claimed that he was specially injured, or peculiarly or individually hurt, in any other manner or degree than in common with all others in the community. He could not have maintained an action in his own name to abate the nuisance. *Jones v. Chanute* (Kan.) 65 Pac. 243. In the case of *Brown v. Perkins*, 12 Gray, 89, the supreme court of Massachusetts had before it a similar question. In an action of tort for breaking and entering the plaintiff's shop and carrying away and destroying a barrel of vinegar and other goods, the answer of the defendant alleged that the building was kept for the sale of intoxicating liquors, and was a public nuisance; that a large number of persons assembled to abate the same, and destroyed or injured no article of merchandise, but only spirituous liquor, unlawfully kept for sale, and did no other act and used no more force than was necessary to abate such nuisance. By statute in force in Massachusetts at that time all intoxicating liquors kept for sale, and the vessels and implements actually used in selling and keeping the same, were declared to be common nuisances, and were to be regarded and treated as such. By another statute all buildings or tenements used for the illegal keeping or sale of intoxicating liquors were declared to be common nuisances. The trial court instructed the jury that intoxicating liquors kept for sale, with the vessels containing them and articles used in their sale, being declared by law to be a common nuisance, it was lawful for any person to destroy them by way of abatement, and that such action would be the exercise of a common and lawful right. This instruction was held to be erroneous. The opinion was delivered by Shaw, Ch. J., one of the ablest of American jurists, and we extract from it such portions as are most pertinent to the question before us: "It is not lawful by the common law for any and all persons to abate a common nuisance merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never intrusted to individuals in general, without process of law, by way of vindicating the public right, but solely

for the relief of a party whose right is obstructed by such nuisance." Page 101. "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable water-course, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law." Pages 101, 102. "The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children, or servants of any person do frequent such a place, and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold, and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law." Page 102. The enunciation of the law finds approval in all the text-books upon the subject, so far as we have examined them. Wood, Nuisances, 3d ed. pp. 968-969; Webb's Pollock, Torts, p. 515, note. See also *Corthell v. Holmes*, 87 Me. 24, 32 Atl. 715. In Webb's Pollock, on Torts, p. 517, it is stated that in England the application of the remedy of abatement by the forcible act of an individual is now in use only as to rights of common rights of way, and sometimes rights of water, "and even in those cases it ought never to be used without good advisement." A fence across a public road is a common nuisance, which a person journeying along the highway may legally abate by removing the obstruction. This is so because his progress is impeded, and particular injury is sustained by him not shared in by the community generally. This right of abatement, however, cannot be lawfully exercised by one living at a distance from the obstructed way, with no immediate occasion to use it, who goes out for the express purpose of removing the impediment in the interest of the traveling public, for fear that he or his neighbors might receive injury from it. The appellant and his associates proceeded on the erroneous belief that, because the prosecuting witness was a violator of the law, they might right the wrongs the public was suffering by his acts, and this in a summary manner, by resort to physical

force, guided only by the counsels of a mob. It was a congregation of law breakers on one side retaliating upon an individual law breaker on the other for lawless acts of the latter which affected, not them alone, but hundreds of others (the public), whom they assumed to represent. Courts of justice cannot approve or countenance such disregard of the law. To do so would create and encourage disrespect for all governmental restraint, which is the beginning of anarchy. *The judgment of the District Court will be affirmed.*

All the Justices concur.

Rehearing denied.

H. C. POHLMAN, *Plff. in Err.*,
v.

G. F. DAWSON *et al.*

(.....Kan.....)

*Defendant, who was a barber and owner of a shop, sold his furniture, tools, and fixtures to the plaintiffs, and agreed that he would not engage in the barber business in any manner in the town of Russell. *Held*, that a decree enjoining defendant from working as an employee of the owner of another barber shop in that town will be sustained.

(July 6, 1901.)

ERROR to the District Court for Russell County to review a judgment in favor of plaintiffs in an action brought to enjoin defendant from engaging in the barber business. *Affirmed.*

The facts are stated in the opinion:

Messrs. L. B. Beardsley and W. G. Eastland, for plaintiff in error:

All contracts of this kind are to some extent against public policy, and their provisions are not to be extended by construction or implication.

Roller v. Ott, 14 Kan. 609; *Richardson v. Emmert*, 44 Kan. 265, 24 Pac. 478.

From reading the contract as a whole, the words as therein used, "in any manner," in their usual and ordinary interpretation, which should be given them, admit of but one construction, and that is, that plaintiff in error was not to own, operate, carry on, control, or conduct a barber business in Russell, Kansas, on his own account, or by an agent or partner.

*Headnote by SMITH, J.

NOTE.—For earlier cases in this series as to contracts in restraint of trade generally, see *Western Wooden Ware Assn. v. Starkey* (Mich.) 11 L. R. A. 503; *Gamewell Fire Alarm Teleg. Co. v. Crane* (Mass.) 22 L. R. A. 673, and note; *Cowan v. Fairbrother* (N. C.) 32 L. R. A. 829; *Lufkin Rule Co. v. Fringell* (Ohio) 41 L. R. A. 185; *Anchor Electric Co. v. Hawks* (Mass.) 41 L. R. A. 189; *Trenton Potteries Co. v. Olliphant* (N. J. Eq.) 46 L. R. A. 255; *Stovall v. McCutchen & Co.* (Ky.) 47 L. R. A. 287; and *Steichen v. Fehleisen* (Iowa) 51 L. R. A. 412.

A mere employee—one who works in a barber shop owned and operated by another—is not engaging in the business in any manner.

Richardson v. Emmert, 44 Kan. 262, 24 Pac. 478; *Tabor v. Blake*, 61 N. H. 83. *Mr. George W. Holland* for defendants in error.

Smith, J., delivered the opinion of the court:

This was an action brought by plaintiffs below to enjoin the plaintiff in error from working at the barber trade in the town of Russell in violation of the terms of a contract made by him with the plaintiffs. It is alleged in the amended petition that the parties entered into a written contract, a copy of which is set out, in which plaintiff in error, for adequate consideration, agreed as follows: "I, H. C. Pohlman, do hereby sell and assign all my right, title, and interest to the building now used by me as a barber shop, together with all furniture, tools, and materials in said shop, to G. F. Dawson. I also agree not to engage in the barber business in any manner in Russell, Kansas, while said G. F., E. E., or H. A. Dawson shall conduct the same." The petition avers that, at the time the action was brought, Pohlman was working at the barber trade in Russell, Kansas, in a shop run by one Clarence Lester, in violation of the terms of the contract, to the great damage of plaintiffs; that he commenced work in said shop, in violation of his agreement, on or about the 21st day of July, 1898, and has worked ever since, and is now working, at said barber trade. The defendant below demurred to this petition on the ground that it stated no cause of action. His demurrer was overruled, and, electing to stand thereon, a perpetual injunction was decreed against him, and he comes here by proceedings in error.

The principal contention is that the plaintiff in error was not violating the terms of the contract in working for the proprietor of another shop. We disagree with counsel in this claim. The contract is that Pohlman should not engage in the barber business in any manner in Russell, Kansas. This means

that he would not carry on said business after the manner of either a proprietor or an employee. We think that by the comprehensive language used he contracted not to work as a barber for any other person in that town so long as defendants in error were in business. Engaging himself as an employee in a rival shop would result in greater harm to the defendants in error than if the parties had been carrying on a purely commercial business. The barber sustains personal relations with his customers, which are at least quasi professional. Formerly, by statute (32 Hen. VIII. chap. 42), in England, barbers were united with a company of surgeons; it being enacted that they should confine themselves to the operations of bloodletting and drawing teeth. While a barber no longer practises surgery or extracts teeth, his vocation depends for success on the skilful sharpening of his blade and the dexterity of its use. It differs essentially from a commercial pursuit. The patrons of a mercantile establishment are generally indifferent concerning the ability and experience of a clerk or proprietor, whose dealings with them are chiefly confined to quoting prices, and separating from the stock such quantities of goods as the customer buys. The owner may sell out to another and set up again for himself in the same business near by, yet purchasers find what is suitable to their wants still exposed for sale by the new proprietor at the old stand. Like the surgeon or dentist, when the barber moves he attracts to himself those having confidence in his ability; and, the greater his professional skill, the more difficult it is to alienate from him those to whom his services have given satisfaction. The claim that the amended petition did not relate back to the time the action was commenced cannot be sustained. There is an express averment that it does so, and the verification states that the facts set out were true when the original petition was filed.

The judgment of the court below will be affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

E. A. MONTGOMERY, Appt.,
v.

City of LEBANON.

(.....Ky.....)

A farmer who, to give his children school facilities, takes a house in town, in which he places some of his household effects and lives with his family, is not subject to taxation there, where he keeps his country house at all times in readiness

to receive the family when the purpose of their sojourn in town shall have been accomplished, and performs his duties as a citizen where his country house is located, claiming that as his home.

(October 2, 1901.)

A PPEAL by complainant from a judgment of the Circuit Court for Marion County in favor of defendant in a suit to enjoin the collection of certain taxes which had been assessed against complainant. *Reversed.*

The facts are stated in the opinion.
Mr. H. W. Rives for appellant.
Mr. H. P. Cooper for appellee.

NOTE.—For cases in this series as to acquiring residence as a voter while attending school, see note to *Wolcott v. Holcomb* (Mich.) 23 L. R. A. 215, and *Re Barry* (N. Y.) 52 L. R. A. 851.

54 L. R. A.

Guffy, J., delivered the opinion of the court:

It is substantially alleged in the petition that the appellant was, and had been for many years, a citizen of Marion county, residing and making his home upon his farm, owned by him, a few miles from Lebanon; that his farm and a dwelling thereon constituted his home, and the proceeds of his cultivation and management of the farm were the source of his income from which he derives support for himself and family, and that he had no other business, that a short time since, desiring to have his children within convenient access to the schools in the city of Lebanon while they were of school age, he, with his family, removed many of his household effects to a house in the city of Lebanon owned by plaintiff's wife, and his family now occupy said house for the purpose aforesaid. It is further averred that he was still devoting his attention to his farming and his dwelling thereon, which he has never abandoned as his permanent home, and which he keeps in condition ready at all times to receive his family when the purpose of their sojourn in Lebanon shall have been accomplished, or when they desire to return; that his farm is his only home, his residence in Lebanon temporary; that he at all times continued to perform his duties as a citizen in the precinct in which his said home is situated, being a regularly appointed and acting surveyor of a public highway in said precinct; that he had not at any time sought or undertaken to exercise any of the privileges pertaining to citizens having their domicile in the city of Lebanon, and has never at any time claimed a home in said city. The petition further shows that against his protest the officers of Lebanon had listed him for taxation as a citizen, and had assessed against him for municipal taxation \$1,800 of personalty, consisting of cash, cash notes, etc., and charged against him a *per capita* or poll tax. A perpetual injunction was asked for restraining the officers from compelling him to pay said taxes. The answer of the appellee, city of Lebanon, may be treated as a traverse of all the material averments of the petition which tend to show a right to relief. It is further alleged, in substance, that about two years before the institution of the suit plaintiff and his wife, with the intention of making the city their permanent home, constructed a very commodious and costly residence, in which plaintiff and his wife and children have resided and lived at all times since its construction. It also shows that he sends his children to the school located in the city free of charge; that his wife, Little Montgomery, did not and does not intend abandoning her home in the city of Lebanon. The reply traverses the material averments of the answer except as to the building of the house for his wife and the fact that he sends his

children free to school, he paying his proportion of the tax imposed by the state for schools. The court, upon final hearing, dismissed plaintiff's petition, and from that judgment this appeal is prosecuted.

We deem it unnecessary to recite in detail the evidence at length introduced by the parties. Nor is it necessary to enter into an extended discussion of the law in respect to the domicile of a party, nor what it takes to constitute a domicile to acquire one, or to lose one's domicile. An extended discussion of these questions may be found in 10 Am. & Eng. Enc. Law, 2d ed. pp. 18 *et seq.* The intention of a party to hold or acquire his domicile is always a very material fact, and is entitled to much weight in determining the legal domicile of a party. Notwithstanding this, the manifest actions and conduct of a party may be properly held to fix and determine his true domicile despite his declared intention. In the case at bar it is clear that appellant never became domiciled in Lebanon unless he became so by reason of the facts occurring within two years preceding this litigation. His domicile was certainly in the county, not far from Lebanon, but outside of it. His only business is farming. He cultivates his farm, or has it cultivated. Part of his household goods remains in his house on his farm. He retains the right to remove his family back to his house at any time, and he says he spends most of his time on the farm, and that he removed his family to Lebanon to stay only while his two children were in the school age, the youngest of whom was sixteen years old at the time of the trial. He says he never exercised any of the privileges of citizenship peculiar to the city, never registered there as a voter. It is true that he sends his children free to the free school in Lebanon, but it does not appear that there is any special municipal tax collected for the support of the free school, and it is claimed for appellant that, inasmuch as he pays his share of the state tax devoted to free schools, he should be allowed to send his children to the free school in whatever district they might for the time being reside. After careful consideration of the law and facts of the case, we have reached the conclusion that the appellant had not, at the time of the trial of this case, lost or abandoned his country domicile. It results, therefore, that the court erred in dismissing his petition. We do not mean, however, to determine or decide that an indefinite continuation of his residence in Lebanon, or other acts, may not work a forfeiture of his country domicile, and authorize the court to hold that his true domicile is in Lebanon.

The judgment appealed from is reversed, and cause remanded, with directions to perpetuate the injunction against the collection of the taxes then assessed, and for proceedings consistent herewith.

COMMONWEALTH of Kentucky, *Appt.*,
v.
MOBILE & OHIO RAILROAD COMPANY.

(.....Ky.....)

1. A statute permitting a foreign railroad corporation to extend its road through the state, subject to the restrictions prescribed by its charter for its government within the state of its domicile, when accepted, constitutes a contract which will preclude the state from subsequently requiring it to become domesticated as a condition to its continued enjoyment of the privilege.
2. Compelling a foreign railroad corporation operating a portion of its road within the state to become domesticated is not an unlawful interference with interstate commerce.
3. The equal protection of the laws is not denied to a foreign railroad corporation operating a portion of its road within the state, by compelling it to become domesticated as a condition to its continuing such operation.

(*Guffy, J., dissents.*)

(September 27, 1901.)

APPPEAL by the Commonwealth from a judgment of the Circuit Court for Carlisle County in favor of defendant in a prosecution against it for violating the statute requiring it to become domesticated as a condition of continuing business within the state. *Affirmed.*

The facts are stated in the opinion.

Mr. Robert J. Breckinridge for appellant.

*Messrs. Lansden & Leek, Saffold Bern-
ney, and Shelbourne & Kane* for appellee.

O'Rear, J., delivered the opinion of the court:

Appellee, Mobile & Ohio Railroad Company, was incorporated by the state of Alabama February 3, 1848, with the usual powers and privileges, looking to the construction of a line of railway from Mobile, Alabama, to some point on the Ohio or Mississippi river. On the 26th day of February, 1848, the legislature of this state passed the following enabling act:

"An Act to Authorize the Mobile & Ohio Railroad Company to Extend Their Railroad from the South Boundary Line of the State of Kentucky to the Mississippi or Ohio Rivers.

"Sec. 1. Be it enacted by the general assembly of the commonwealth of Kentucky, that the Mobile & Ohio Railroad Company, when formed, under the act of the general assembly of the state of Alabama, approved February 3, 1848, entitled, 'An

Act to Incorporate the Mobile & Ohio Railroad Company,' shall be allowed the privilege of making a necessary reconnaissance and survey, for the purpose of ascertaining the most eligible route for extending their Mobile & Ohio Railroad to any point upon the Mississippi or Ohio rivers, in this state.

"Sec. 2. That as soon as said route and point shall be ascertained, the said Mobile & Ohio Railroad Company shall be allowed the right of way for the extension and construction of their said railroad, from the Tennessee line to the Mississippi or Ohio rivers; and that they shall be entitled to all the privileges, rights, and immunities, and subject to all such restrictions as are granted, made, and prescribed, for the benefit, government, and direction of said Mobile & Ohio Railroad Company, within the state of Alabama, by the act above described." Acts 1847-48, chap. 392.

The company was formed under the charter granted by the parent state, and did build and operate thereunder its road from Mobile through Alabama, Mississippi, Tennessee, into and through Kentucky, and Illinois to St. Louis, Missouri. Appellee has been operating its line of railroad under the legislative grants above named from 1848 to the present time although a portion of its road in Kentucky, from South Columbus to East Cairo, a distance of some 20 miles, was built since 1856, and along the line of way proposed for the Kentucky & Tennessee Railroad Company, incorporated by the legislature of this state February 23, 1870. The charter privileges of the latter company seem to have been acquired by appellee by permissive provisions of both the charters of appellee and of the Kentucky & Tennessee Railroad Company. Section 841, Ky. Stat., which became a law July 12, 1893, provides as follows: "No company, association, or corporation created by, or organized under, the laws or authority of any state or country other than this state, shall possess, control, maintain, or operate any railway, or part thereof in this state until, by incorporation under the laws of this state, the same shall have become a corporation, citizen, and resident of this state. Any such company, association, or incorporation may, for the purpose of possessing, controlling, maintaining, or operating a railway or part thereof in this state, become a corporation, citizen, and resident of this state by being incorporated in the manner following, namely: By filing in the office of the secretary of state, and in the office of the railroad commission, a copy of the charter or articles of incorporation of such company, association, or corporation, authenticated by its seal and by the

NOTE.—For a case in this series holding that foreign corporation acquires no vested rights by complying with existing police regulations or comity laws, which cannot be affected by subsequent changes in such regulations or laws, see *State on Information of Crow v. Firemen's Fund Ins. Co. (Mo.)* 45 L. R. A. 363.

As to recognition or exclusion of foreign corporation by state, see *Cone Export & Commission Co. v. Poole (S. C.)* 24 L. R. A. 289, and note.

For exclusion of foreign corporation as an interference with interstate commerce, see note to *Kindel v. Beck & P. Lithographing Co. (Colo.)* 24 L. R. A. 311.

attestation of its president and secretary; and thereupon and by virtue thereof, such company, association, or corporation shall at once become and be a corporation, citizen, and resident of this state. The secretary of state shall issue to such corporation a certificate of such incorporation." Appellee continued to operate its road in Kentucky after the passage of the foregoing act, and, failing to incorporate under the laws of this state, it was indicted and tried in the Carlisle circuit court in November, 1900, for the alleged violation of the provisions of this act. The circuit court found the defendant not guilty, and the commonwealth has appealed.

Following is the judgment rendered by the circuit court: "This cause coming on for trial, the defendant entered a motion to dismiss the indictment for the following reason: That §§ 841, 842, Ky. Stat., on which this indictment is based, are unconstitutional. And for the purpose of trying the constitutional question the facts were agreed and written, and were filed, and Exhibits A, B, C, D, and E filed as evidence, the same specified in agreement of facts, and jury was waived, and cause submitted to the court on the agreed facts, whereupon the court held that § 841 did not apply to defendant company, or, if it did apply to defendant company, that it was unconstitutional, in that it impairs the obligation of the grant of the Kentucky general assembly to the M. & O. R. R. Co., approved February 26, 1848, and, so far as that company is concerned, that it is a regulation of commerce among the states; and therefore the indictment is dismissed, to all of which the commonwealth objects and excepts, and prays an appeal, which is granted."

It was the contention of appellee on the trial below, and is its argument here, that the act of February 26, 1848, quoted above, constituted a contract between the state of Kentucky and the Mobile & Ohio Railroad Company; that, therefore, in so far as the provisions of § 841, Ky. Stat., passed subsequent to February, 1848, imposed additional conditions upon, or in any wise altered the provisions of, the original grant to appellee, it was not applicable to this company, or, if applicable, such provisions were contrary to the provisions of § 10, art. 1, of the Constitution of the United States. It was and is further urged by appellee that, its business being admittedly the carrying of commodities and passengers between and among two or more of the states, it was interstate commerce, and that § 841 is an interference with said interstate business, and violates the 3d clause of § 8, art. 1, of the Constitution of the United States. It is again argued for appellee that § 841 violates the 14th Amendment of the Constitution of the United States, in that it denies to foreign railroad companies in Kentucky the equal protection of the laws.

What was the nature of the grant, or, rather, the legal character and effect of the act of legislature of February 26, 1848, conferring certain privileges upon appellee corporation?

The position assumed in argument for the commonwealth by the attorney general is that the act "is neither a charter, a contract, nor a grant, but is only a license." It is not claimed by appellee that the act is a charter, as that term is generally applied in law. And it argues that "contract" embraces both "grant" and "license." It is to be observed that the Kentucky legislature, by the act in question, in the very title of it, stated the purpose of the act, viz.: "An Act to Authorize the Mobile & Ohio Railroad Company to Extend Their Railroad from the South Boundary Line of the State of Kentucky to the Mississippi or Ohio Rivers." It may be assumed that both the legislature of Kentucky and the railroad company regarded the permission of the state to construct and operate the railway through its territory to be necessary. This act was to grant to the railroad company that consent, and to impose the terms upon which the privilege or right was granted. The first section of the act gave the company the right, upon its organization under the original charter, "to make any necessary reconnaissance and survey for the purpose of ascertaining the most eligible route" for extending the proposed road. Section 2 of the act then provided that after such route might be ascertained the railroad company "shall be allowed the right of way for the extension and construction of their said railroad from the Tennessee line to the Mississippi or Ohio rivers." Thus are the purpose of the act and the right conferred clearly set forth. It may be said, without question, that the Kentucky legislature may have imposed such conditions upon the exercise of the right granted as to it seemed just and expedient. And the conditions so imposed would be part of the grant. Now, what were the conditions actually imposed? We find them in the language of the closing clauses of the 2d section of the act,—that the company "shall be entitled to all the privileges, rights, and immunities, and subject to such restrictions as are granted, made, and prescribed, for the benefit, government, and direction of said Mobile & Ohio Railroad Company, within the state of Alabama, by the act above described." Act Feb. 3, 1848. The state of Kentucky having offered the right to construct and operate the railroad in question, and named the only restrictions reserved by it to be ones similar to those reserved in the charter granted by Alabama, it remained to the company to either accept the terms named, and build subject to them, or to refuse to enter the state with its road. It chose the former course. The terms of the Alabama charter are contained in the copy of the act of its general assembly, approved February 3, 1848, and copied into the record. It is sufficient to say that there is nothing in that requiring or looking to the imposition of such conditions as are named in § 841, Ky. Stat.

What may constitute a grant by the state a contract, within the meaning of the Federal Constitution? Since *Dartmouth Col-*

lege v. Woodward, 4 Wheat. 518, 4 L. ed. 629, and perhaps the most famous judicial utterance of the past century, it has not been an open question in this country that a legislative grant to a corporation is a contract, within the meaning of the Constitution. Where the legislature grants franchises or privileges to a corporation, without reservation of right to amend or repeal the grant, and the corporation accepts it, and expends money or acquires property rights based thereon, it is not competent for the state to subsequently, by amendment or independent enactment, impose additional conditions upon the privilege of exercising the franchises or using the rights so previously granted. On this point Mr. Justice Story, in the first-cited case, said pp. 683, 684, 4 Wheat., and p. 670, 4 L. ed.: "When a contract has once passed bona fide into grant, neither the King nor any private person who may be the grantor can recall the grant of the property, although the conveyance may have been purely voluntary. A gift completely executed is irrevocable. The property conveyed by it becomes, as against the donor, the absolute property of the donee, and no subsequent change of intention of the donor can change the rights of the donee. 2 Bl. Com. 441; Jenkins, Cent. 104. And a gift by the Crown of incorporeal hereditaments, such as corporate franchises, when executed, comes completely within the principle, and is, in the strictest sense of the terms, a grant. 2 Bl. Com. 317, 346; Shep. Touch. chap. 12. . . . And a grant of franchises is not, in point of principle, distinguishable from a grant of any other property." And he further said (p. 675, 4 Wheat., and p. 668, 4 L. ed.): "Unless a power be reserved for this purpose, the Crown cannot, in the virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them." And further along (p. 699, 4 Wheat., and p. 674, 4 L. ed.): "In respect to franchises, whether corporate or not, which include a perannuity of profits, such as a right of fishery, or to hold a ferry, a market, or a fair, or to erect a turnpike, bank, or bridge, there is no pretense to say that grants of them are not within the Constitution. . . . The truth, however, is that all incorporeal hereditaments, whether they be immunities, dignities, offices, or franchises, or other rights, are deemed valuable in law. . . . Whenever they are the subject of a contract or grant, they are just as much within the reach of the Constitution as any other grant." That this case, decided in 1819, both from its profoundly important utterances, as well as the connection with it of most illustrious and distinguished advocates and jurists, attracted the attention of the Kentucky legislature, in common with that of all other lawmaking bodies, cannot be doubted. Yet the legislature omitted to reserve in its grant of 1848 any right of future control over the rights ceded to the railroad company, further than were retained by the provisions of the Alabama

charter. Furthermore, we find that the legislature, by its act of February 14, 1856, tacitly recognized that it had no control over such rights as it had previously granted to corporations, and which rights had become vested, for it provided in the act of that date as follows: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to repeal at the will of the general assembly, unless a contrary intent be therein plainly expressed: provided, that whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested." [Ky. Stat. (1894) § 1987].

We are now brought to the consideration of the question whether, if the provisions of § 841, Ky. Stat. be applied to appellee, it is an impairment of its grant of February 26, 1848. On this point the attorney general argues that an obedience by appellee to § 841 would not require it to "surrender a single right or power it has ever lawfully had or exercised in Kentucky." But, if it could not lawfully exercise them as heretofore, that would be equivalent to being denied the right to exercise them at all. For appellant it is argued that, to fulfil the requirement of the section named, it would be compelled to change its status from that of a foreign corporation to a domestic one. In other words, it would be compelled to become a citizen of Kentucky. One of the advantages now thought to pertain to its non-residency is the privilege of claiming the jurisdiction of the Federal courts in certain actions. Others of equal or greater value in fact may readily occur to the mind. But we apprehend that the real question is not to the extent of any change of condition, but whether there is in fact any change. The imposition of further conditions to be performed by the grantee, other than the police regulations, before it can lawfully use or enjoy the privileges theretofore granted to it, is essentially a change of the contract. A case very much like the one at bar is that of *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952. It appears that the railroad company, a New York corporation, was permitted by an act of the Pennsylvania legislature to build some 42 miles of its railway through two counties of the latter state. The permission was granted upon certain stated conditions in regard to taxation and rate of freight on certain kinds of coal, etc. Subsequently the state of Pennsylvania enacted a law under a section of which it sought to levy and collect a tax upon the New York corporation on an entirely different basis from that prescribed in the act granting the franchise or right to build its road in the state. The company resisted the attempt. The state courts having decided the question adversely to it, it appealed to the Supreme Court of the United States. In the latter court it was held, speaking of the effect of the Pennsylvania acts: "Those acts prescribed the terms and conditions up-

on which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory.

Consistently with those terms and conditions Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the state, in the exercise of its police powers for purposes of taxation and for other public objects, may legally impose with respect to business carried on and property situated within its limits." If § 841 is applied to appellee, it will be required, in order to continue the use and enjoyment of the privileges granted to it in 1848, to do something in addition to that required by the terms of its grant. It will be compelled to take up the burdens of a citizenship, which it has not hitherto had to bear, and deprive itself of privileges deemed by many, or all similarly situated, to be of considerable pecuniary value. This would be manifest, substantial impairment of the obligation of the state's contract, and is therefore repugnant to § 10, art. 1, of the Constitution of the United States.

The majority of the court are of the opinion that, even were the statute in question (§ 841) enforced against appellee it would not be such an interference with the interstate traffic in which appellee is engaged as to fall within the inhibition of the Federal Constitution on that subject. Nor is the court of opinion that the 14th Amendment to the Constitution is in any wise infringed, or would be, by the enforcement of the statute in question against the appellee.

For the reasons indicated, the judgment appealed from is affirmed.

Guffy, J., dissents.

J. P. WALDRON, Admr., etc., of Solon Fagg, Deceased, Appt.,
v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(.....Ky.....)

A railroad company is liable to one who, having without right and while in a drunken and helpless condition at night boarded a train standing in a cut, is immediately ejected from the train with knowledge on the part of the trainmen that a passenger train will soon pass through the cut, for injuries by the latter train, which

NOTE.—For other cases in this series as to exposure of drunken passenger to danger by ejection from car, see *Roseman v. Carolina C. R. Co.* (N. C.) 19 L. R. A. 827, and note; and *Louisville & N. R. Co. v. Johnson* (Ala.) 31 L. R. A. 372.

As to liability for death of drunken man ejected from railroad station, see *Haug v. Great Northern R. Co.* (N. D.) 42 L. R. A. 664, 54 L. R. A.

its superintendent and nearest station agent, who have been informed of his peril, make no effort to avoid.

(*Du Relle and Burnam, JJ., dissent.*)

(May 28, 1901.)

APPEAL by plaintiff from a judgment of the Circuit Court for Simpson County in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. Roark & Finn, for appellant:

In exercising the right of ejecting passengers, it should not be done at a time and place, and under such conditions and circumstances, as would necessarily expose the person ejected to great peril of life or bodily harm, whether the attendant danger arises from the natural infirmity of the person or is self-imposed.

Louisville, C. & L. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186; *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372, 19 So. 51; *Louisville & N. R. Co. v. Logan*, 88 Ky. 232, 3 L. R. A. 80, 10 S. W. 655; *Louisville & N. R. Co. v. Ferrell*, 7 Ky. L. Rep. 607; *Louisville & N. R. Co. v. Moss*, 13 Ky. L. Rep. 684; *Louisville, St. L. & T. R. Co. v. Gatewood*, 14 Ky. L. Rep. 108; *Louisville & N. R. Co. v. Ellis*, 97 Ky. 330, 30 S. W. 979; *Thurman v. Louisville & N. R. Co.* 17 Ky. L. Rep. 1344, 34 S. W. 803; *Brown v. Louisville & N. R. Co.* 103 Ky. 211, 44 S. W. 648; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601; *Burch v. Baltimore & P. R. Co.* 3 App. D. C. 346, 26 L. R. A. 129; *Haug v. Great Northern R. Co.* 8 N. D. 23, 42 L. R. A. 667, 77 N. W. 97.

The law requires humane treatment. It censures that conduct which evinces such a disregard for human life as to shock the conscience of good citizenship.

If the station agent at Franklin knew that Fagg was in this deep cut upon this dark and stormy night, upon defendant's roadbed, and in a drunken helpless condition, and also knew that this north-bound passenger train would of necessity run over and probably kill him, and yet stood idly by, perfectly unconcerned, taking no precaution whatever, absolutely failing to notify those in charge of said passenger train to be on the lookout and guard against any injury to him, is not such conduct just as cruel, as brutal, as merciless, and as inhuman as if those actually in charge of said north-bound train had notice of his danger and failed to take any precaution to prevent the same?

The company is liable for an injury to trespassers by negligence when those in charge of the train discover the peril, because knowledge of danger by the servants in charge of the train is knowledge by the company, they being agents of the company.

Louisville & N. R. Co. v. Coleman, 86 Ky. 556, 6 S. W. 438, 8 S. W. 875.

The crew upon the passenger train could have stopped and rescued Fagg without en-

dangering the life of any passenger; bringing it within the rule laid down in *Reed v. Louisville & N. R. Co.* 20 Ky. L. Rep. 816, 47 S. W. 591.

Messrs. J. A. Mitchell and Edward W. Hines, for appellee:

Neither paragraph of the petition states a cause of action.

If Fagg had been discovered in the attempt to board the train, and defendant's servants had prevented him from doing so, would defendant have owed him the duty of removing him to a place of greater safety? Clearly not, and surely the fact that he succeeded in getting on the train before he was discovered did not deprive defendant's servants of the right to put him off at the very place where he got on.

Reed v. Louisville & N. R. Co. 20 Ky. L. Rep. 815, 47 S. W. 591.

The mere allegation that the defendant's agents knew of the presence of Fagg on the track in a drunken and helpless condition is not sufficient to show that they had reason to believe that he could not get out of the way of an approaching train.

Notice will not be imputed to the principal, unless the knowledge of the fact reaches the agent while acting for his principal, either generally, or with reference to the transaction to which the notice relates.

4 *Thomp. Corp.* § 5197; 1 *Elliot, Railroads*, § 226; *Day v. Wamsley*, 33 Ind. 145; *Walker v. Hannibal & St. J. R. Co.* 121 Mo. 575, 24 L. R. A. 363, 26 S. W. 360; *Congar v. Chicago & N. W. R. Co.* 24 Wis. 157, 1 Am. Rep. 164.

Paynter, Ch. J., delivered the opinion of the court:

The plaintiff, *J. P. Waldron*, administrator of *Solon Fagg*, deceased, instituted this suit against the appellee to recover damages for the alleged negligent killing of the intestate. The question here for review is the action of the court in sustaining a demurrer to the petition as amended, and in dismissing it upon appellant's failure to plead further. It is in two paragraphs, but, in our opinion, it was not necessary or proper to thus paragraph it. If it is good, it simply states one cause of action; that is, the appellee's negligent killing of the appellant's intestate, which resulted in damage to the estate of the intestate. Because there may have been one or more acts of negligence which produced the injury resulting in death does not make it proper, in stating the cause of action, to do so in as many paragraphs as there may have been acts of negligence which separately or collectively produced the injury. So, in stating the averments of the petition, we will do so as though it was not paragraphed. It is averred that there is a deep cut upon the defendant's roadbed in the city of Franklin, immediately north of defendant's north switch; that upon a night in December, 1898, the decedent, *Solon Fagg*, was in a drunken and helpless condition, and at about 8:00 o'clock upon that night, while in that condition, boarded the north-bound freight train

in the cut; that the night was dark and rainy; that the agents and servants of defendant in charge of the freight train knew the drunken and helpless condition of the decedent; that they knew that other trains of the defendant would shortly pass through the cut, yet they then and there negligently and wrongfully ejected him from the train; that it was natural and probable that death or great bodily harm would be inflicted upon him by reason of being ejected from the train; that upon the same night, while upon the track in the cut, drunk and in a helpless condition, he was run over and killed by one of the defendant's trains; that upon the night in question the defendant's superintendent at Nashville, Tennessee, and its agent at Franklin, Kentucky, had notice that he was in the cut upon defendant's track in a drunken and helpless condition; that the superintendent and agent knew that in a short while a north-bound passenger train would pass through the cut where he was, and that he was in great danger; that the superintendent and agent had ample time and opportunity to notify defendant's crew in charge of the north-bound passenger train which would shortly pass through the cut that he was in the cut, and to take other precautions to prevent his injury; that they failed to notify the crew upon that north-bound passenger train concerning him, and failed and refused to use any care or take any precaution to prevent injury to him; that the north-bound passenger train ran over and killed him in the cut upon the night in question. In an amended petition it is averred that the decedent was killed at the point where he was ejected from the train; that if the superintendent at Nashville and the agent at Franklin had notified the crew upon the passenger train of the position which he occupied, and of his condition, those in charge of it could and would have avoided injuring him, without endangering the passengers or the train. The foregoing averments are substantially those contained in the petition as amended; at any rate, all those that are essential to be stated for the purpose of considering the sufficiency of the petition. They are taken as true on demurrer.

For the purpose of considering the question involved, the facts averred may be summarized as follows: Decedent, without a right to do so, placed himself upon a freight train, and thus became a trespasser. He did this while the train was standing in a deep cut, on a dark and rainy night in December. While he was in a drunken and helpless condition, he was ejected from the train in the cut, and left there in the condition described. This condition was known to those in charge of the train from which he was ejected. They also knew that shortly thereafter a passenger train would pass over the track through the cut. The superintendent of the road at Nashville, and the agent at Franklin, the station near by where the ejection took place, were notified that he was on the track in the cut in a

drunken and helpless condition, and this notice they received in time to have saved him from the impending peril by the exercise of ordinary care, and in doing which it would not have hazarded the lives of the passengers or the property of the appellee. The question is not involved as to the right of those in charge of the freight train to have ejected the decedent. That he was a trespasser, and the right to eject him, is admitted. The law gave the right to the agents and servants of the appellee to eject him. The question here for determination is whether they should have ejected him at the time, place, and under the circumstances averred in the petition, considering his mental and physical condition. The liability of appellee, if it exists, arises from the disregard of those in charge of the freight train for human life while in the performance of a legal right, and the disregard for human life by the appellee's superintendent and agent after they were advised of the perilous position which the decedent occupied, and their failure to use care to save him. All courts and all law writers agree that those in charge of a train have no right to throw a trespasser from it while moving, and thus jeopardize his life. Principles of humanity forbid the exercise of the right in such a cruel manner. For the same reason, if they eject a trespasser who is not imperiling the lives of the officers in charge of the train, or the passengers, or doing something which makes it hazardous to permit him to remain upon the train (*Louisville & N. R. Co. v. Logan*, 88 Ky. 232, 3 L. R. A. 90, 10 S. W. 655), they must be regarded of the time, place, and circumstances under which they perform the act of removal. If the decedent had boarded the train several miles from the cut, and after reaching there had been removed, under the circumstances described, it seems to us that no one could have had any difficulty in reaching the conclusion that death or great bodily harm would have been the natural and probable result of the removal, and a liability would have been incurred by the appellee. In this case, according to the averments of the petition, he got on the train, and, after getting on, was a trespasser, just the same as if he had boarded it at another station, and been carried to that point. Getting on the train was an accomplished fact. The fact that he had just got on the train while it was standing in the cut did not give those in charge of it the right to seize and hurl him from it, without regard to consequences; neither did that fact give them the right to eject him, regardless of time, place, and circumstances, and his physical and mental condition. They had no more right to jeopardize his life in his removal because he had been on the train but a short time than they would have had if he had been carried to that point from elsewhere. The right to remove a trespasser does not depend upon the question as to the length of time he has been on the train, neither is the liability of the railroad company affected by the fact that the trespasser

has been on the train a long or a short time. That fact has nothing to do with the case. The same responsibility attaches for the removing of him in the one case as in the other.

The principle which underlies the doctrine enunciated in *Louisville, C. & St. L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, and *Louisville & N. R. Co. v. Ellis*, 97 Ky. 330, 30 S. W. 979, is applicable to the facts of this case. Sullivan was drunk, and failed to pay his fare on demand, and was removed while in a drunken condition, in a deep snow, and fell and laid in it until he was badly frozen, entailing the loss of some toes, fingers, and part of his heel. The court held that the railroad company was liable for the injury resulting to him under the circumstances detailed. In the *Ellis Case*, the removal took place when he was drunk and in a cut in the road, on either side of which was a wire fence, and the court held that if the natural and probable result of his removal, under such circumstances, was that he would be killed by trains that would subsequently follow, then the company was liable. In condemning an instruction in that case which assumed the agents of the railroad company had the right to eject a trespasser, regardless of the time, place, and circumstances and his physical and mental condition, the court said: "It seems to us that the ordinary principles which characterize humanity condemn such claim. If the claim of appellee be true, that the decedent was ejected in a cut, away from any station, with banks and fences on either side of the track, in such mental or physical condition as rendered him incapable of taking care of himself, the officer with a knowledge of his condition, then it was no less wrong to eject decedent under such circumstances than it would have been to have ejected from the train a toddling child who had not mental capacity to know the danger of walking upon a railroad track, or the physical ability to avoid such danger if it had the mental capacity to discern it. Would anyone contend, if appellant should kill a child under such circumstances, that it would not be liable to damages therefor?" To show the views that other courts have on questions substantially similar to the one here involved, we will quote from opinions delivered by them. It was said in *Haug v. Great Northern R. Co.* 8 N. D. 23, 42 L. R. A. 669, 77 N. W. 97: "When the carrier discovers that one helpless from intoxication is upon its train without right, it must, in selecting a safe place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. The law declares to the carrier that it shall not expose him to great peril, even in exercising its undoubted right to eject him; and, in declaring whether he will be subjected to peril, not only must climatic conditions, the propinquity of shelter, and other matters be taken into account, but also the actual state of his mind and bodily health and strength, if known to the agent

of the carrier." In *Railway Co. v. Valleley*, 32 Ohio St. 349, 30 Am. Rep. 601, the court said: "It might, perhaps, as far as this case is concerned, be conceded that, if a man were so intoxicated as to be without reason, sense, or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as likely as not to lie down upon the rails and go to sleep. We may concede, further, that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible in law as it would be wicked and cruel in fact. And, further, to put a man off, in a dark night, upon a high railroad bridge, or upon the brink of a precipice, where the first step would be destruction,—this could find no justification in law. All this might possibly be." In *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 554, 52 Am. Rep. 543, 6 Pac. 877, the court said: "The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried the cause: 'Of course, the carrier is not required to keep hospitals or nurses for sick or insane passengers, but, when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made.'" In *Conolly v. Crescent City R. Co.* 41 La. Ann. 61, 3 L. R. A. 133, 5 So. 259, 6 So. 526, the court said: "But none of these cases hold that this right of exclusion can be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well-being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized." In *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 186, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70, the court, referring to some cases, said: "These are cases—extreme ones, it may be—illustrating the doctrine that regard must be had to the helpless condition of one who enters a railroad train, and that those in charge of the train must do no act which is cruel or inhuman. Granting that these cases are extreme ones, still the general doctrine which they assert is undeniably a sound one; for through all the cases runs the principle that what humanity requires must be done by those who act with knowledge of another's helplessness." In *Roseman v. Carolina O. R. Co.* 112 N. C. 716, 19 L. R. A. 327, 16 S. E. 766, the court said: "But where the power expressly given by law is exercised in such a manner as to wilfully and wantonly expose the ejected person to danger of life or limb, the company is still lia-

ble for injury or death resulting from the expulsion. Cases falling within this last exception to the general rule, and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel, or too much intoxicated to be trusted to find the way to the nearest house or station. 3 Wood, *Railway Law*, § 362; 2 Shearm. & Redf. Neg. § 493; *Toledo, W. & W. R. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277." In *Brown v. Chicago, R. I. & P. R. Co.* 51 Iowa, 238, 1 N. W. 487, the court said: "In exercising the right of ejection, reasonable and ordinary care should be employed. In determining whether such care has been exercised, all the circumstances should be considered,—as the physical condition of the person ejected; the time, whether in daylight or late at night; the condition of the country, whether thickly or sparsely settled; the place of the ejection, whether near to, or remote from, dwellings of any character, including stations; the character of the weather, whether pleasant or inclement, etc. The rules of law, as well as the dictates of humanity, require that the ejection shall occur at such place, and be conducted in such manner, as not unreasonably to expose the party to danger." Judge Elliott, in his work on Railroads (§ 1637), says: "If he is so intoxicated or so young or feeble as not to be able to take care of himself, or look out for his own safety, the company should exercise reasonable care to see to it that he is not expelled and abandoned in such a place, and under such circumstances, that he will be exposed to unnecessary peril." The conclusion which we have reached is supported by *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78.

Should the company be held responsible because its superintendent at Nashville and agent at Franklin knew that the decedent was on the track in a drunken and helpless condition, and that shortly thereafter a train would pass over its track through the cut, and failed to notify those in charge of it of his situation, and thus avoid the calamity which befell him? We think it should. The knowledge of these officers was the knowledge of the company. From the averments, they could have avoided the injury by the exercise of ordinary care. They could have saved the life of the unfortunate man by giving notice to those in charge of the passenger train of his peril. It would be a strange doctrine of ethics and of law if an unfortunate man, on a dark, cold night, in a drunken and helpless condition, is on the track of a railway company in a deep cut, and that fact is known to the superintendent, together with the knowledge that a passenger train will soon pass over the track through the tunnel, and will probably kill him, that the company is not responsible if its superintendent could have avoided the injury by the exercise of ordinary care, and failed to do so. We are of the opinion that if the death of decedent would naturally and probably flow from the act of his removal from the train at the time,

place, and under the circumstances in his physical and mental condition, then the company is liable. We are also of the opinion that, if the company could not be made responsible for the acts of its agents and servants in thus removing the decedent, still if he was on the track in a drunken and helpless condition, and the superintendent at Nashville and the agent at Franklin knew of his situation, and failed to exercise ordinary care to save his life, by notifying those who were in charge of the train which was

soon to pass over its track through the cut, and those in charge of the train could have, without hazarding the lives of the passengers on it or the property of the company, avoided running over him, the company is liable.

The judgment is reversed for proceedings consistent with this opinion.

Du Relle and Burnam, JJ., dissent.

Rehearing denied November 26, 1901.

LOUISIANA SUPREME COURT.

SMITH BROTHERS & COMPANY

v.

NEW ORLEANS & NORTHEASTERN
RAILROAD COMPANY

and

CHARLESTON & SAVANNAH RAILWAY
COMPANY *et al., Appts.*

(106 La. 11.)

*1. This is an action for damages for the breach of an obligation of the carriers to carry goods in bond. Plaintiff's instructions were not misleading, but in all respects were clear enough. The reasons of plaintiff for desiring the goods to come from Charleston in bond were evident enough to warn defendants not to take them out of bond. Proper papers were delivered by plaintiff for obtaining the goods to be carried in bond. The goods were taken out of bond without authority, and were, in consequence, of less value at the point of destination than they would have had, had they been brought there in bond, as intended by plaintiff. The defendants are liable for damages which might have been foreseen. They knew that plaintiff was a merchant who would seek to sell his goods in the most favorable market. It was not proper for them to assume (although they were in good faith) that it was as well to pay the duties in Charleston, and there take the goods out of bond, thereby rendering it no longer possible to export them from New Orleans. Taking the goods out of bond was an act of interference with plaintiff's right, rendering the defendants responsible for actual damages.

*2. Between the two defendants—the one the initial line and the other the continuing line to the point of destination—the responsibility is solidary; both having taken part in the taking of the goods out of bond, and the carrying of them to the point of destination.

(February 18, 1901.)

A PPEAL by defendants Charleston & Savannah Railway Company *et al.* from a judgment of the Civil District Court for the

*Headnotes by BREAUX, J.

NOTE.—The above case seems to be of first impression with respect to the liability of a common carrier which has engaged to transport imported goods in bond, for paying the duties and taking the goods out of bond without authority.

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Parish of Orleans, Division B, in plaintiff's favor in an action brought to recover damages for breach of contract to transport rice in bond. *Reversed.*

The facts are stated in the opinion.

Messrs. Henry J. Leovy and Rice & Montgomery, for appellants:

There was no privity of contract between the plaintiff and these appellants.

The averment in the answer of these appellants, to the effect that plaintiff did not furnish the necessary papers to obtain shipment of his goods in bond, is not disproved by plaintiff, on whom was the burden of proof.

24 U. S. Stat. at L. p. 414, chap. 218.

The "special circumstances" making it important to plaintiff that the goods should arrive at New Orleans in bond were not communicated to these appellants, who cannot, therefore, be held to have "contemplated" or to have "foreseen" the damages that might result from the duties being paid in Charleston.

Civil Code, arts. 1934, 1943; *Hadley v. Barendale*, 9 Exch. 341; *Sedgw. Damages*, pp. 126, 136; *British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 509; *Hydraulic Engineering Co. v. McHaffie*, L. R. 4 Q. B. Div. 676.

Under the instructions communicated to them, these appellants were justified in believing that it was not a matter of consequence to plaintiff whether the duties were paid in Charleston or New Orleans, as according to said instructions they were to be paid.

The evidence does not show that rice, or such rice as that of this shipment, is habitually imported for re-exportation, or for the purpose of selling to the United States; but, if it did, how were these defendants to know the grade of the rice, or the custom of trade in it? The very circumstances of the present suit show that such importations in bond cannot be frequent.

Hadley v. Barendale, 9 Exch. 341, has been repeatedly affirmed as applicable to similar cases in the United States.

United States Teleg. Co. v. Gilderslove, 29 Md. 249, 96 Am. Dec. 519.

Mr. Harry H. Hall for appellee railroad company.

Messrs. Denegre, Blair, & Denegre for appellee corporation.

Breaux, J., delivered the opinion of the court:

Plaintiff claims damages in the sum of \$2,182.66, growing out of defendants' failure to carry a consignment of rice in bond. Plaintiff avers, substantially, that 218,260 pounds of rice were shipped to it from Hamburg on the steamship *Dalmatia*, due to arrive in Charleston, South Carolina, in May, 1898; that, through their agents, the defendant railroads applied to plaintiff for the transportation of the consignment over their line of railroads from the port above named to New Orleans; that plaintiff made known to these agents that it wanted the rice carried in bond, as sanctioned by a statute of the United States (without custom duty), and that for that reason they were not willing to pay the custom duty of 2 per cent per pound at the port of Charleston; that, after having been informed of plaintiff's desire, the defendants' agents advised it of their willingness and ability to transport this rice on the conditions before stated; that, on receiving this information, plaintiff delivered its bill of lading to the agents of the Northeastern Railroad Company, who promised to make all needful arrangements with the steamship before named, and with the custom-house authorities at Charleston, and with other connecting railroads, for the transportation of the rice through to New Orleans in bond, without payment of custom duties; that the said railroad company bound itself to deliver this rice in bond to plaintiff in New Orleans for 25 cents per 100 pounds, for all charges. The invoice, dated May 10, 1898, issued in Hamburg for the 1,000 bags of rice in question, which in due time was placed in the hands of the Plant Railroad System, after the arrival of the steamship *Dalmatia* at Charleston, among other statements, contained the following: "To be shipped per *Str. Dalmatia* to Charleston in bond for New Orleans." On May 25th the agent here wrote to the representative of the Plant System, inclosing the invoice to which we have just referred. The letter contained the following, among other, statements: "As I understand it, the Plant System is a bonded line, and there will be no difficulty in handling the business to New Orleans. All custom-house duties to be paid here by Smith Bros. & Co., Limited." A member of the plaintiff firm testified that when he delivered the bill of lading to the agent in New Orleans, in the presence of the agent of the Plant System, who was here at that time, he stated to them that it was necessary for the rice to come in bond. He also stated, as a witness, that he declined to turn over his rice to a rival system of railroads, to be hauled for the same rate, as he was led to believe that the Plant System was also a bonded road. As relates to the Plant System, its codefendant, the New Orleans & Northeastern Railroad Company, charges that the former agent falsely represented

that their system was a bonded line, and also represented that they could bring the rice from Charleston to New Orleans without the payment of duty, and that they paid the duty, although well aware that they ought not to have paid it. This defendant avers that the judgment of the lower court released the New Orleans & Northeastern Railroad Company from all liability, and held its codefendant the Plant System for the damages, because it had not committed the breach of contract of which plaintiff complained; that it was pretended by the officers of the Plant System that their officials had been misled by a letter of instructions sent by the agent of the New Orleans & Northeastern Railroad Company,—a position not sustained in the district court; that the officers of the Plant System always understood that the rice in question was to be shipped in bond; that they were informed by the customs officials in Charleston that their line was not a bonded road, and, instead of notifying plaintiff, they purposely withheld the information until June 2d, and after they paid the duties; and that this was done only in order to cover the freight upon the haul. It appears that about June the rice arrived in New Orleans, but not in bond, in violation of the agreement to which we have just referred. The New Orleans & Northeastern Railroad Company refused to deliver the rice to plaintiff without payment to it of the custom charges, amounting to \$4,362.12, and the freight charges of 25 cents per 100 pounds. To prevent loss and to avoid a forced sale, plaintiff paid these amounts under protest, and reserved all of its rights to sue for and recover the amount thus paid to this railroad. Plaintiff, in its petition, sets out at some length the loss it incurred in consequence of defendant's disregard and violation of the agreement as stated, growing out of the fact, it avers, in substance, that the rice could have been more profitably handled and sold here in bond than with the custom duties paid, for the reason that if it had been in bond it could have been exported to foreign markets, or it could have been sold to the United States government, which at the time was buying large quantities of such food for its armies, and, further, that plaintiff could not profitably handle so large a quantity of rice not in bond, owing to the limited sales of rice in the local market at the time. Plaintiff charges that all these facts were well known to the defendants when they promised to transport the rice in bond. Plaintiff avers that it had to sell this rice in the local market for less than it cost, and that if the defendants had complied with their contract as a common carrier, instead of losing it would have made a profit. It claimed from the defendants *in solido* the amount of loss it alleges it has sustained, and the profits it would have made. The final balance of the exhibit annexed to the petition reads, "Actual loss per pound \$.0156." The defendants filed separate answers. The New Orleans & Northeastern Railroad Company admits that a

consignment of rice was made to the plaintiff as alleged, and specially avers that it was agreed by its agent with the agent of the Plant System that the rice was to come from Charleston to New Orleans over the Plant System and this defendant's road in bond, and that it was understood that the customs duty of 2 cents per pound should not be paid in the port of Charleston. This defendant avers that it was in no wise responsible for the failure of the Plant System of railroads to carry out the instructions received, or to fulfil the undertaking it had assumed, and that, if any payment of the duty in question made by the Plant System has violated any contract with plaintiff, this defendant is not responsible for its violation. The other defendant, the Plant System, alleges, in substance, in its answer, that, if any damages have been suffered by the plaintiff, it alone was at fault, in communicating its instructions and purposes to the agent of the New Orleans and Northeastern Railroad Company, or in the misleading instructions given to the representative of the Plant System by the agent of the New Orleans & Northeastern Railroad Company. The judgment of the district court was in favor of plaintiff and against the defendant the Plant System for the sum of \$2,182.66, with legal interest from June 22, 1898, and sustained the writ of attachment sued out by plaintiff. As relates to the New Orleans & Northeastern Railroad Company, the district court rejected the demand of plaintiff.

There is no question but that the plaintiff desired to have the rice carried from Charleston to New Orleans in bond, and that ample notice of plaintiff's wish in this respect was given to the agent of the New Orleans & Northeastern Railroad Company in New Orleans. We think that it is equally as evident that the Plant System was aware of the instructions given by plaintiff for hauling the rice in bond. While it is true the testimony is conflicting, one of the members of the plaintiff firm who testified and the agent of the New Orleans & Northeastern Railroad Company agree in the statement that such were the instructions received and afterwards communicated to the officials of the Plant System. The agent of the Plant System admitted, as a witness, that his understanding and that of the agent of the New Orleans & Northeastern Railroad Company was that the Plant System was a bonded line. But this was error, as the Plant System was not a bonded line for south-bound freight from Charleston. We will not dwell upon this particular issue at any length. Before passing to the consideration of another ground of the decision, we will state, however, with reference to one of the defendants (the Plant System) that it must be held to have been informed of plaintiff's intention regarding this consignment.

We repeat, the defendants knew that the goods were to come to New Orleans in bond. But, while virtually conceding this, the defendants urged that they did not know, and

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that plaintiff did not make the least attempt to inform them of, the fact that it (plaintiff) wished to sell the goods to the United States government, or to ship them, duty unpaid, to another country. This defense is particularly urged by the Plant System. The contention on its part is that the New Orleans & Northeastern Railroad Company did not specifically explain or instruct its codefendant as to the intention of plaintiff regarding the sale to the United States, or a reshipment of the goods, as just stated, and that it (the Plant System) had the right to infer that the only possible damage that plaintiff could suffer would arise from the payment at Charleston instead of at New Orleans, and that, as no damage could have arisen in that case, none was due. This is the important question involved. The proof is that the grade of rice in question could not compete in New Orleans with the domestic rice, and that it was quite evident that the rice was only suitable for exportation from the port of this city. In answer to the proposition that the low quality or grade of the rice was warning enough not to take it out of bond, and that it must have been evident from that fact that it was intended for exportation, defendants deny that this was a warning or notice at all. We can only say, in deciding the question, that, whether that fact was in itself a warning or not, defendants should not have taken the goods out of bond. Viewed in the most favorable light, defendants' action was hasty and ill advised. They must or should have known that the owner had an object in importing this rice in bond. A member of the plaintiff firm testified positively that one of the agents of the Plant System had been informed of the object. There are circumstances sustaining the correctness of that statement. The right to ship in bond was absolute, and one should have been extremely slow in interfering with the right without special instructions. In the presence of the testimony, and in view of the surrounding facts and the rights of the parties, we do not think it possible, in justice and reason, to arrive at the conclusion that defendants were justified. The rice was intended by the owner for exportation or for sale to the United States, and it was not for defendants to assume that it was intended to be sold in New Orleans. It is evident that on receipt of the rice in bond the plaintiff would have exported it, if it had been to its advantage. It appearing that it would have been profitable at the time to export this rice, it is not for defendants to set up the defense that, if it had been sold to the United States government, the receipt in bond would not have been of any benefit. The test, as relates to the measure of damages, is the disposition which plaintiff might have made of it by exportation, if exportation was to its benefit. On this point the defendants insist, substantially, that no consequence which is not the necessary and ordinary result of a breach of the obligation can be supposed to have been contemplated, unless full information be im-

parted to the party sought to be held liable at the time of entering into the engagement; in other words, that the "special circumstances" rendering it important to plaintiff that the goods should arrive in New Orleans in bond were not communicated to the defendants, who therefore cannot be held to have contemplated or to have foreseen the damages which might result from the duties being paid in Charleston; citing articles 1934-1943 of the Civil Code and a number of decisions. True, in this case the defendants were not guilty of fraud or bad faith, and in consequence the question falls within the meaning of the articles just cited. We are inclined to the opinion that these articles are not as restricted in their scope as defendants would have us take them. The words of one of the articles are, "such damages as were foreseen or might have been foreseen." We think that the special condition attached was directly brought home to defendants by the recital contained in the invoice in their possession. The damages resulting from the breach might have been foreseen. The loss in the value of the goods was a direct consequence of the breach of the obligation. Besides, information had been imparted to at least one of the defendants, if not both, ample enough to warn either or both not to pay the duty. This, as we think, brings the case within the rule furnished by the cases cited by the defendants; the leading case being *Hadley v. Baxendale*, 9 Exch. 341. The decisions rendered under the common and civil law systems, in our opinion, do not hold that one is not responsible unless every damage possible is brought home to him in express terms at the time the obligation was assumed. It is true that the loss is limited to the thing which was the object of the obligation. Pothier (Dupin's edition, vol. 1) illustrates the principle thus: Let us suppose that I have sold a thing having a well-known value in the market and which I bought myself to deliver within a certain time, and that I failed to comply with my obligation. If in that time the article had increased in value, and it can no longer be purchased at the same price, the increase in price which the buyer from me is obliged to pay is a damage which I owe, because it is damage suffered *propter rem ipsam non habita*m, which is in touch with the thing which is the object of the contract, and which I might have foreseen. This authority then gives examples of damages which could not have been foreseen. The latter do not cover defendants' case. Pothier's view has the support of the civil-law authorities. To conclude upon this subject, the carrier who takes goods of a merchant out of bond, without instructions, and despite the circumstances indicating that they had a value in bond, is not in the situation of one who could not have foreseen the possibility of accruing damages.

The responsibility of the defendants be-
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tween themselves gives rise to the next question. The New Orleans & Northeastern Railroad Company insists that the breach of the obligation was committed by the Plant System; and the Plant System, on the other hand, contend that they only carried out instructions communicated by the agent of the first-named road. A letter was introduced in evidence, written by the agent of the New Orleans & Northeastern Railroad Company, instructing the Plant System to pay the customs duties. This was understood, the Plant System contend, as including all customs duties paid. There were two or more different statements in this letter; one leading to the inference that it was the carrier's wish that the duties be paid in Charleston, and the other that, in compliance with its desire, they must not be paid. There was direct contradiction in the letter. The writer's testimony was admitted to explain the meaning of the letter. To this explanation counsel for the Plant System objected, and reserved a bill of exceptions to its admissibility. For the reasons just stated, the letter was confusing and ambiguous. The explanation was properly heard. This witness said that by the words in the letter, "If any customs duties accrued at Charleston, please have same paid and billed against the shipment," he meant, if any charges accrued while the shipment was in bond, same were to be paid, and billed against the shipment. The other testimony of this witness in this connection does not relieve his company from all responsibility. It remains that these defendant companies acted together. One was the continuing line of the other in carrying this freight. They both obligated themselves as carriers, and each, we think, took a part in securing this freight, and to that end in taking it out of bond. The information gained by one of the officials at one end of the line was communicated to the other at the other end. The errors of each in the interest of both and with the sanction of both do not present issues enabling us to conclude that the damages were all due by one of these railroads. As relates to the amount, we do not think that the testimony would justify us in reducing it lower than found due by the judgment of the district court.

For these reasons, the judgment of the District Court is avoided, annulled, and reversed, and it is now ordered, adjudged, and decreed that there be a judgment in favor of plaintiff against defendants *in solido* for the sum of \$2,182.66, with interest at 5 per cent from June 22, 1898, until paid. It is further ordered that the writ of attachment herein issued be maintained with plaintiff's lien and privilege on the property attached. Costs of appeal are to be taxed to defendants and appellants.

Monroe, J., concurs in the decree.

Petition for rehearing overruled.

STATE of Louisiana *ex rel.* Joseph LASERRE, App't,

v.

Blanche MICHEL *et al.*

(105 La. 741.)

*1. It is error for a district court to refuse to entertain an application made to it by a husband and father, during his marriage, for a writ of habeas corpus to be directed to his wife,—the application being based upon an alleged illegal detention by the latter of their minor child,—upon the ground that the spouses can only bring suit against each other in specially permitted cases, and that an application of this character is not authorized by law.

2. A writ of habeas corpus is essentially a writ of inquiry in aid of right and liberty in respect to matters in which the state has an interest, though private rights may be involved. The writ simply brings the parties before the court for the ascertainment of the facts of the case. The court is clothed with a sound discretion, after hearing, to grant or refuse to the applicant the relief asked for. Neither spouse has an absolute right to the custody of the children.

(Breau, J., dissents.)

(May 6, 1901.)

APPEAL by relator from a judgment of the Civil District Court for the Parish of Orleans, Division C, in favor of defendants in a habeas corpus proceeding to obtain possession of relator's minor child. *Reversed.*

The facts are stated in the opinion.

Messrs. Edwin T. Merrick, Philip Gensler, Jr., and Walter S. Lewis, for appellant:

In case of difference between the parents, the authority of the father prevails.

Civil Code, art. 216; *Bosworth v. Beiller*, 2 La. Ann. 293; *Gates v. Renfro*, 7 La. Ann. 570; *Woods v. Perkins*, 43 La. Ann. 349, 9 So. 48.

The husband can invoke the writ of habeas corpus against his wife to recover possession of his children.

Bermudes v. Bermudes, 2 Mart. (La.) 181; *Acosta v. Robin*, 7 Mart. N. S. 387.

Mr. Frank McGloin, for appellees:

The policy of this state in the matter of the personal custody of children pending disagreements between spouses has been radically altered by act 124 of 1888, and, in the absence of a final judgment of separation or divorce, the wife is the party now preferred.

The general rule is that a married woman cannot be sued, even by a stranger, except in exceptional cases.

NOTE.—As to habeas corpus to obtain custody of child generally, see, in this series, *Weir v. Marley* (Mo.) 6 L. R. A. 672; *State ex rel. Bethell v. Kilvington* (Tenn.) 41 L. R. A. 284; and *Prieto v. St. Alphonsus Convent of Mercy* (La.) 47 L. R. A. 656.

For earlier cases in this series as to right to custody of child, between parents and others, see *Van Walters v. Marion County Childrens'* 54 L. R. A.

Coward v. Pulley, 9 La. Ann. 13.

The law of Louisiana places a married woman in her own interest, under incapacity (Civil Code, art. 1782), and confides her to the particular protection of her husband, holding him responsible for the common obligations of the marriage, and giving to him, as a rule, the prosecution and defense of her rights.

Civil Code, arts. 121, 122, 1316, 1786, 2307; Code Prac. arts. 106, 107, 118.

The Code of Practice, art. 105, positively forbids suits by married women against their husbands, except in certain specified cases. Shall it be contended that, if the law has thus protected the husband against his wife, free and fully capacitated as he is, the latter, incapacitated as she is, and under the tutelage of her husband, should be placed in a position of such comparative disadvantage?

Heyob v. Her Husband, 18 La. Ann. 41; *Moore v. Moore*, 18 La. Ann. 614; *Carroll v. Carroll*, 42 La. Ann. 1071, 8 So. 400; *Mack v. Handy*, 39 La. Ann. 491, 2 So. 181; *Carroll v. Her Husband*, 42 La. Ann. 1073, 8 So. 400; *Suberville v. Adams*, 46 La. Ann. 124, 14 So. 518; *Theurer v. Schmidt*, 10 La. Ann. 296; *Alexander v. Alexander*, 12 La. Ann. 589.

Parents have a right of their own to the love, society, and services of their children, and it is for the enforcement of this right that petitioner herein is before the court.

17 Am. & Eng. Enc. Law, p. 362.

While the writ of habeas corpus is one of right, a party seeking to avail himself of it is not at liberty to select for himself, absolutely, either the time or place for relief, or the tribunals through which it is to be obtained.

State ex rel. Baumann v. Langridge, 44 La. Ann. 1014, 11 So. 541; *State v. Roger*, 7 La. Ann. 382; *State ex rel. Johnson v. Britton*, 48 La. Ann. 1407, 20 So. 892; *State ex rel. Williams v. Klock*, 45 La. Ann. 316, 12 So. 307; *State ex rel. Courtney*, 49 La. Ann. 687, 21 So. 729; *State ex rel. Price v. Scott*, 43 La. Ann. 857, 9 So. 501.

Nicholls, Ch. J., delivered the opinion of the court:

The plaintiff alleged that about the 19th of October, 1898, he was married to Blanche Michel, in the city of New Orleans; that of his said marriage there was issue, a girl child named Lucille, who was at the institution of this suit nineteen months old; that on or about the 10th of January, 1901, his wife left his marital domicile, and was then residing at No. 738 Napoleon avenue, and, although summoned to return to the marital domicile, had refused to do so; that his

Guardians (Ind.) 18 L. R. A. 431; *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593; *Re Lally* (Iowa) 16 L. R. A. 681; *Sheers v. Stein* (Wis.) 5 L. R. A. 781; *Kelsey v. Green* (Conn.) 88 L. R. A. 471; *Stringfellow v. Somerville* (Va.) 40 L. R. A. 623; *Anderson v. Young* (S. C.) 44 L. R. A. 277; *Hibbette v. Bains* (Miss.) 51 L. R. A. 839; and *Stapleton v. Poynter* (Ky.) 53 L. R. A. 784.

wife had taken away from him his said child, and declined to return her to his care, and she was therein aided and abetted in the illegal retention of said child by her father, Henry Michel; that his wife was unfit to have the custody and control of the said child, for the reason that she was wanting in discretion; that the child had been in bad health for some time, and she had exposed her by taking her away from home when sick, contrary to the instructions of plaintiff's physician, among other occasions, on December 31, 1900; that he, as husband and master of the community, was entitled to the custody of the child. He prayed that his wife be authorized by the court to defend in this proceeding; that a writ of habeas corpus issue to his said wife and said Henry Michel, commanding them to produce the said child to the court on the 15th of November, and to show cause on said day why the writ should not be made absolute, and relator should not be given the custody of his child; that after due proceedings the writ be made absolute. He prayed for general relief and for costs. The petition was sworn to. The court authorized the wife to defend the suit and to stand in judgment therein, and ordered that a writ of habeas corpus issue to her and to her father, Henry Michel, commanding them to produce the child in open court on the day fixed, and then and there to show cause why they kept the child detained, and why she should not be delivered to the care and custody of the relator. The wife excepted to the petition on the ground of no cause of action, and, for answer to the petition, averred that she was in possession of the child; that the child was of tender years and needed a mother's care, and could not, with safety to said child, be deprived thereof. She denied that she was wanting in discretion, or that she was unfit to have control of her own child. She averred that her husband did himself force her to leave the home he had only recently set up for her, having deliberately abandoned her child in said home, discharging the only servant, cutting off her credit, and leaving her and her said child without either money, food, or protection; that relator had never adequately supported either herself or her child, but had left upon her own family, during the entire term of their married life, not only the charge of supporting and housing her and her child, but also of supporting and sheltering himself; that he had more than once prior to this occasion abandoned his family, and at other times threatened so to do; that by his long-continued course he had forfeited his right to have her or her child, and that he had frequently declared his inability to do so; that respondent and her child had with her parents a safe and comfortable home, where they had extended to them kindness and affection, and had every need supplied; that relator could not support, maintain, or educate said child, or give it the necessary care. She prayed that the writ of habeas corpus be denied, and that she have judgment given

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her for the custody of the child. The district court rendered judgment refusing the application, dismissing the proceeding, and maintaining the exception of no cause of action. It held, under article 105 of the Code of Practice, and the authority of *Cowand v. Pulley*, 9 La. Ann. 12; *Theurer v. Schmidt*, 10 La. Ann. 296; *Heyob v. Her Husband*, 18 La. Ann. 41; *Moore v. Moore*, 18 La. Ann. 614,—that the public policy of the state, since the adoption of the Code of Practice, was against the maintenance of any civil suit between husband and wife, no matter what the cause of action, or how serious the complaint, when not within one of the exceptions of article 105, Code of Prac.; that it was against the policy of the state that husbands and wives should be heard complaining of one another during marriage. The court, in its opinion, referred incidentally to articles 104 and 105 of the Code of Practice; to articles 119, 120, and 229 of the Revised Civil Code; to *Carroll v. Carroll*, 42 La. Ann. 1074, 8 So. 400; *Suberville v. Adams*, 46 La. Ann. 124, 14 So. 518; *State ex rel. Huber v. King*, 49 La. Ann. 1508, 22 So. 887; *Bermudez v. Bermudez*, 2 Mart. (i.a.) 181; *Heno v. Heno*, 9 Mart. (La.) 643; and *Bird v. Black*, 5 La. Ann. 189,—and declared that it did not always follow that, because there might be an undoubted obligation (right), there must necessarily be a means of enforcing it (Rev. Civ. Code, art. 1757); that the legislature might, in its wisdom, have determined that it were better, in the public interest, that the fulfillment of certain obligations, however desirable, should not be made enforceable in law; and it was of the opinion that, since the Code of Practice, the duties which husband and wife owed to each other and to their children were of this nature. The relator appealed.

In the brief filed in this court on behalf of the mother, counsel analyzes and discusses the petition, declaring that an examination of the same will show that there is no just cause of complaint against the wife, justifying her deprivation of the custody of her only child; that it is not alleged that she is a woman of vicious life, or that the child is in surroundings not suitable and comfortable. The district court did not, in dealing with the question, consider the pleadings or the merits at all, but based its action upon the broad proposition that a husband is without legal right during marriage, at least without the simultaneous pendency of an action for divorce or separation from bed and board, to apply to a court of justice for a writ of habeas corpus, directed to a wife, for the custody of their child, and that courts were without legal right to entertain such an application, no matter what the particular facts of the particular case might be. Under such circumstances, consideration of the pleadings becomes unnecessary.

Counsel of the relator urges that a child remains under the authority of his father and mother until his majority or emancipation; that in case of difference between the

parents, the authority of the father prevails (citing *Bosworth v. Beiller*, 2 La. Ann. 203; *Woods v. Perkins*, 43 La. Ann. 349, 9 So. 48; and *Gates v. Renfro*, 7 La. Ann. 570); that the writ of habeas corpus is a writ in the name of the state of Louisiana (Code Prac. art. 791); that at common law a husband and wife cannot sue each other, because they are regarded as one person (9 Am. & Eng. Enc. Law, p. 799; 1 Bl. Com. 120; 2 Kent, Com. 129; *Doe ex dem. Merigan v. Daly*, 8 Q. B. 934); but that the writ of habeas corpus would lie in favor of the one against the other (*King v. De Manneville*, 5 East, 221; *People v. Landt*, 2 Johns. 375). Counsel calls the attention of the court to *Bermudes v. Bermudes*, 2 Mart. (La.) 182, 183; *Hyde v. Jenkins*, 6 La. 427; and *Prieto v. St. Alphonsus Convent of Mercy*, 52 La. Ann. 683, 47 L. R. A. 656, 27 So. 153. It is urged that, under the court's view, the husband, to enforce his legal rights, would either be driven to an action of separation from bed and board, or for a divorce, which it was not the policy of the law to encourage (*Gahn v. Darby*, 36 La. Ann. 74), or he would have to have recourse to fraud or force. In the case of *Bermudes v. Bermudes*, 2 Mart. (La.) 182, the court said: "The paternal house is the proper residence of the family. If the wife choose to absent herself from it without offering to the court any reason, the court will presume that none exists. *De non apparentibus, et non existentibus, eadem est lex*. In such a case they must consider her as the faulty parent. The father is the master of the family. His authority as to its civil force is founded in nature, and the care which it is presumed he will have of their education. While his conduct is proper the court cannot interfere with his authority, and will cause it to be respected. The mother, however, is not without her rights. If she be compelled to live separated from him on account of ill treatment,—if from his conduct she can show that the children are not likely to receive a proper education, or that it will be a dangerous example to them,—the court will afford their aid to her solicitude, especially in regard to the daughters, and deprive the father of a power which it is likely that he will abuse. For the right of the community to superintend the education of its members, and disallow what, for its own security and welfare, it sees good to disallow, goes beyond the right and authority of the father. *Blissett's Case*, Loft, 748, 749." It has been held elsewhere that where the wife breaks up the household and departs from her husband's home wrongfully, whether it be done of her own purpose or from weakly yielding to the evil influence of others, she is not to be allowed to take with her the children of their union. *People ex rel. Olmstead v. Olmstead*, 27 Barb. 9; *People ex rel. Nikerson v. —*, 19 Wend. 16; Church, Habeas Corpus, § 443. But the father's right to the custody of his children is not absolute, even during marriage, and even where there is no suit pending for a separation from

bed and board. The courts in the United States, while adopting the legal principle that the father is usually entitled to the custody of his children, have been inclined to modify it by adopting the equitable principle that this right must yield in some instances to considerations affecting the welfare of the children, and by regarding more highly than was formerly done in England the rights of the mother. Hurd, Habeas Corpus, § 441. Thus, while the father may have the first title to custody of the children by nature, his claim may be disregarded by the court, acting on a principle of natural justice, if his character and conduct render him unfit to be a guardian; hence they will not be delivered to him on a writ of habeas corpus when it would be manifestly to their injury to do so, nor taken from the mother when the mother, blamelessly on her part, had been forced to live with her father, apart from her husband, and when it appears that they are well provided for by the mother, and not likely to be by their father. Particularly is this so in cases where the matter at issue is the custody of an infant child of such tender years as to require the personal care of the mother, where the minor child is out of the possession and custody of the father. It by no manner of means follows that the prayer of the petitioner will be granted because the writ has been ordered to issue. The writ simply brings the parties before the court for the purpose of inquiry and the ascertainment of the facts of the case. The court is clothed with the power, with a sound discretion, to grant or refuse relief. The child itself, in contentions of this kind, is entitled to some measure of protection from the court. The parents, in issues of this kind, are not simply urging their own legal rights, but are acting for and on behalf of the child; and in respect to this matter the state itself, as stated in the *Bermudes Case*, has an interest which goes beyond the mere right and authority of either the father or mother. The right of neither is absolute. The right of either or both depends upon matters in *pais*, of which it is the object of the writ to have full inquiry, through an exhaustive examination under oath, so that the tribunal may have before it all the light practicable. We scarcely think that a writ of habeas corpus, directed to a woman, touching the custody of a minor child, can be called a suit by the husband against the wife because the party invoking the state's action is a husband, and the party against whom the writ is directed is his wife, and the child is theirs. It is the result of the suggestion that the child is improperly restrained of its liberty, and that inquiry should be made into the facts of the case. It may be observed in this connection that illegal restraint may exist without the exercise of force or coercion. Church, Habeas Corpus, § 439. When the writ issues the wife is called into court in the name of and by the state itself, though this be done on the relation of the husband. It is true that the ultimate action of the court upon

the writ may be in aid and in enforcement of private rights,—of the rights of the husband of the wife in the premises,—but the result is incidental and consequential. The writ of habeas corpus is essentially a writ of inquiry, and upon matters in which the state itself is concerned, in aid of right and liberty. As mere inquiry is primarily sought, and the costs of the proceeding will fall upon the relator in case the action of the state has been unadvisedly sought and obtained, the exact or precise legal interest which the relator may have in inaugurating the inquiry and in its result should not be subjected to too rigid a test at the instance of those whose conduct and action are sought to be investigated. We do not think that either husband or wife should be driven to the necessity of instituting an action of separation from bed and board or divorce, to have the matter of the legal custody of the children judicially inquired into. Actions of separation or divorce should not be forced; nor do we think that where husband and wife are, as a matter of fact, living apart, the spouse out of the possession of the children of the marriage, and claiming the legal right to have such possession, should be driven to force or to fraud to obtain the same. Such a course of conduct would tend directly to breaches of the peace and to violence. It is right, proper, and legal for the party entitled to the possession of the child to obtain the same under the sanction of judicial proceedings. It would be stretching the terms of article 105 of the Code of Practice for no good purpose, and with no good results, to hold otherwise. That article does not refer to proceedings of that character.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment of the District Court be, and the same is hereby, annulled, avoided, and reversed; that the application for the writ of habeas corpus be reinstated, to be proceeded upon according to law, under the exceptions and answers filed by the defendants.

Breaux, J., dissenting:

I entertain the greatest respect for the opinion of the majority in this case. I know that there are decisions in other jurisdictions sustaining the views expressed; yet, again, in matter of habeas corpus, I am compelled to dissent on grounds that I consider strictly legal. It is my misfortune, perhaps, that opinions of those in authority while I was at the bar have brought about a conviction which I am unable to overcome. Turning to the Code of Practice, I find the following, *vis.*: Habeas corpus enables free persons to obtain their release "from illegal arrest or detention." Code Prac. art. 787. In another article this writ is referred to as directed to a person who has another in his custody, or detains him in confinement. Id. art. 791. Again, the supreme court shall have the power to issue writs of habeas corpus at the instance of persons in actual custody. In another article: "If the imprisonment or detention took place by vir-

tue of a judicial order, regular in its form, but illegally obtained or executed, the petition shall mention in what the illegality consists." Id. art. 797. But, if the imprisonment or detention has not been made by virtue of a judicial order, the petitioner need only allege that he is illegally imprisoned or confined; and throughout, as I read the articles, illegal custody or imprisonment is made a condition to issuing the writ. The provisions of the Constitution are not broader, regarding habeas corpus, than those of the Code of Practice from which I have just quoted. Power is given to issue the writ of habeas corpus at the instance of any person in actual custody. Article 93. The text of article 104 of the Constitution is similar on the subject. I quote from article 115 of that instrument: "The district judges shall have power to issue writs of habeas corpus at the instance of all persons in actual custody in their respective districts." In my view, the husband, independently of any other proceeding or suit, is not entitled, under our law, to the writ of habeas corpus to compel the mother to surrender the children primarily intrusted to her care by law and by nature. The law does not seem to contemplate giving to the husband the power, as a separate and independent one, to bring the wife before the court by way of habeas corpus in a case such as the one just decided. While it may be that the decision in *Bermudes v. Bermudes*, 2 Mart. (La.) 181, is or should be controlling, I cannot avoid the thought that it was pronounced in 1812,—many years before the adoption of our Code of Practice. Legislation has not, in my view, at any time gone to such an extent as to justify the issuance of writ on a state of facts as related in the cited decision. I read none. I respectfully submit that it cannot well be considered as the construction of the articles of the Code of Practice and of the Constitution of a date long subsequent. In dissenting, I must again disclaim any intention of criticising a different conclusion. I must say that I regret my inability to construe the law differently than as before expressed.

Rehearing denied June 3, 1901.

Richard H. GRANT
v.

William P. HAYNE et al., Appts.

(105 La. Ann. 304.)

*1. In an action brought to recover for services rendered in having obtained subscription to the stock in a corporation, the issue was the amount earned for services *vel non*. If a public wrong was committed, not connected with the services

*Headnotes by BREAU, J.

NOTE.—As to privilege of defamatory words used in pleading, see *Randall v. Hamilton* (La.) 22 L. R. A. 649, and *note*; and *Sherwood v. Powell* (Minn.) 29 L. R. A. 153.

rendered, it might give rise to condemnation at the bar of public opinion, which may seek by legitimate influence to condemn and suppress it; but in matter of business it affords no ground to refuse to pay a creditor if he has earned the amount which he claims.

2. An issue of fact is not sustained by the testimony that some time previous to the services rendered wrongs against the social order had been committed. Rumors and reports based, from all appearances, on the previous wrongs charged,—i. e., wrongs of a date anterior to services claimed, and as to which several of the witnesses directly swore,—do not make it appear with reasonable certainty that they were continuing wrongs.
3. Witnesses testified that in the community in which he resided plaintiff, as a member of the community, and while at home, was not deemed guilty as charged; others testified to the contrary. The jury found that the weight of the testimony was with the former.
4. To that extent the jury's verdict is affirmed. It is not affirmed as to the amount of damages.

(Blanchard, J., dissents.)

(March 18, 1901.)

APPEAL by defendants from a judgment of the Judicial District Court for the Parish of Rapides in favor of plaintiff in an action brought to recover damages for the alleged publication of a libel. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Andrews & Hackenyo and *Scarborough & Carver*, for appellants:

The administration of justice requires the utmost latitude to evidence and pleadings in court proceedings, where parties are acting in good faith.

Burke v. Ryan, 36 La. Ann. 951; *Vinas v. Merchants' Mut. Ins. Co.* 33 La. Ann. 1265; *Staub v. Van Benthuyssen*, 36 La. Ann. 470; *Clement Bros. v. Their Creditors*, 37 La. Ann. 694; *Gardemal v. McWilliams*, 43 La. Ann. 458, 9 So. 106; *Kelly v. Lafitte*, 28 La. Ann. 436; *Rayne v. Taylor*, 14 La. Ann. 407.

The proceedings connected with the jurisdiction of the courts are so important to the public good that the law holds that nothing that may be therein said, with probable cause, whether with or without malice, can be slander, and, in like manner, nothing written with probable cause, under the sanction of such proceedings, can be libel.

Vinas v. Merchants' Mut. Ins. Co. 33 La. Ann. 1265.

Where there is a suit pending in a court of competent jurisdiction between proper parties, everything alleged or said pertinent to the issue in the case is absolutely privileged.

Gardemal v. McWilliams, 43 La. Ann. 454, 9 So. 106; *Wimbish v. Hamilton*, 47 La. Ann. 252, 10 So. 856.

Where no malice has been shown, only actual damages can be recovered.

Roos v. Goldman, 36 La. Ann. 132; *Crétin v. Lecy*, 37 La. Ann. 182.

In all slander suits both malice and ab-

sence of probable cause must concur to give grounds for action.

Stewart v. Sonneborn, 98 U. S. 187, 25 L. ed. 116; *Cauchois v. Dupuy*, 3 La. 207; *Boullemet v. Philips*, 2 Rob. (La.) 365.

Messrs. White & Thorator, for appellee:

A libel is any publication, whether in writing, print, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obliquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

Staub v. Van Benthuyssen, 36 La. Ann. 467; *Weil v. Israel*, 42 La. Ann. 955, 8 So. 826.

Declarations of a witness "are protected by the occasion, and cannot serve as the foundation for a civil action when they are pertinent and material."

Burke v. Ryan, 36 La. Ann. 951.

The fact that defendant in a suit for damages for malicious prosecution acted under the advice of counsel is no excuse if the advice was given upon his misrepresentation of the circumstances of the case.

Découx v. Lieux, 33 La. Ann. 392.

Communications in a judicial proceeding are privileged, "and the only questions are whether the occasion existed and the matter complained of was pertinent to the occasion."

Gardemal v. McWilliams, 43 La. Ann. 454, 9 So. 106; *Weil v. Israel*, 42 La. Ann. 955, 8 So. 826; *Monroe v. H. Weston Lumber Co.* 49 La. Ann. 595, 21 So. 742.

Words spoken by way of interrogation, if imputing a crime, are actionable. And it is not necessary that the charge should be made in direct terms; it may be made by insinuation.

13 Am. & Eng. Enc. Law, p. 348.

The fact that matter defamatory and libelous in its character was charged in the petition of a plaintiff against a defendant does not of itself carry absolute exemption from liability for damages claimed by reason of said defamatory and libelous charges. Other facts must concur to bring about that result.

Wimbish v. Hamilton, 45 La. Ann. 1191, 14 So. 77.

Matter inserted in a pleading, to be privileged, must be legitimately related to the issues, or so pertinent to the subject of the controversy that it may become matter of inquiry on the trial.

Union Mut. L. Ins. Co. v. Thomas, 28 C. A. 96, 48 U. S. App. 575, 83 Fed. 803.

Under the law of Louisiana slander is a quasi-offense, actionable under the broad provisions of the Code: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Both malice and injury may be inferred from the nature and falsity of the words.

Spotorno v. Fourichon, 40 La. Ann. 423, 1 So. 71; *Miller v. Holstein*, 16 La. 389; *Daly v. Van Benthuyssen*, 3 La. Ann. 69;

Tresca v. Maddox, 11 La. Ann. 206; *Cass v. New Orleans Times*, 27 La. Ann. 214.

When the facts furnished by a client to his attorney are misleading and defamatory in character, and their incorporation into the petition is foreign to the objects and purposes of the suit, the client is responsible in damages.

Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856.

Though there was no proof of malice on the part of the defendant in uttering the slander, "yet, in such case, the law imputes malice to the act on account of its character."

Savoie v. Scanlon, 43 La. Ann. 973, 9 So. 916.

Breaux, J., delivered the opinion of the court:

Defamation of his character is plaintiff's cause of action. Ten thousand dollars is the amount he claims for damages. From a verdict and judgment for plaintiff in the sum of \$500, the defendants appeal.

Plaintiff is a steamboat captain and pilot, and defendants are stockholders and promoters of the Boyce Cotton-Seed Mill & Manufacturing Company. Plaintiff brought suit against the defendants some time previous to the present suit, in which he alleged that he had entered into a contract with defendants to raise a subscription to the stock of the Boyce Cotton-Seed Mill & Manufacturing Company, and to secure a site for the mill at or near Boyce, Louisiana, and that as a consideration defendants agreed to pay him 5 per cent on the amount of all stock subscribed. He alleged in his petition in this first suit that it was agreed that he was to use his energy and influence to secure a site and raise subscriptions; and he also alleged in his petition that through his efforts an oil-mill site was secured, and stock subscribed to the amount of \$10,000; and he claimed \$500 for his services, that amount being 5 per cent of the sum he claimed to have secured, and the commission he averred the defendants had bound themselves to pay. Defendants in the first suit answered plaintiff's petition, and admitted that they had employed plaintiff to solicit subscriptions, but alleged that he failed to secure any subscriptions, and that those obtained were secured by themselves. They also charged that they had learned that plaintiff's reputation was such that plaintiff could not secure subscriptions; that many persons refused to subscribe for the reason that plaintiff was connected with the proposal to construct the mill in question, which was afterwards (they aver) constructed by themselves (the defendants in this suit). The plaintiff accepted a sum less than the amount of his claim, and discontinued the suit. In the present action he sets forth that the answer filed in the suit which was discontinued, as just stated, and the interrogatories propounded to various witnesses, suggested and gave rise to the implication that the plaintiff's conduct as the father of a family was not what it should have been.

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Plaintiff is a widower, with eight children, four of whom reside with him. Defendants, in their answer in the case now before us for decision, pleaded the privileged character of their allegations in their defense in the first suit filed. They also alleged that their defense and allegations to that end were based on probable cause, and with the advice of counsel that, if true, the allegations were a good defense to the suit brought; and they substantially further averred that, should the court not sustain these grounds of defense, they honestly believed, from common report, the truth of their allegations. Defendants aver in their answer, *inter alia*, "that his conduct with her (the asserted concubine) on the boat and since she left there has been such as to cause them to believe, as they did at the time, that he lived with her as his concubine." (The parentheses ours.) In the case here a number of witnesses were examined, and the interrogatories and answers filed in the first suit were filed in evidence in the present suit. By his witnesses plaintiff sought to prove the extent to which he had been wronged by defendants' answer, and the issues raised by them in the first suit, and defendants directed their efforts chiefly to prove that the reports circulated in the community, and the poor success plaintiff had met with in securing subscriptions, justified their defense. The charge brought, we think, was useless to the defense. If true, the defendants were none the less liable for the amount due for services actually rendered by plaintiff in securing subscriptions. A defense entirely foreign to the issues does not fall within the rule protecting averments as privileged. Averments are not privileged if it appears that they are entirely useless to the defense. The charge made was not a disqualification to attend to the business of soliciting subscriptions and to aid in establishing a factory in the community. The language used had a tendency to degrade, without in the least, as we take it, assisting in establishing a defense. While it is true that the greatest latitude should be allowed in judicial proceedings in order to enable the parties to bring before the court all pertinent issues, or issues which parties may deem pertinent, yet there must be some limit to this wide range.

We have reviewed our decisions on the subject, and have not found that they (while they recognize every right which is needful to the full presentation of the issues) have gone to the extent of laying down the rule that an averment which has the effect of holding up one of the parties to public odium is to be sustained as protected, or as privileged, although not called for by the character of the issues. The most recent views of this court upon this subject were expressed in *Wimbish v. Hamilton*, 47 La. Ann. 246, 16 So. 856. In that case the court said: "The allegations were pertinent to the issue presented." Here there is nothing of the sort. The employee was seeking to recover from his employer an amount he averred was due. The charge was an inde-

pendant one, not connected in any manner with the service he was expected to render. The lack of influence of one who has undertaken to do a certain thing in which his influence may be of some moment would not be a cause preventing him from recovering for what he has done. We are justified in concluding that the amount due for his services is all the court would have allowed him. To determine that issue, the question of personal conduct in matter not connected with the service, if true, however to be regretted and reprehended, is not an issue to be considered.

We pass to the other grounds of defense in the case before us for decision,—want of malice, probable cause, and the truth of the averments contained in the answer filed in the first suit. We take it that absence of malice is not a complete defense against a demand for damages by one who uselessly charges another with having failed in a duty, or with having transgressed the law in a manner in which he, as a defendant in a suit, cannot be held to have been particularly concerned. Although the averments may not have been made *malò animo*, they are not to be dismissed from all consideration because of that fact. With reference to probable cause, we have not discovered wherein it was, in its nature, a probable cause; for we think it was made without any cause whatever. The truth of the averments *vel non* made in the first suit presents the serious and most important issue of the case. It is true that defendants heard from credible persons of the community words condemning plaintiff for an asserted intimacy with his servant or housekeeper at his home, at which his children reside. The particulars of the intimacy at plaintiff's home are not given, and the testimony does not disclose acts leading to unavoidable inferences of improper intimacy. At a previous time, while away at some distance, commanding and piloting a steamboat, this servant was a chambermaid on the boat. Witnesses testified to facts which sustain the allegations made in the first suit. It must be borne in mind that this was some time previous to defendants' employment of plaintiff as a solicitor, and while the latter was away from home. In reading decisions upon the subject, we found the following in point, which we think expresses a correct view: A woman who is at the time chaste, virtuous, and exemplary, although she may at some previous time have had illicit intercourse with a man, is an innocent woman, within N. C. Code, § 1113, which provides that, "if any person shall attempt, in a wanton manner, to destroy the reputation of an innocent woman by words, written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor." *State v. Grigg*, 104 N. C. 882, 10 S. E. 684. Beyond the fact that this woman is plaintiff's housekeeper, that she is a quadroon or octoroon, that her conduct was not reputable before she came to Boyce, and that rumor charges im-

proper relations, the record does not reveal any particular fact showing illicit intimacy.

In bringing this decision to a close, we will state that the advice of counsel is available as a mitigating circumstance, and to that fact we have given due weight. Besides, we do not think that this is a case for allowing an unreasonable sum in damages. It is therefore ordered, adjudged, and decreed that the amount of the judgment be, and the same is hereby, reduced to \$100, and, as reduced, it is *affirmed*.

Blanchard, J., dissents.

Rehearing denied April 1, 1901.

STATE of Louisiana

v.

Jean Baptiste NED, *Appt.*

(105 La. 696.)

*The conviction of a person of a crime which the Constitution requires should be tried by a jury of twelve, though nine jurors concurring might render a verdict (Const. 1898, art. 116), is not a legal conviction, though twelve jurors were physically present during the trial, and all concurred in a verdict of guilty, if one of the jurors on the jury was in a drunken condition during the trial.

(June 2, 1901.)

APPEAL by defendant from a judgment of the Judicial District Court for the Parish of St. Landry convicting him of crime. *Reversed*.

The facts are stated in the opinion.

Messrs. John W. Lewis and James J. Bailey for appellant.

Mr. E. Lee Garland for the State.

Nicholls, Ch. J., delivered the opinion of the court:

The defendant appeals from a sentence of seven years' imprisonment at hard labor in the penitentiary. The crime of which he was convicted was one requiring for conviction, under the Constitution, "a trial" by a jury of twelve. Const. 1898, art. 116. The court overruled his motion for a new trial, which assigned as the ground therefor that "one of the jurors, Lastie L. Harmon, who after the panel had been completed, and the trial gone into, and the court reconvened pursuant to adjournment, appeared in court in a drunken condition; that when the first witness after the recess hour was called on, and before his testimony was given, the said juror, because of his drunken condition, had to be removed to an adjoining room; that when he reappeared in court and resumed his seat among his fellow jurors he was still in an intoxicated condition, unable to hear, follow, and understand the tes-

*Headnote by *NICHOLLS*, Ch. J.

NOTE.—As to number and agreement of jurors necessary to constitute a valid verdict, see *State v. Bates* (Utah) 43 L. R. A. 33, and *note*.

timony, and immediately fell asleep, and remained in that condition during the remainder of the trial, and had to be awakened by one of the jurors when the judge ordered the jury to their chamber for deliberation; that the juror remained asleep during the entire time that the different witnesses were testifying, during the argument of counsel, and the charge of the judge." The judge refused the new trial, assigning as his reason "that, under article 116 of the Constitution, in cases of this character, though a jury of twelve is required, nine of the jurors can find a verdict, and the misconduct of one member of the jury does not render the finding of the nine concurring members invalid, unless it be shown that said juror was one of the nine rendering the verdict; that the record in the case failed to show any dissenting juror, and the reason for setting aside the verdict of jurors under the old rule of unanimity does not exist in this case, and, in the opinion of the court, should not be applied especially in view of the consideration that no injury either appears or has been shown to the accused; the misconduct of the juror was not of such a nature as to have any appreciable influence on the other members in arriving at a just verdict, as the law permitted the remaining jurors to render a legal verdict." The attorney general has filed no brief in the case. In that of the district attorney he says: "The evidence taken on the trial of the motion for a new trial we must admit establishes the fact that the juror was to a certain extent *hors de combat*, so that there can be no dispute between the state and the defense as to the facts governing the trial of the motion narrowing the contention to a question of law, to wit, whether, since the adoption of the Constitution of 1898, misconduct on the part of one member of the jury will vitiate a verdict rendered in a case where under the Constitution nine concurring can render a verdict, unless similar charges of misconduct can be leveled against his fellows."

Neither the judge nor the district attorney should have permitted the trial to proceed under the conditions existing. The spectacle of a man on trial for a crime involving his liberty, with a drunken juror in the jury box, is not one calculated to advance the proper administration of justice, nor to inspire the people with the respect which should be due to courts.

Independently of this, the conclusions of law reached by the court and the district attorney were not well grounded. The duty of a jury is not simply to hear the evidence adduced upon a trial, but, on retiring to their room, to deliberate upon it. The Constitution required that in this case the accused should be tried by twelve men. He could not waive this requirement. He was entitled to the deliberation, consultation, and decision of twelve men. This he has not had. Had a jury of twelve been impaneled for the trial of this cause, and, one or two of the jurymen absenting themselves, the trial been proceeded with, with nine or ten or eleven jurors, it could not be claimed that the constitutional requirement that the accused should be tried by a jury of twelve had been complied with. We understand the Constitution to require, not simply that nine jurors should concur in a verdict, but that twelve must be present from the beginning of the trial to the end. The juror in this case was physically present, but for legal purposes he might well have been absent. We do not intimate that every act of misconduct by a single juror would carry with it the avoidance of the verdict rendered by the jury, but misconduct, such as has been shown in this case, should carry, and does carry, with it that result.

For the reasons assigned herein, it is ordered, adjudged, and decreed that the verdict of the jury, and the judgment thereon rendered, be, and the same is hereby, set aside, and the cause remanded to the District Court for further proceedings according to law.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Ann MULHALL

v.

John FALLON et al.

(176 Mass. 266.)

1. Declarations of one killed by negligence that his mother was poor, and that he sent money to her repeatedly, are admissible under Stat. 1898, chap. 535, in a suit by her to recover for the killing.

2. Evidence of a son's declarations that his mother was very poor, and that he sent her money repeatedly, corroborated by her testimony that she bought food with his money, sufficiently shows her dependence on him for support to carry to the jury a suit by her to recover for his negligent killing, under Stat. 1887, chap. 270, § 2.

3. A woman's testimony that she was almost entirely dependent on her son for support is not inadmissible in a suit by

NOTE.—Right of alien nonresident to maintain statutory action for death of other person.

It would seem that from the earliest times the notion has prevailed in the mind of man that those having an interest in the life of a person were entitled to compensation from, or punishment of, the person who wrongfully caused his or her death. In the English law 54 L. R. A.

under the Saxons are found the weregilds for the killing of a person varying in amount from the death of the poor or peasant up to that of the King himself. Blackstone informs us that during the continuance of this custom, a process was certainly given for the recovering of the weregild by the party to whom it was due, and that, when these offenses by degrees grew no longer redeemable, the private process was still

her for his negligent killing, because it is a conclusion which the jury is to draw, or because it is law rather than fact.

4. Upon the question whether or not a woman was dependent upon her son for support, interrogatories are admissible as to whether he contributed to her support, and, if so, how much.
5. Partial dependence upon her son for the necessities of life is sufficient to enable a woman to maintain a suit for his negligent killing, under the Massachusetts statutes.
6. An action for negligent killing of her son may be brought by a nonresident alien under Stat. 1887, chap. 270, § 2.

(May 31, 1900.)

EXCEPTIONS by defendants to rulings of the Superior Court for Norfolk County made during the trial of an action to re-

continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offense. This process was known as an appeal of murder, and by the statute of 8 Hen. VII. chap. 1, it was provided that if a man be acquitted on an indictment for murder, or found guilty and pardoned by the King, he may still be proceeded against by an appeal of murder at the instigation of the party interested in the life of the person killed, if such appeal is brought within a year and a day from the time of the alleged commission of the offense. This appeal of murder existed as late as 1818; and the writ was issued, and, strangely enough, its issuance caused the revival of another thought-to-be obsolete practice, but which the court held to be still in force, *viz.*: Trial by wager of battel. *Ashford v. Thornton*, 1 Barn. & Ald. 405. The case was argued with a great deal of force by Chitty for the appellant and Tindal for the appellee, and Lord Ellenborough, with whom all the judges of the court concurred, held that the appellant had a right to bring the case by the writ of appeal, but that in such case the appellee had an equal right to his plea of wager of battel, and that the court was only in doubt as to what the judgment should be. The appellant, doubtless thinking that one member of the family was enough to fall by the hands of the appellee, declined to accept the decision of the court giving the latter trial by battel, and the appellee was therefore discharged. The idea that such a case could arise in the 19th century was so repugnant to British notions that in the following year appeal of murder, as well as of treason, felony, or other offenses, together with wagers of battel, were abolished by the enactment of Stat. 59 Geo. III. chap. 46.

It is difficult to ascertain just at what period the custom, or rule, or law, whichever it may have been, by which payments of wergild were made, fell into disuse, but since the time when it did so it has been an established rule of the common law that no action for damages can be maintained against a person for causing the death of another, until the passage of the act of Parliament, 9 & 10 Vict. chap. 93, in 1846, commonly known as Lord Campbell's act. Since then, and very shortly after the passage of the pioneer act, the several states of the United States enacted similar acts differing generally only in respect to the persons who were entitled to maintain the action, and for whose benefit the same should be prosecuted. In regard to the rights of aliens to sue, it is believed that all of the acts passed by the dif-

ferent state legislatures are identical with Lord Campbell's act,—that is to say, there is no express provision contained in any of them that the action may be maintained by a nonresident alien.

A person twenty-seven years old came to this country from Italy in 1889, and while employed by the defendant company as a laborer on its roadbed or track, he was, October 28th, 1894, killed in a collision which was imputed to the negligence of his employer. The decedent did not see his mother after he had left her in Italy in 1889. At the time of the trial she still resided in her native country and owed allegiance to the government of it. In an action brought by her to recover under the statute of Pennsylvania, providing that a parent could recover for the death of a child caused by the wrongful act of the party against whom the action was brought, it was held that the statute was not intended to confer upon nonresident aliens rights of action not conceded to them, or to citizens of Pennsylvania by their own country, or to put burdens upon the citizens of that state to be discharged for their benefit; that it had no extraterritorial force, and the plaintiff was not within the purview of it; and that a construction which would include nonresident alien husbands, widows, children, and parents of the deceased was one so obviously opposed to the spirit and policy of the statute that the court would not adopt it. *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558.

In *Adam v. British & Foreign S.S. Co.* [1898] 2 Q. B. 430, 87 L. J. Q. B. N. S. 844, the action was brought by the mother of the decedent, a Belgian subject, who was an engineer on board a Belgian ship. It was not disputed that the collision was caused by the negligence of the defendant's servants; and the court held that had the deceased been an English subject the action would have lain, notwithstanding that the negligence and death both occurred upon the high seas. The court held that the provisions of the act by which damages can be recovered for death caused by negligence do not apply for the benefit of aliens abroad, and therefore the representative of an alien whose death has been caused by the negligence of a British subject, outside the jurisdiction of the court, cannot maintain an action to recover damages in respect of the death; that it is a principle of English law that acts of Parliament do not apply to aliens,—at least if they be not even temporarily resident in Great Britain,—unless the language of the statute expressly refers to them; that the power of the country is to legislate for its own subjects all over the world,

Further facts appear in the opinion.
Messrs. William B. Sprout and Dickson & Knowles, for defendants:

The enactments of a legislature of any state are to be regarded as applying to the territory of such state, and not to extend

beyond its limits, or to operate upon non-resident aliens.

Cope v. Doherty, 4 Kay & J. 367; *Rosseter v. Cahlmann*, 8 Exch. 361; *Ex parte Blain*, L. R. 12 Ch. Div. 522; *Ex parte Crispin*, L. R. 8 Ch. 347; *Re Pearson* [1892] 2 Q. B. 263; *Lloyd v. Guibert*, L. R. 1 Q. B. 125; *The Gaetano & Maria*, L. R. 7 Prob. Div. 143; *Crowley v. Panama R. Co.* 30 Barb. 99.

Our own courts have not regarded general terms in the statutes as sufficient to confer rights upon aliens.

Foss v. Crip, 20 Pick. 121.

It cannot be contended that there is in this case any right of action at common law.

McDonald v. Mallory, 77 N. Y. 550; 33 Am. Rep. 664; *Beach v. Bay State S. B. Co.* 30 Barb. 433; *Richardson v. New York C. R. Co.* 98 Mass. 85; *Davis v. New York & N. E. R. Co.* 143 Mass. 301, 58 Am. Rep. 138, 9 N. E. 815.

In *Dent v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558, it was adjudged that the action could not be maintained.

The same doctrine is held in *Brannigan v. Union Gold-Min. Co.* 93 Fed. 164.

See also *Adam v. British & Foreign SS. Co.* 79 L. T. N. S. 31; *The Zollverein*, 2 Jur. N. S. 429; *Colquhoun v. Heddon*, 62 L. T. N. S. 853, L. R. 25 Q. B. Div. 135; *Jefferys v. Boosey*, 4 H. L. Cas. 946.

The question of dependency was one of law, and not of fact. It was not for the

plaintiff to say whether she came within the provisions of the statute as a dependent person.

Johnson v. Boston Tow-Boat Co. 135 Mass. 209, 46 Am. Rep. 458; *McGinty v. Athol Reservoir Co.* 155 Mass. 183, 29 N. E. 510.

Messrs. James E. Cetter, John W. McAnarney, and J. P. Fagan, for plaintiff:

Oral declarations of Patrick Mulhall that he had sent money to plaintiff were admitted under the provisions of Acts 1898, chap. 535, which provides that "no declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit, and upon the personal knowledge of the declarant."

The legislature "has unquestionable authority to change the common-law rules of evidence, to prescribe the modes of proof, and to direct who may and who may not be competent witnesses."

Goshen v. Richmond, 4 Allen, 458; *Up-ham v. Raymond*, 132 Mass. 186; *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381; *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802.

The question of dependency in this case was one of fact for the jury, and was rightfully submitted to them.

Houlihan v. Connecticut River R. Co. 164 Mass. 555, 42 N. E. 108; *Daly v. New Jersey*

and as to foreigners within its jurisdiction, but no further (*Colquhoun v. Heddon* [1890] 25 Q. B. 129; *Jefferys v. Boosey*, 4 H. L. Cas. 815, 3 C. L. Rep. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615); and that there was nothing in Lord Campbell's act to show that it was intended to apply for the benefit of foreigners not resident in the Kingdom. The intention of the legislature is to be collected from the statute; and there is no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 & 10 Vict. chap. 93.

In an action brought in the circuit court of the United States for the district of Colorado, based upon the statute of the state which gives the right to the father and mother to recover damages in the case of a death occurring through the negligence of the defendant, a demurrer was put in to the complaint upon the ground that it appeared therein that the plaintiffs were nonresident aliens, they being citizens and residents of Ireland, in the Kingdom of Great Britain. The case of *Dent v. Pennsylvania R. Co.* 181 Pa. 527, 37 Atl. 558, was cited in support of the demurrer. The court adopted and followed that case completely, and gave judgment sustaining the demurrer, and asserted that one of the reasons for doing so, given by the Pennsylvania supreme court, was satisfactory, which was that no case had been brought to the notice of the court in which an English court had held that a nonresident alien was entitled to the benefits conferred by the act of 1846. This decision was made March 11th, 1899, and the decision of the Queen's Bench in the case of *Adam v. British & Foreign SS. Co.* [1898] 2 Q. B. 430, 67 L. J. Q. B. N. S. 844, was made the July previous, but must have been unknown to the judge who made the decision 54 L. R. A.

or he certainly would have cited it. *Brannigan v. Union Gold-Min. Co.* 93 Fed. 164.

Thereafter, in a decision made April 17th, 1900, the circuit court of the United States for the district of Massachusetts, disapproved *Dent v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558, and *Brannigan v. Union Gold-Min. Co.* 93 Fed. 164, stating that they rest largely upon the proposition that no case can be found in which Lord Campbell's act has been extended to nonresident aliens, and that the act has no extra-territorial force. After stating that this is hardly in accordance with the facts, the court held that the mother of a son who had been killed by the wrongful act of the defendant could maintain an action for so wrongfully causing the death of her son, although she was a resident of Ireland and had never been a resident of this country. *Vetaloro v. Perkins*, 101 Fed. 398. The reasoning of the court was as follows: The manifest purpose of the provision of the statute of Massachusetts giving the right of action is to give the widow and next of kin of an employee the same right to bring an action in the case of death as the employee would have had in case he had survived. No distinction is made between citizens and aliens. The only limitation imposed is that the next of kin, in order to maintain an action, must be dependent for support on the wages of the employee. To exclude nonresident aliens from the right to maintain an action would be to incorporate into the act a restriction which it does not contain; i. e., to refuse compensation to a certain class of persons for a real injury recognized by statute law; that it would be to relieve employers with respect to some employees from the exercise of due care in the employment of safe and suitable tools and machinery and competent superintendents; and to offer an inducement to employers to give a pref-

Steel & I. Co. 185 Mass. 1, 29 N. E. 507; *McCarthy v. New England O. of P.* 153 Mass. 314, 11 L. R. A. 144, 26 N. E. 866; *Supreme Council A. L. of H. v. Perry*, 140 Mass. 580, 5 N. E. 634; *Simmons v. White* [1899] 1 Q. B. 1005; *Davis v. Main Colliery Co.* 107 Law Times, 135; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553, 20 S. E. 550; *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561; *Alexander v. Parker*, 144 Ill. 355, 19 L. R. A. 187, 33 N. E. 183; U. S. Rev. Stat. § 4707.

As the act stands, its language applies to any next of kin to a person killed as the deceased was in this case, without reference to their residence or citizenship.

The statute is of a remedial and protective nature, and should be interpreted liberally. It was intended for the benefit of employees and those dependent upon them, and an employee might well consider it as an inducement to enter into a contract for labor, expecting to receive its protection, and the assurance that, in case of wrongful death, those dependent upon him would, in a measure, be provided for.

The fact that the plaintiff was an alien was no bar to her recovery in this case.

Luke v. Calhoun County, 52 Ala. 115; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Philpott v. Missouri P. R. Co.* 85 Mo. 164; *Chesapeake, O. & S. W. R. Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47; *Marvin v. Mayville Street R. & Transfer Co.* 49 Fed. 436; *Lumb v. Jenkins*, 100 Mass. 527.

erence to aliens, and to discriminate against citizens. That would be to hold that the legislature of Massachusetts intended by the act to declare that employers should not be liable for the grossest negligence which results in the instant death of an alien employee in cases where his widow or next of kin happen to reside in a foreign country.

In this case the court was evidently unaware of, or ignored, *Adam v. British & Foreign S.S. Co.* [1898] 2 Q. B. 430, 87 L. J. Q. B. N. S. 844, as the latter sadly interferes with the reasoning herein, and justifies that in *Denl v. Pennsylvania R. Co.* 181 Pa. 527, 37 Atl. 558, and *Brannigan v. Union Gold-Min. Co.* 98 Fed. 164.

Then follows *MULHALL V. FALLON*, the principal case, which, as will be seen, approves and follows the case last cited. These are all the cases which are direct authorities upon this subject.

Previous to any of the decisions herein mentioned, in 1875 a case arose in Alabama under an act to suppress murder, lynching, etc., by which it was provided that certain parties who were injured by a death caused by a riot or lynching could maintain an action against the county for a penalty of \$5,000. The decedent at the time of his death was a subject of Great Britain, had always lived in Canada, and had only been, as the court expresses it, a resident, or rather a sojourner, in Alabama for a few months immediately preceding his death. The plaintiff was the wife of the decedent, and as such wife was, according to the terms of the statute, entitled to sue for the penalty. Prior to and at her husband's death she resided in Canada. She and her husband were alien subjects of Great Britain,—never had been domiciled in Alabama or in the United States. The court, on the request of the defendant, charged the jury that if they believed from the evidence 54 L. R. A.

There are in Great Britain laws similar to our own, conferring similar rights of action under like circumstances.

Lord Campbell's Act, 9 & 10 Vict. chap. 93, 1846; Employers' Liability Act, 43 & 44 Vict. chap. 42, 1880; Workmen's Compensation Act, 60 & 61 Vict. chap. 37, 1897.

This court has always dealt liberally with the rights of aliens.

Judd v. Lawrence, 1 Cush. 531; *Lumb v. Jenkins*, 100 Mass. 527; *Roberts v. Knights*, 7 Allen, 449; *Peabody v. Hamilton*, 106 Mass. 217.

Holmes, Ch. J., delivered the opinion of the court:

This is an action under Stat. 1887, chap. 270, § 2, for causing the death of the plaintiff's son. The plaintiff is an Irish woman, who, so far as appears, never has left Ireland. In the superior court she had a verdict, and the case is here on exceptions to a refusal to direct a verdict for the defendants either on the ground that the statute conferred no rights upon the plaintiff, or on the ground that she did not appear to have been dependent upon the wages of her son for support. Exceptions were taken, also, upon some matters of evidence.

On the question of the plaintiff's dependence upon her son we are of opinion that there was evidence for the jury. It appeared from declarations of the deceased, properly admitted under Stat. 1898, chap. 535, that his mother was very poor, and

that plaintiff and her deceased husband, for whose death plaintiff sues, were aliens, not citizens of Alabama or the United States, the plaintiff could not recover. The supreme court, in reversing a judgment in favor of the defendant, held that the words "any person" in the statute were as comprehensive as would have been the expression "any human being." One of the principal grounds, however, upon which the court placed its decision was, that the object of the statute was the suppression of murder—was the purpose the statute intended to accomplish. It was supposed that the consequences such murders might visit on the country at large would quicken the diligence of public officers and private citizens to detect, pursue, apprehend, and bring offenders to conviction and punishment. The court stated that conviction on a prosecution bars the suit, or, if it has ripened into judgment, operates as a satisfaction thereof. That be the victim an alien or a citizen, the law is violated, the peace is broken, the security of person and life is lessened, to the same extent, and as great crime is committed in the killing of the one as the other. That the purpose of the statute would not be accomplished if a distinction was drawn between the killing of a citizen and an alien; murder would not be suppressed. *Luke v. Calhoun County*, 52 Ala. 115.

There are certain decisions like *Philpott v. Missouri P. R. Co.* 85 Mo. 164, in regard to the right of the representative, beneficiary, or other person to whom the right to maintain the action is given by statute, if, resident in one state, to maintain such an action in another state; but as such decisions necessarily relate to a citizen or resident of a state, and are possibly grounded upon the constitutional rights of citizens of the several states, it is considered that they do not affect the question. P. H. V.

that he sent over money repeatedly, and regretted not being able to do more. The money, it is true, was received by his father while alive, but the father was a paralytic, and died nearly a year before his son. The plaintiff, in her deposition, confirmed the statements of her son. She testified that she bought food with his money, among other things, and that she wished she had more to eat.

In answer to the question to what extent, if at all, she was dependent upon her son for support, she answered that she was almost entirely dependent upon him for the last two years. This question was objected to, but was admissible. The extent to which particulars may be summed up in a general expression is a matter involving more or less discretion, and cannot be disposed of by the suggestion that the general expression involves the conclusion which the jury is to draw, or that it is law, rather than fact. *Poole v. Dean*, 152 Mass. 589, 591, 26 N. E. 406; *Windram v. French*, 151 Mass. 547, 550, 551, 8 L. R. A. 750, 24 N. E. 914. The question to what extent she was dependent upon her son called for details of fact in a perfectly proper way. Whether the answer showed a sufficient dependence to satisfy the statute remained for the jury to answer under the instructions of the court. Even more plainly admissible were interrogatories whether the son contributed to her support, and, if so, how much. The plaintiff also testified that she "had to turn around and go 3 miles to earn [her] support;" that she had a boy that was hard set to earn from 8 pence to 1 shilling a day, and another boy an invalid. How far these statements should outweigh the others was for the jury. See *Houlihan v. Connecticut River R. Co.* 164 Mass. 555, 557, 42 N. E. 108; *Daly v. New Jersey Steel & I. Co.* 155 Mass. 1, 5, 29 N. E. 507; *Supreme Council A. L. of H. v. Perry*, 140 Mass. 580, 590, 5 N. E. 634. Partial dependence for the necessities of life would be enough, as it is made in terms by the English statute. 60 & 61 Vict. chap. 37, § 7, cl. 2; *McCarthy v. New England O. of P.* 153 Mass. 314, 318, 11 L. R. A. 144, 26 N. E. 806; *Simmons v. White* [1899] 1 Q. B. 1005; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 372, 26 L. R. A. 553, 20 S. E. 550. In *Hodnett v. Boston & A. R. Co.* 156 Mass. 86, 30 N. E. 224, there was nothing to show that the plaintiff did not support herself by her own earnings.

We come, then, to the more difficult question whether the plaintiff can claim the benefit of the act. However this may be decided, it is not to be decided upon any theoretic impossibility of Massachusetts law conferring a right outside her boundary lines. In *Manville Co. v. Worcester*, 138 Mass. 89, where a Rhode Island corporation sought to recover for a diversion of waters from its mill in Rhode Island by an act done higher up stream in Massachusetts, it was held, following earlier decisions, that there was no such impossibility, although the point was strongly urged. It is true that legislative power is territorial, and that no

duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered. The same principle is recognized without discussion in *Lumb v. Jenkins*, 100 Mass. 527, where a nonresident alien was held entitled to take land by descent. So, after discussion, as to a nonresident's right to sue. *Peabody v. Hamilton*, 106 Mass. 217. So the Supreme Court of the United States holds that a right to recover for wrongfully causing death under a state law similar to Lord Campbell's act may be asserted by an administrator appointed in another state. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439. See 8 Am. & Eng. Enc. Law, 2d ed. p. 879, *Death by Wrongful Act*. It is true that the arguments which prevailed in this case did not prevail in *Richardson v. New York O. R. Co.* 98 Mass. 85, and perhaps would not have prevailed in England. *Adam v. British & Foreign SS. Co.* 79 L. T. N. S. 31. But so far as the principle for which we cite the case is concerned, it is in accord with our own decisions, assuming that, like Lord Campbell's act, the statute was regarded as conferring a new right of action on the foreign executor or administrator, and not as giving a right of action to the deceased which went to the executor by survival only. *Blake v. Midland R. Co.* 21 L. J. Q. B. N. S. 233, 237; *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59, 67. The cause of action survived in *Higgins v. Central New England & W. R. Co.* 155 Mass. 176, 29 N. E. 534. This distinction seems to be lost sight of by many of the cases given in the Encyclopedia as following *Dennick v. Central R. Co.* so that their reasoning is not very satisfactory. But see *Bruce v. Cincinnati R. Co.* 83 Ky. 174, 182 et seq.

The question, then, becomes one of construction, and of construction upon a point upon which it is probable that the legislature never thought when they passed the act. In view of the decisions to which we have referred, we lay on one side as too absolute some expressions which are to be found in the English cases, and some of which are cited in *Adam v. British & Foreign SS. Co.* 79 L. T. N. S. 31. Our different relation to our neighbors politically and territorially is a sufficient ground for a more liberal rule,—at least as to inhabitants of the United States.

One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens. *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558; *Brannigan v. Union Gold-Min. Co.* 93 Fed. 164. But compare *Knight v. West Jersey R. Co.* 108 Pa. 250, 56 Am. Rep. 200. On the other hand, in several states the right of the nonresident to sue is treated as too clear to need extended argument. *Philpott v. Missouri P. R. Co.* 85 Mo. 164, 167; *Chesapeake, O. & S. W. R. Co. v. Higgins*,

85 Tenn. 620, 622, 4 S. W. 47; *Augusta R. Co. v. Glover*, 92 Ga. 132, 142, 143, 18 S. E. 406; *Luke v. Calhoun County*, 52 Ala. 115, 118, 120.

Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain. Stat. 1887, chap. 270, § 1, cl. 3. In the latter case there would be no exception to the right of recovery if the next of kin were nonresident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical, and when the different provisions are part of one scheme. In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to

the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in. Whether, if the statute were of a different kind, we could make a distinction between a mother living just across the boundary line between Massachusetts and Rhode Island and one living in Ireland, need not be considered now.

We are of opinion that the superior court was right in letting the case go to the jury. A similar decision has been rendered upon this statute by the United States circuit court for this district. *Vetaloro v. Perkins*, 101 Fed. 393.

Exceptions overruled

MAINE SUPREME JUDICIAL COURT.

Austin BLACK

v.

SECURITY MUTUAL LIFE ASSOCIATION.

(.....Me.....)

No recovery of his commissions can be had by one who secures applications for insurance at a time when he has not complied with the statute prohibiting, under penalty, the soliciting of insurance without a license, although the policies are not issued until after the license is procured, and the statute does not expressly prevent recovery of the commissions.

(January 31, 1901.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Knox County made during the trial of an action brought to recover commissions alleged to be due to plaintiff on policies secured by him, which resulted in a verdict in his favor. *Sustained.*

The facts are stated in the opinion.

Mr. R. I. Thompson for defendant.

Mr. L. M. Staples for plaintiff.

Wiswell, Ch. J., delivered the opinion of the court:

Action of assumpsit, upon an account annexed to the writ, to recover commissions upon premiums paid by various persons to the defendant on policies of life insurance issued by it, the applications for which were solicited, received, and forwarded to the de-

fendant by the plaintiff under a written contract between the plaintiff and the defendant wherein the plaintiff was appointed an agent of the defendant "for the purpose of procuring and effecting applications for insurance," and which provided for the compensation that was to be received by the plaintiff.

At the trial the defendant, among other defenses, contended that some or all of the applications of these persons for insurance were solicited, received, and forwarded to the defendant at a time when the plaintiff had no license from the insurance commissioner of this state as provided by Rev. Stat. chap. 49, § 73, and subsequent amendments, and that consequently the plaintiff could not recover. The case shows that the plaintiff had no such license between July 1 and October 18, 1897.

Thereupon the defendant's counsel requested the presiding justice to instruct the jury that the plaintiff could not recover any commission upon the premiums paid to the company in cases where the applications for such insurance were solicited by the plaintiff during the period that he was without such a license. The requested instruction was applicable to the state of facts involved, because, although the policies may have been in fact issued after October 18, 1897, and during a period when the plaintiff had a license, it is clear that in more or less instances the plaintiff's work in soliciting and receiving applications for the policies was

NOTE.—For earlier cases in this series as to effect of failure to procure license for business on validity of contracts therein, see *Buckley v. Humason* (Minn.) 16 L. R. A. 423, and *note*; *Fairly v. Wappoo Mills* (S. C.) 29 L. R. A. 215; 54 L. R. A.

Vermont Loan & T. Co. v. Hoffman (Idaho) 37 L. R. A. 500; *Randall v. Tuell* (Me.) 38 L. R. A. 143; *Smith v. Robertson* (Ky.) 45 L. R. A. 510; and *Dennig v. Yount* (Kan.) 50 L. R. A. 103.

performed during the period that he was without a license.

In order to give progress to the case, the presiding justice declined to give the requested instruction, but did instruct the jury "that for any policy bearing date subsequent to the 18th of October the plaintiff is entitled to his commission from the company upon that risk, although he may have solicited the insurance before that time and made himself liable to the penalty." To this refusal to instruct, and to the instruction given, the defendant (the verdict being for the plaintiff) took exception.

The statute above referred to, as last amended by chapter 95, Pub. Laws 1895, after providing that the commissioner may issue a license to any person to act as an agent of a domestic insurance company, and to any resident of the state to act as agent of any foreign insurance company, which has received a license as provided by another section, and after fixing the fee that shall be received by the commissioner for each license, contains this language: "And if any person solicits, receives, or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he forfeits not more than \$50 for each offense; but any policy issued on such application binds the company if otherwise valid."

Although this statute contains no express provision preventing a recovery for his services by one who acts as an agent of an insurance company without such license, and does not expressly provide that contracts for such services shall be void, it prohibits the performance of such services, without the license referred to, under the penalty therein provided. In *Harding v. Hagar*, 60 Me. 340,—a very similar case in principle,—this court said in its opinion: "It is too

well settled to require the citation of authorities that no party can recover for acts or services done in direct contravention of an express statute, or for property so sold and delivered." In *Randall v. Tuell*, 89 Me. 443, 38 L. R. A. 143, 36 Atl. 910, where the authorities are fully collected, the principle is thus stated: "It is the general doctrine, now settled by the great weight of authority, that where a license is required for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void."

In accordance with these authorities, and many others that might be referred to, it must be held that the plaintiff cannot recover for the services performed by him in direct contravention of the statute. The purpose of the statute is undoubtedly for the protection of the public. It is clearly not for revenue. The license fee required was only the sum of \$2. True, the statute referred to provides that a policy issued in such a case shall not thereby be void, but the contract of insurance is not the one under consideration here. It is the contract between the company and the plaintiff by virtue of which the latter performs services in obtaining applications for insurance which the statute prohibits unless the person performing such service has a license therefor.

The evidence as to when these applications for insurance were solicited and obtained by the plaintiff is somewhat indefinite, but some of them were unquestionably received when the plaintiff had no license, and the burden is upon him to show that he had a license when the services were performed. *Harding v. Hagar*, 60 Me. 340.

Exceptions sustained.

MARYLAND COURT OF APPEALS.

Mayor, etc., of HAGERSTOWN, Appt.,
v.

Max KLOTZ.

(.....Md.....)

1. Failure of a municipality to attempt to enforce its ordinance limiting the speed at which bicycles may be ridden on its streets will render it liable for injuries to a pedestrian knocked down by a bicycle which is being ridden at an immoderate rate of speed.
2. Sustaining a demurrer to a plea in an action for negligent injuries, which alleges that they were committed by a third person, is not error where there is also a

plea of the general issue, since the plea demurred to amounts merely to the general issue.

(June 12, 1901.)

APPEAL by defendant from a judgment of the Circuit Court for Washington County in favor of plaintiff in an action brought to recover damages for injuries received by plaintiff by being knocked down by a bicycle in one of defendant's streets. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. A. Mason, W. J. Witsenbacher, and E. J. Halm, for appellant:

NOTE.—For a case holding that a municipality is not liable for injury to a person struck by a bicycle ridden on the sidewalk, by reason of its failure to enact an ordinance prohibiting the riding of bicycles on sidewalks, see, in 54 L. R. A.

this series, *Jones v. Williamsburg* (Va.) 47 L. R. A. 294.

For an extensive note on bicycle law generally, see the case of *Taylor v. Union Traction Co.* (Pa.) 47 L. R. A. 289.

It would not be pretended that the state incurred any liability for the failure on the part of public officers to enforce the provisions of its statutes, or owed compensation to anyone injured by a transgression of these provisions; and the municipality of Hagerstown should not be held to any greater liability.

Boehm v. Baltimore, 61 Md. 265; *Jones v. Williamsburg*, 97 Va. 722, 47 L. R. A. 294, 34 S. E. 883.

Messrs. M. L. Keedy, A. C. Strite, and Roger T. Edmonds, for appellee:

The declaration brings the case within the reason and the principles enunciated by the court in—

Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027; *Cochrane v. Frostburg*, 81 Md. 54, 27 L. R. A. 728, 31 Atl. 703.

Schmucker, J., delivered the opinion of the court:

The appellee in this case instituted an action against the appellant for damages for an injury resulting from being struck and knocked down by a rapidly moving bicyclist on a public street in Hagerstown. The appellant demurred to the *narr.*, and, its demurrer having been overruled, filed pleas, and went to trial upon the issues joined thereon, and, the verdict and judgment being against it, appealed. The record contains no exceptions to the court's action upon the evidence, or its instructions to the jury, and the main question, therefore, presented for our consideration, is whether the declaration stated a good cause of action. The declaration alleges the incorporation of the appellant, and that it was vested by its charter with control over its streets, and was given full power and authority to prevent, suppress, remove, and abate all nuisances and obstructions thereon, and, for the purpose of carrying out its powers and for the preservation of the peace and good order of the community and the protection of the lives and property of its citizens, to pass and enforce appropriate ordinances; that, in the exercise of the powers thus conferred on it, the appellant, some time prior to the happening of the injury complained of, passed an ordinance to regulate bicycle riding within its corporate limits, by which it was provided that it should be unlawful for any person to ride a bicycle at an immoderate speed on its streets, and a fine was imposed for a violation of the ordinance; that, by virtue of the power and authority conferred upon the appellant, it became its duty, not only to pass such ordinances as were necessary to protect the lives and limbs of its citizens, and prevent, suppress, and abate all nuisances and obstructions as aforesaid, but also to exercise all reasonable care and diligence in the enforcement of the same. The declaration alleges, further, that the appellant negligently, carelessly, and wrongfully failed, refused, and omitted to enforce the provisions of said ordinance; that the

provisions were negligently permitted to remain and be unenforced, so as, practically, to be a dead letter, although immoderate bicycle riding, trials of speed between riders of bicycles, and racing of bicycle riders upon the streets of Hagerstown had become and was at the time of the injury complained of, and for some time prior thereto had been, a nuisance upon that portion of West Franklin street between North Potomac street and Walnut street, a menace to the lives and limbs of the citizens of said Hagerstown traveling along, upon, and across said West Franklin street at its intersection with said North Jonathan street, as well as at other places on said portion of West Franklin street; that on diverse days and at diverse times, both in the daytime and after night, immoderate bicycle riding, trials of speed, and racing between bicycle riders occurred on said portion of West Franklin street, openly, publicly, and notoriously, and that the appellant negligently, carelessly, and wrongfully failed, refused, and omitted to enforce the provisions of said § 3; that, by reason of the failure of the appellant, the provisions of said ordinance became and were treated and considered, by persons riding bicycles on said portion of West Franklin street, as a dead letter, or an ordinance the provisions of which could be violated with impunity. The declaration further alleges that on the 5th day of August, A. D. 1899, the plaintiff, while in the exercise of due care and caution on his part, was crossing said West Franklin street at its intersection with said North Jonathan street, and while so crossing was struck and knocked down by a certain person or persons unknown to the plaintiff, who were then and there riding at an immoderate speed along and upon said portion of West Franklin street, at its intersection with said North Jonathan street, by reason of the carelessness, negligence, omission, and default of the appellant in the premises; that, by reason of such carelessness, negligence, omission, and default of the appellant in the premises, the plaintiff was seriously and permanently injured.

In the cases of *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326; *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027; and *Cochrane v. Frostburg*, 81 Md. 54, 27 L. R. A. 728, 31 Atl. 703, this court held that a municipal corporation having powers similar to those possessed by the present appellant is bound to exercise them for the public good, and to protect persons and property, and that its duty is not discharged by merely passing ordinances upon the subject. It can relieve itself from responsibility only by a vigorous attempt to enforce them. In *Marriott's Case* the city was held liable for damages to the plaintiff who suffered injury from falling upon ice which had accumulated upon the footway of one of the streets in such manner as to constitute a nuisance, and to obstruct and endanger the public in walking thereon; the injury having occurred after the lapse of a sufficient time after the city might, by the exercise of ordinary care

and diligence, have obtained notice of the condition of the street. In *Taylor's Case* the plaintiff was injured by being struck by a sled coasting on the public street at a high rate of speed, at a place where large numbers of men and boys had for several days prior thereto been coasting at a rapid and dangerous rate of speed. This sport was held to constitute a nuisance of a dangerous character, which the city should have suppressed. Inasmuch, however, as the city had, through its police, made a vigorous effort to suppress the coasting, and had so far succeeded in doing so that the sled by which the plaintiff was injured was the only one then on the street, the court, while affirming the principle of *Marriott's Case*, held that the lower court should have submitted to the jury the question whether the defendant had used reasonable care and diligence to suppress the nuisance. In *Cochrane's Case* the declaration averred that large numbers of horses, cows, hogs, and horned cattle were permitted to run at large upon the public streets, until they, especially the horned cattle, became a nuisance, and a source of danger to persons passing along the streets, and that, although the nuisance had become notorious, the city refused to take any steps whatever to abate it. The further allegation was made that the plaintiff, while passing along the street with due care, was attacked and seriously injured by one of the horned cattle so negligently permitted to be at large upon the street. The defendant demurred to the declaration, and the demurrer was sustained. Upon an appeal this court held the declaration to be sufficient, and reversed the judgment of the lower court. In the opinion in that case the cases bearing upon the subject in both this and other states, were reviewed, and, although it was conceded that the law in some of the other states was different, the *Cases of Taylor and Marriott* were affirmed and relied upon by the court in reaching its conclusion. It is apparent that the allegations contained in the declaration in the present case, which we have already stated at some length, bring it within the principle of the last-mentioned cases. We think the learned judge below committed no error in overruling the demurrer filed by the appellant.

Nor was there any error in sustaining the demurrer to the appellant's third plea, which alleged that the injury complained of had been done by one Lester Davis while conducting himself in accordance with the provisions of the ordinance regulating the use of bicycles on the streets. The plea in question amounted to general issue; for to aver that a third party committed the wrong alleged is the same thing as to say that the defendant did not commit it. The general issue is set up in the first plea, and under it the facts alleged in the third plea could have been offered in evidence, so that the appellant was, in no aspect of the case, injured by the court's action upon that demurrer. The judgment appealed from will be affirmed.

Judgment affirmed, with costs.

54 L. R. A.

UNITED RAILWAYS & ELECTRIC COMPANY OF BALTIMORE, Appt.,

v.

STATE of Maryland to Use of Emma P. DEANE, Widow of Frank H. Deane, Deceased, et al.

(.....Md.....)

1. An exception to a refusal to take a case from the jury at the close of plaintiff's evidence is waived by the introduction of evidence by defendant.
2. Failure of employees of a street railway company to overpower or remove from the car a drunken passenger whose conduct is such as to indicate danger to other passengers if he is permitted to ride unrestrained is negligence which will render the company liable for injuries which he inflicts upon a passenger, although there is nothing to indicate that the one injured is in especial peril.
3. Permitting a drunken passenger who has been removed from a street car for turbulence and an assault upon a fellow passenger, to return to and remain upon the car without further effort to remove him, although his turbulence continues, is negligence which will render the street car company liable for injuries inflicted by him upon a passenger.

(June 13, 1901.)

APPEAL by defendant from a judgment of the Superior Court of Baltimore City in favor of plaintiff in a suit to recover damages for the death of Frank H. Deane, which was alleged to have resulted from negligence of defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Fielder O. Slingluff, George D. Penniman, and T. Rowland Slingluff, for appellant:

Every means at the command of the employees of the railroad was resorted to, to eject the turbulent passenger, as a protection to the remaining passengers, and the assistance of willing passengers was called in, but to no avail. This relieves the carrier from responsibility.

Tall v. Baltimore Steam Packet Co. 47 L. R. A. 120, 90 Md. 255, 44 Atl. 1007; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220, 30 Atl. 560; *Illinois C. R. Co. v. Minor*, 69 Miss. 710, 16 L. R. A. 627, 11 So. 101.

Messrs. John Prentiss Poe, Daniel B. Chambers, and John R. M. Staum, for appellee:

The court properly left the case to the jury.

The defendant had the full benefit of the

NOTE.—For other cases in this series as to duty of carrier to protect passenger from assault by fellow passenger, see *Illinois C. R. Co. v. Minor* (Miss.) 16 L. R. A. 627, and note; *Richmond & D. R. Co. v. Jefferson* (Ga.) 17 L. R. A. 571; *West Memphis Packet Co. v. White* (Tenn.) 38 L. R. A. 427; and *Tall v. Baltimore Steam Packet Co.* (Md.) 47 L. R. A. 120.

As to liability for insult to passenger by drunken person, see *Lucy v. Chicago G. W. R. Co.* (Minn.) 31 L. R. A. 551.

strongest possible statement of the law in its favor.

Meyer v. St. Louis, I. M. & S. R. Co. 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116; *Lucy v. Chicago G. W. R. Co.* 64 Minn. 7, 31 L. R. A. 551, 65 N. W. 944; *Hendricks v. Sixth Ave. R. Co.* 12 Jones & S. 8.

McSherry, Ch. J., delivered the opinion of the court:

This suit was brought in the name of the state of Maryland, to the use of the widow and children of Frank H. Deane, against the United Railways & Electric Company of Baltimore, to recover damages for the injury caused to the equitable plaintiffs by the death of Mr. Deane. His death is alleged to have been the result of the defendant's negligence, and the negligence charged consisted in the failure of the company's servants to protect the deceased, while he was a passenger on one of its cars, from the deadly assault made upon him by a fellow passenger. The main question in the case is whether there was sufficient evidence of negligence to justify the trial court in allowing the case to go to the jury. At the close of the evidence adduced in behalf of the plaintiff the defendant requested the court to withdraw the case from the consideration of the jury. That request was refused, and the defendant reserved an exception. The defendant then offered evidence on its part, and, when all the evidence on both sides was in, it renewed the request previously refused, and presented several other prayers for instructions to the jury. The request to withdraw the case from the jury was again refused, though the court granted several other prayers submitted by the defendant. The refusal to grant the first, third, and tenth prayers, which asked to have the case taken from the jury, the refusal to grant the defendant's eighth prayer, and the granting of the plaintiff's first prayer constitute the rulings assigned as error in the second exception. No point has been made upon the plaintiff's prayer, and we need not allude to it further than to say that it fairly submitted the law of the case to the jury. The first exception is out of the case, because the presentation of evidence by the defendant after the court had declined to take the case from the jury on the evidence of the plaintiff was a waiver of that exception. That proposition has been so recently decided, in *Barabass v. Kabat*, 91 Md. 53, 46 Atl. 337, that we shall not pause to discuss it. We therefore come to inquire as to the legal sufficiency of the evidence to support the averments of the declaration.

It may not be amiss at this point to state briefly the legal principles applicable to such a case as this, though they were considered and announced not long ago in *Tall v. Baltimore Steam Packet Co.* 90 Md. 248, 47 L. R. A. 120, 44 Atl. 1007: "A carrier is not an insurer of the absolute safety of his passengers, yet he is bound to use reasonable care according to the nature of his contract; and, as his employment involves

the safety of the lives and limbs of his passengers, the law requires the highest degree of care which is consistent with the nature of his undertaking. *Baltimore & O. R. Co. v. State use of Hauer*, 60 Md. 449. This, though the measure of the carrier's duty as between him and his passenger in respect to the acts or omissions of the carrier and his servants towards the passenger, is not the standard by which his liability to the passenger is to be gauged or determined when intervening acts of fellow passengers or strangers directly cause the injury sustained whilst the relation of passenger and carrier is subsisting. Such an injury, due in no way to defects in the means of transportation or to the method of transporting or to an actual trespass by an employee whilst the relation of passenger continues, and involving, therefore, no issues of negligence concerning the duty to provide safe appliances and competent and careful servants to operate them, but arising wholly from the independent misconduct of a third party, furnishes a ground of action against the carrier only when the carrier or his servants could have prevented the injury, but failed to interfere to avert it. The duty of the carrier in such instances is consequently relative and contingent, not absolute and unconditional. . . . The negligence for which in such cases the carrier is responsible is not the tort of the fellow passenger or the stranger, but it is the negligent omission of the carrier's servants to prevent that tort from being committed. The failure or omission to prevent the commission of the tort, to be a negligent failure or omission, must be a failure or an omission to do something which could have been done by the servant; and therefore there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and that he had that knowledge, or had the opportunity to acquire it, sufficiently long in advance of its infliction to have prevented it with the force at his command." It is not because a particular passenger is known by the carrier's servants to be in peril of injury at the hands of a fellow passenger or stranger that a failure to use the means at command to protect him will be actionable negligence; but it is because there is a known or discoverable danger that an injury may be done to some passenger, and because no effort is made to avert that injury from all the passengers, that the carrier is liable if an injury is inflicted on one of the passengers when it could have been prevented. It is just as incumbent on the carrier to protect all his passengers from assault by a fellow passenger, when his servants have knowledge or the means of knowing that an assault on someone is imminent, and when they have time and the means to avert it, as it is to protect all his passengers from injuries likely to result from defective means or methods of transportation. Consequently it will not do to say, after an assault has been made, that the servants of the carrier did

not know or could not have foreseen that the particular individual who was assaulted would be injured by an assault, if they were apprised, or with proper care could have known, of circumstances which indicated that someone would be injured unless the disorderly passenger or stranger were ejected or controlled.

Turning to the facts, the usual conflict between the witnesses for the plaintiff and defendant encountered in personal injury cases is found in the record, though there are some circumstances about which there is no controversy. It is quite a familiar doctrine that, in dealing with a request to withdraw a case from the consideration of the jury, the court has nothing to do with the weight of the evidence, but is confined strictly to determining whether there is any evidence legally sufficient to sustain or justify a recovery. The truth of the evidence adduced in behalf of the plaintiff, no matter how flatly contradicted, must therefore be conceded, except in very rare instances, where it is physically impossible that it could be true. Upon the hypothesis that it is true, the sole inquiry is, Will it warrant a jury in finding a verdict for the plaintiff? If it will, then the case must go to the jury. If it will not, then the jury should not be permitted to deal with it at all. Now, it is not disputed that on Sunday afternoon, September 17, 1899, the deceased got on a car of the defendant railway company on South Charles street, going north; that at the corner of Charles and Cross streets a man named Geisenkotter boarded the same car; that Geisenkotter was very drunk, boisterous, and disorderly; that he assaulted a passenger on the rear platform, and acted like a maniac. Either because of the assault which he made on the passenger upon the rear platform, or because of his violent and threatening conduct, he was ejected from the car at the corner of Charles and Barre streets by the conductor and motorman. It is practically conceded that he was not a fit person to be upon the car, which was quite crowded with passengers, and therefore that he was properly put off. But when the car started he again got on, and, though the conductor saw him get on, and the motorman saw him after he was on, they did not at once make an effort to remove him. Though the car stopped at Charles and Conway streets, one square north of where Geisenkotter had re-entered the car after having been ejected, no attempt was made to remove him, notwithstanding his continuous disorderly conduct. The next street north of Conway is Camden. The car stopped there, but still no effort was made to put Geisenkotter off. From this point there is a divergence in the evidence. According to the testimony of the plaintiff's witnesses, while the car was proceeding from Camden street towards Pratt street, Geisenkotter, without the slightest provocation, assaulted Mr. Deane, striking him a vicious blow in the eye, which caused the rupture of a cerebral blood vessel, and thereby produced paralysis, and ultimately death. On 54 L. R. A.

the part of the defendant it was shown that an effort was made to eject Geisenkotter at Pratt street; that at each intersecting street a search was made for a police officer, but none was found; and that after the car passed Baltimore street, and before it reached Fayette street, the fatal blow was struck. The company insists that it was not derelict in its duty to the passenger, because its agents did not know, and had no reason to apprehend, that Deane was in imminent danger of injury at the hands of his drunken and disorderly fellow passenger; and the question was asked during the argument, What did the employees fail to do that they ought to have done, and which, if they had done, would have prevented the injury? It may be true that there was no reason to suppose that Mr. Deane, rather than any other passenger, was in imminent peril. But that is not material. As already observed, it is not the peril which a particular individual is in that is to be considered in a case of this kind. If there is danger of anyone being injured, and the employees fail to remove, subdue, or overpower the turbulent individual, after knowing that there is danger, or after they ought to have known that there was danger if they had exercised proper care, that failure is negligence, for the consequences of which the company is answerable. So the case comes down to the inquiry, Was there evidence tending to show that the employees of the defendant failed to do what they ought to have done under the circumstances? There ought to be no difficulty in answering this question. If Geisenkotter, who had assaulted another passenger before he was ejected from the car, and who was drunk, disorderly, and turbulent, was properly put off the car because his presence was a menace to other passengers, then it was the plain duty of the employees who put him off, to have kept him off. They demonstrated their ability to keep him off by having put him off. If he had been kept off after having been put off, he could not have assaulted Deane. While his assault on the other passenger did not necessarily indicate that he would subsequently strike Mr. Deane, it did show that he was in a condition which rendered it very probable and likely that he would attack someone else; and this was known to the employees sufficiently long before the assault was made on Mr. Deane to enable the conductor, not only to put Geisenkotter off, but to have kept him off, the car. It cannot be doubted that if there was sufficient reason for putting Geisenkotter off the car, so that injury to other passengers might be avoided, there was equally sufficient reason for keeping him off; and the failure to do this when there was power to do it was an act of negligence which caused the injury to and death of Mr. Deane. If, on the other hand, every effort was made by the employees to avert the injury, but was made without success, then the company would not be liable. This was plainly said to the jury, and it was a question of fact which was properly left to them.

The eighth prayer was rightly rejected. It sought to exculpate the defendant unless the jury should find that after Geisenkotter re-entered the car the defendant's servants knew, or should have known of the danger to the deceased. This prayer was faulty for two reasons: First, it eliminated all the facts that had preceded Geisenkotter's expulsion from the car, and narrowed the investigation to the occurrences which took place after he had returned, though the things which transpired before he was put off explained and threw light on what happened after his re-entrance; secondly, it undertook to confine the jury to a consideration of the danger to Deane, though the company's liability depended,

not on that fact, but upon the circumstance that anyone was in peril.

Upon the whole record, we think there was sufficient evidence to go to the jury on the question of negligence, and it was their exclusive province to weigh its value and probative force. They evidently believed the version of the unfortunate affair which was narrated by the witnesses for the plaintiff, for they returned a verdict against the defendant, and it is not for us to say that they were mistaken in doing what they did. As no error was committed by the trial court, the judgment will be affirmed, with costs.

Judgment affirmed, with costs above and below.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

FIDELITY MUTUAL LIFE ASSOCIATION, Appt., v.

John A. DEWEY *et al.*, *Respts.*

(.....Minn.....)

*In an action on a bond given by an agent to his principal, conditioned for the faithful performance of his duties, it appeared that, by the terms of the agency contract to secure the faithful performance of which the bond was given, the agent was required to make weekly reports to his principal of the business transacted by him; that the principal, without the knowledge or consent of the sureties, permitted the agent to continue in its employ, and to transact its business under the agency, without requiring him to make such weekly reports; and it is held that the failure to require the agent to make the reports, and permitting him to continue to transact its business under the contract in violation of the terms thereof in this respect, constituted a material departure from the contract, and released and discharged the sureties from liability on the bond. *Morrison v. Arons*, 65 Minn. 321, 68 N. W. 33, followed.

(June 7, 1901.)

APPEAL by plaintiff from a judgment of the District Court for St. Louis County in favor of defendants in an action upon the bond of one of plaintiff's agents to re-

*Headnote by BROWN, J.

NOTE.—For concealment or misrepresentation to release surety, see, in this series, *Pine County v. Willard* (Minn.) 1 L. R. A. 118; *Lachman v. Block* (La.) 28 L. R. A. 255; *Benton County Sav. Bank v. Boddicker* (Iowa) 45 L. R. A. 321; and *Lieberman v. First Nat. Bank* (Del.) 48 L. R. A. 514.

As to retaining employee after knowledge of his embezzlement to release surety, see *McShane v. Howard Bank* (Md.) 10 L. R. A. 552.

As to liability on guaranty or surety obligation obtained by fraud, see *Page v. Krekey* (N. Y.) 21 L. R. A. 409.

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cover money which he had collected and failed to account for. *Affirmed.*

The facts are stated in the opinion.

Messrs. Mahon & Agatin, for appellant:

The alleged omission to require weekly statements is not sustained by the evidence, and is not a defense in any event. Such omission, if there was any, could not be held to discharge the sureties, because it could not be prejudicial to them, nor was it made a condition of their liability.

Brandt, Suretyship & Guaranty, § 425.

Messrs. Searle & Spencer and *John G. Williams*, for respondents:

Appellant cannot recover because, without the knowledge or consent of the sureties, he disregarded the terms and conditions of the contract of hiring in that it did not require Dewey to make weekly remittances of all the money collected and a weekly statement of all business done by him, as required by the contract of hiring and the regulations and rules of the company.

Morrison v. Arons, 65 Minn. 321, 68 N. W. 33.

Appellant cannot recover because without the consent or knowledge of the sureties Dewey was permitted to retain money collected, largely in excess of what he was permitted by the contract to retain, and which under the contract he was required promptly to remit to appellant.

Burley v. Hitt, 54 Mo. App. 272; *Rapp v. Phœnia Ins. Co.* 113 Ill. 390, 55 Am. Rep. 427; *Morgan County v. Branham*, 57 Fed. 179; *Bragg v. Shain*, 49 Cal. 131.

Brown, J., delivered the opinion of the court:

In 1896, plaintiff, a Pennsylvania insurance corporation, with its head office in Philadelphia, constituted and appointed defendant Dewey agent for the transaction of certain of its business in thirty-seven counties of this state. As such agent, Dewey had the general management and charge of its

business in the matter of soliciting and procuring insurance risks, delivering policies, collecting premiums, and remitting and paying the same over to the company. To secure the faithful performance of his duties as such agent, Dewey executed and delivered to plaintiff a bond in due form of law, with the other defendants as sureties. The agent defaulted in the performance of his duties, failed to remit moneys collected by him, and this action was brought against him and his sureties upon the bond to recover the amount of his delinquency. Defendants had judgment in the court below, and plaintiff appealed.

It is claimed by the sureties in defense that they were released and discharged from liability on the bond because and for the reasons: (1) That plaintiff, without their knowledge or consent, modified and changed Dewey's agency contract by extending and enlarging his territory, thereby creating additional duties and responsibilities which were not contemplated by the parties when the bond was executed, and which constituted a material departure from the original agreement; (2) that Dewey was permitted by plaintiff, without the knowledge or consent of the sureties, to continue to transact the business of the company without being required to make remittances of money collected, and without being required to make weekly statements of business transacted by him, as provided by the terms of the contract; and (3) that the sureties were released and discharged because the company permitted Dewey to retain money collected, which, under the terms of the contract, he was required to promptly remit. It is unnecessary to go into a discussion or consideration of the first and third of these defenses. The evidence fully sustains the second, and, as this disposes of the case adversely to plaintiff, we need consider no other question. The terms of the contract between plaintiff and the agent, for the faithful performance of which the bond was given, so far as pertinent to the second defense, are as follows: "It is expressly agreed and understood that the said second party [Dewey] shall receive as a special trust the net or gross premiums, as the case may be, due the association, and shall remit to the said first party [insurance company] at the beginning of every week, and the said second party shall also at the same time make and forward a detailed statement of the collections made during the preceding week, showing the policies delivered, the collections made thereon, policies in hand not delivered, reasons for nondelivery, and policies in the hands of subagents." The contention is that plaintiff permitted Dewey to continue in its employ as its agent without requiring of him the remittance of money collected, or the weekly reports provided for by the terms of the contract, without the consent of the sureties, and that, in consequence of which, the defendants were released and discharged from all liability upon the bond. Our conclusion, from a careful examination of the evidence, is that the case of *Morrison v. Arons*, 65 Minn. 321, 68 54 L. R. A.

N. W. 33, is decisive of the case. In that action it appeared that one Arons was employed as a traveling salesman under a contract by the terms of which it was provided that there should be monthly settlements between the agent and his employer, and for the faithful performance of his duties Arons executed and delivered the bond upon which the action was brought. Instead of requiring of the agent monthly settlements, as provided by the terms of his agency contract, he was permitted by his employer to make such settlements and such reports of his doings as agent at such times as his inclination prompted. The court there held: "We agree with the court below in its construction of the contract, but we cannot concur in its holdings that the sureties were not discharged by the failure and omission to have monthly accountings and settlements between Arons and plaintiffs. . . . [Had monthly accountings been had], it is quite certain that plaintiffs would have discovered before the expiration of thirteen months that the business was not profitable, while Arons would have learned that he was far from earning a living out of it. The natural result would have been for both parties to terminate their contract relation, and avoid further loss. It is evident that there would be much less hesitation on the part of a person called upon to become a surety upon a bond given for the faithful performance of a contract with such conditions than if the real situation was not to be ascertained for months. The condition in the employment contract, whereby monthly accountings and settlements were agreed upon, was an exceedingly beneficial one for all concerned. It was an essential feature of the contract, whereby Arons agreed to conduct plaintiffs' business enterprise for an indefinite period of time. . . . The contract of suretyship was departed from and varied when this provision was wholly disregarded, and the case is brought directly within the rule that, if an essential condition of such a contract is not complied with, a surety is not bound." No distinction can be made between the two cases. In the case at bar, as in that case, the terms of the agency contract required the agent to make stated reports of transactions had by him, and in each case he was permitted by his employer to wholly fail to comply with the terms of his contract in that respect. The evidence in the case in hand, though perhaps not as specific as might have been, is reasonably clear and conclusive that Dewey made no reports of his doings as plaintiff's agent at all, and wholly failed to comply with the terms of his contract in that regard. The testimony of plaintiff's comptroller, taken by deposition at Philadelphia, and offered in evidence on the trial, is to the effect that Dewey never made any reports to the company, and that the company never required him to do so. It is true that he also testified that reports were made by the company's cashier, who received his information from Dewey; but that Dewey never made any reports, in writing or otherwise, direct to the company, is conceded by him.

He testified further that no other officer of the company had any more information on the subject than he possessed. The testimony of the local cashier at the company's Minneapolis office, who claims to have acted in a dual capacity as cashier of the company and clerk or agent for Dewey at the same time, though the evidence is clear that he was the agent and representative of the company, is to the effect that Dewey never made any weekly reports to him, and was never required to make any. He did state that Dewey made some verbal reports whenever he had matters on hand to report, but did not explain how he knew that the reports were made when the agent had material on hand for that purpose. There is no other evidence on this subject, and, although the cashier may have made reports to the company of the business of the agency, such reports were not the ones required or contemplated by the terms of Dewey's contract. The contract expressly required the agent to make detailed reports, and the terms thereof in this respect could not be complied with by reports made by another, under no responsibility, and bearing no relation to the contract with the sureties. Plaintiff was bound, in so far as the sureties were concerned, to require the agent to keep and perform the contract, and the sureties had the undoubted right to insist upon its faithful and strict observance. The consequences of a departure from the terms of the contract in this particular cannot be avoided by showing that another agent endeavored to perform the duties required of Dewey. Therefore the act of the company in continuing the agent in its employ without insisting upon the performance of the terms of the contract was a material departure therefrom, and one affecting the substantial rights of the sureties. It may be stated, as a general rule, that dealings between the principal and agent, which amount to a departure from the contract by which a surety is bound, and which, by any possibility, might materially vary or enlarge the surety's liability, operate to discharge him; and it is no answer to say that he was not in fact prejudiced. *Brandt, Suretyship & Guaranty*, § 345; *General Steam Nav. Co. v. Rolt*, 6 C. B. N. S. 550; *Calvert v. London Dock Co.* 2 Keen, 638; *Bragg v. Shain*, 49 Cal. 131. In line with this general rule, it was held in *Lancaster Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261, that, where there is a continuing suretyship for the faithful discharge of his duties by a servant, if the master discovers dishonesty in the servant, and continues him in his service thereafter, without the consent of the surety, express or implied, the latter is not liable for any losses arising from such dishonesty. Although there is no evidence in this case that plaintiff knew of Dewey's dishonesty, or continued him in its employ after acquiring any such knowledge, it is very certain and clear that such dishonesty might have been discovered had he been required to make reports as required by the terms of his contract. The sureties had the undoubted right to insist

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that the provisions of the contract be fully complied with in this respect, and, plaintiff having, without their knowledge or consent, acquiesced in the violation and breach thereof, they were released and discharged from all liability on the bond, and the court below properly ordered judgment in their favor. As this finally disposes of the case adversely to the plaintiff, it is not necessary to consider any of the other questions argued.

Judgment affirmed.

STATE of Minnesota, *Resp't.*,
v.

Jesse ROHART, *Appt.*

(.....Minn.....)

- *1. An ordinance of the board of park commissioners of the city of Minneapolis provides that no vehicle which, together with its load, weighs more than 2,000 pounds, and which is in use for carrying goods, merchandise, building material, manure, dirt, earth, or other article or commodity, and which has tires less than 6 inches in width, shall pass or enter upon any park or parkway. *Held*, as applicable to a parkway, the ordinance is void because unreasonable, and in its effect prohibitive of traffic thus classified.
2. Whether or not the parkway in question was established as such by assumption of authority over it by the park board, and by acquiescence therein on the part of the city council, in the absence of any express action as a body,—*quære*.

(May 17, 1901.)

APPEAL by defendant from an order of the Municipal Court of Minneapolis denying a new trial after conviction for violation of a municipal ordinance prohibiting the use on a parkway of traffic wagons having tires less than 6 inches wide. *Reversed*.

The facts are stated in the opinion.

Mr. John W. Arcander, for appellant:

A municipal corporation holds the title to its streets in trust for the general public.

The public for whom it holds the streets in trust is not only its own citizens, but the entire public, of which the legislature alone is the representative.

West Chicago Park Comrs. v. McMullen, 134 Ill. 170, 10 L. R. A. 215, 25 N. E. 676.

Municipal authorities, independently of

*Headnotes by LEWIS, J.

NOTE.—For another case in this series as to excluding loaded vehicles from pleasure driveway, see *Cicero Lumber Co. v. Cicero* (Ill.) 42 L. R. A. 696.

As to restricting heavily loaded vehicles to a specified portion of a street, see *State v. Boardman* (Me.) 46 L. R. A. 750.

As to regulating the use of vehicles on streets generally, see cases in note to *State v. Clarke* (Conn.) 39 L. R. A. on page 678.

As to regulation of speed of vehicles, see *State v. Sheppard* (Minn.) 36 L. R. A. 305, and note; also *Kansas City v. McDonald* (Kaa.) 45 L. R. A. 429.

special authorization to that effect, have no power to divest themselves of their power or control over public streets.

Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L. R. A. 696, 51 N. E. 758; *Kreigh v. Chicago*, 86 Ill. 407; *People ex rel. Branson v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135; *McCormick v. South Park Comrs.* 150 Ill. 516, 37 N. E. 1075.

It cannot be argued that, because the city by its charter is given the right to control and limit the use of its streets, it would therefore also have the right to delegate this power of control and limitation to someone else.

The ordinance is unreasonable and therefore void.

State v. Waddell, 49 Minn. 500, 52 N. W. 213.

Messrs. Frank Healy and C. J. Rockwood, for respondent:

A parkway is a passage, path, road, or street set apart for ornamentation, to afford the benefit of air, exercise, or amusement.

It was competent for the legislature to authorize the establishment of such a system, with such limited uses, and to authorize taking, as a part of such a system, ordinary streets and highways, and to limit their use to these purposes.

If any way called a parkway has all the usual features of a parkway except that it is carrying a traffic of lumber, ice, hay, stone, earth, garbage, merchandise, and all the miscellaneous traffic of a large city population, it is not in fact a parkway, no matter what appellation may be given to it. It is not reserved for ornamentation, nor to afford the benefit of air, exercise, or amusement. The uses are inconsistent.

If the park board has power to exclude heavy traffic from parks and parkways, it certainly has power to prescribe the conditions upon which such traffic shall be permitted.

There is certainly nothing unreasonable in attempting to preserve a few streets out of hundreds, and to set them apart for recreative uses. Nobody is inconvenienced by thus limiting the use of Lyndale avenue, because within 300 feet on either side there is a street just as good as Lyndale avenue would have been if it had not been boulevarded and macadamized.

Lewis, J., delivered the opinion of the court:

An ordinance of the board of park commissioners of the city of Minneapolis provided that no vehicle which, together with its load, weighed more than 2,000 pounds, and had tires less than 6 inches wide, should pass over or enter upon any of the parkways of the city. Defendant was convicted of violating this ordinance in July, 1900, by driving upon Lyndale avenue with a wagon equipped with tires 3½ inches wide, and carrying a load of over 2,000 pounds. Defendant appeals from an order denying his motion for a new trial, and claims in this court that the conviction ought not to be

sustained, for the reason that the part of Lyndale avenue upon which he was driving when arrested was not a parkway, but, if it was a parkway, that the ordinance requiring such traffic to be conveyed upon vehicles furnished with 6-inch tires was unreasonable and void. It appears from the record that in 1887, and for many years prior thereto, Lyndale avenue was a public street and highway, and had been used and traveled as such; that on June 25, 1887, the park board passed a resolution designating that part of Lyndale avenue here in question as a parkway, and through its secretary sent a communication to the city council announcing the passage, on July 19, 1887, of that resolution, as follows: "Resolved, by the city council of the city of Minneapolis, that so much of Lyndale avenue as lies between Western avenue and Twenty-Ninth avenue North he dedicated and turned over to the board of park commissioners as a parkway in compliance with their request of July 7, 1887." After these proceedings the park board took possession of the street, and caused the same to be macadamized, at a cost of \$13,000, the foundation of such macadam being broken stone, surfaced with limestone rock, with a slight covering of gravel, and rolled with a steamroller. Thereafter, and on November 19, 1887, the park board's attorney submitted a report to the board relative to the title of the land along Lyndale avenue, and recommended that a certain proportion thereof, including that involved in this case, be abandoned for parkway purposes until the city should have perfected its title thereto. Upon this report the board passed a resolution to the effect that all proceedings of the board relative to laying out and improving Lyndale avenue as a parkway between Twentieth avenue North and Twenty-Ninth avenue North be abandoned, annulled, and rescinded, to the end that the city might acquire a perfect title to the same before designating it for parkway purposes. The city thereupon commenced proceedings for the laying out of Lyndale avenue to a width of 66 feet, and for condemning the necessary property for that purpose, which proceedings terminated in making the street a public highway. It does not appear that any further steps were taken by the city council to redesignate the avenue for a parkway, or in any way giving its consent to the same, except by its silent acquiescence; nor does it appear that the park board took any action, as a body, to rededicate, or to designate and set aside, such avenue for parkway purposes. It is asserted by counsel for the city that the park board assumed control of the avenue, and has had possession of and exercised dominion over it from the time of the completion of the council's condemnation proceedings in 1888 down to appellant's arrest in July, 1900. But the record is void of evidence showing what, if any, acts the park board performed in the exercise of such control. There is nothing to show that it kept the roadway in repair. Neither does it appear when the ordinance went into effect.

So far as we are informed by the record, dominion and jurisdiction by the board over the avenue as a parkway can only be inferred from the fact that in 1887 the board instituted proceedings for its improvement by macadamizing it, and vacated such proceedings only for the purpose of permitting the city to perfect its title to the land, and from the further fact that the board assumed jurisdiction over it by having caused the arrest of appellant. Section 2 of chapter 281, Special Laws 1883, provides that the park board shall have the power, and it shall be its duty, to devise and adopt a system of public parks and parkways, and to designate the lands and grounds to be used and appropriated for the same; and, upon obtaining title or the right of possession thereof, to hold, govern, and administer the same, and to lay out and improve the same according to such plan as the board may adopt. But by § 1, chap. 304, Special Laws 1885, it is provided that all parkways shall be subject to the control and government of the board of park commissioners in respect to the construction, maintenance, regulation, and government thereof, and to the use, travel, and traffic over and upon the same: provided, that no street, alley, or public place, or any part thereof, shall be made a parkway without the consent of the city council. Under this law it is clear that the park board had authority to designate Lyndale avenue as a parkway in the manner in which it did,—by a resolution to that effect. It is equally clear that the rights of the public in relation to such street could not be changed unless the city council gave its consent to such dedication. Such consent might be given, as it was in the first instance, by a resolution of that body; but there is nothing in the act to prevent such consent from being given in some other manner. It might be inferred from the council's conduct in reference to the avenue. If, in fact, the park board did designate it as a parkway, and had assumed control of it for a number of years without objection on the part of the city council, then consent might be inferred. The difficulty with this case is that the record does not furnish convincing evidence either that the park board actually took possession of the avenue after title thereto was perfected by the city, and continued to exercise dominion over it as a parkway down to the time of appellant's arrest, or that the city council acquiesced in such control, if assumed, by the park board. But, inasmuch as the case must be disposed of adversely to respondent upon the question of the validity of the ordinance, we have deemed it wise not to determine, at this time, whether or not Lyndale avenue was a parkway at the time in question.

2. The pertinent part of the ordinance here involved reads as follows: “. . . No vehicle, which, together with its load, weights more than 2,000 pounds, and which is in use for carrying goods, merchandise, building material, manure, dirt, earth, or other article or commodity, and which has tires less than 6 inches in width, shall pass
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or enter upon any park or parkway.” It was held in the case of *State v. Waddell*, 49 Minn. 500, 52 N. W. 213, that in respect to a parkway to which the city had not acquired title as a part of its park system the board had no power to exclude the ordinary class of traffic, and confine the travel thereon to what may be termed park or pleasure travel. A distinction is made between streets and avenues of a park system to which the city has acquired title for such purposes and a street which has simply been designated a parkway by the board with the consent of the city council. In the one case the board has complete jurisdiction and power, not only to regulate, but to prohibit, general traffic; while in the other case it has no power to prohibit general traffic. It does not follow, however, that it has not the power to regulate such traffic within a reasonable limit. Conceding that the avenue in question was a parkway, and could be used by the public for general purposes of travel and traffic, how far does the board's regulating power extend? If, in order to protect the roadbeds, it were necessary to prohibit heavy traffic in wagons with narrow tires, provided wider ones were reasonably obtainable, such requirement would not be unreasonable; but in this case the tire used by appellant was of the widest in common use carried in the market for such traffic. According to the evidence, the 6-inch tire was not in common use, and was not found in the market ready-made, and only obtainable upon special order, and at extra expense. The evidence does not disclose that the roadway was in any manner damaged by appellant's wagon, nor does it appear that such traffic with 3½ inch tires would tend to impair the same. Under these circumstances the ordinance contained an unreasonable and arbitrary requirement, which, in its effect, was prohibitive of that class of traffic. Such power the board of park commissioners did not possess, and in that respect the ordinance is void.

Order reversed.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on May 28, 1901:

Since filing our opinion in this case, attention has been called to a misstatement of facts. It is stated in the opinion that all proceedings with reference to the acquisition of Lyndale avenue as a parkway between Twentieth and Twenty-Ninth avenues had been abandoned and rescinded by the board of park commissioners. A more critical examination of the record discloses the fact that the resolution passed by the park board, as amended, referred only to Lyndale avenue between Twentieth and Twenty-Fourth avenues North, and, as the alleged trespass occurred between Twenty-Fourth and Twenty-Ninth avenues North, it is contended on behalf of respondent that that portion of the parkway was never abandoned. It appears, however, that the resolution was reported by the secretary of the park board to the city council as originally introduced, including

the street from Twentieth to Twenty-Ninth avenues North, and it was upon this resolution, as so reported, that the council took action. We make this correction in order that the facts may not be misunderstood, but we are unable to see that it affects the con-

clusions of the court as stated in the former opinion. We shall not undertake to decide whether or not, under such circumstances, the parkway was abandoned, and we leave that question undetermined. The petition for reargument is denied.

MISSOURI SUPREME COURT.

STATE of Missouri, *Resp't.*,
v.

James THOMPSON, *Appt.*

(160 Mo. 333.)

1. An unconstitutional delegation of legislative power is not effected by conferring upon the state auditor the right to issue licenses for bookmaking on horse races to persons of good character, to be exercised on grounds of good repute.
2. A statute prohibiting bookmaking or pool selling at all places except upon grounds where the races are to be run, and by all except licensed persons, is not an unconstitutional special law on the ground that it grants special and exclusive rights and immunities.

(February 19, 1901.)

APPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction convicting him of violating a statute for the punishment of bookmaking and pool selling by unlicensed persons. *Affirmed.* The facts are stated in the opinion.

Mr. T. J. Rowe, for appellant:

The act approved April 7, 1897 (Laws 1897, p. 100), is prohibited by §§ 1 and 53, art. 4, of the Constitution of Missouri, and § 1, art. 14, of the Amendments to the Constitution of the United States.

As to violation of the 14th Amendment of the Federal Constitution, see—

Cooley, Const. Lim. 6th ed. 481-483; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Missouri v. Lewis*, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

As to violation of § 53, art. 4, state Constitution, see—

State v. Thomas, 138 Mo. 102, 39 S. W. 481; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *State v. Julow*, 129 Mo. 176, 20 L. R. A. 257, 31 S. W. 781; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784;

NOTE.—For another case in this series as to constitutionality of statute prohibiting bookmaking except upon a regular race course, see *State v. Walsh* (Mo.) 35 L. R. A. 231.

As to special legislation in regard to race courses, see *State, Alexander, Prosecutor, v. Elizabeth* (N. J. L.) 23 L. R. A. 525. 54 L. R. A.

State v. Loomis, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Lemon*, 45 Mo. 375; *State v. Hayden*, 31 Mo. 35; *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *State ex rel. Lionberger v. Tolle*, 71 Mo. 650; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *Winchester v. Nutter*, 52 N. H. 507, 13 Am. Rep. 93; *Brennan v. Brighton Beach Racing Assn.* 56 Hun, 188, 9 N. Y. Supp. 220; *Swigart v. People*, 154 Ill. 284, 40 N. E. 432.

Messrs. Boyle, Priest, & Lehmann, William M. Williams, and Thomas B. Harvey, for respondent:

Gaming is a vice which the state may, in the exercise of its police power, regulate or suppress, and it may do so by prohibiting gaming on particular games or in particular places.

14 Am. & Eng. Enc. Law, 2d ed. p. 666; *St. Louis v. Fitz*, 53 Mo. 585; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *State v. Debar*, 58 Mo. 395; *Debardelaben v. State*, 99 Tenn. 649, 42 S. W. 684; *Palmer v. State*, 88 Tenn. 557, 8 L. R. A. 280, 13 S. W. 233; *Brown v. State*, 88 Tenn. 572, 13 S. W. 236; *Daly v. State*, 13 Lea, 228; *Es parte Tuttle*, 91 Cal. 589, 27 Pac. 933; *State ex rel. Patterson v. Donovan*, 20 Nev. 75, 15 Pac. 783; *State v. Raymond*, 12 Mont. 226, 29 Pac. 732; *Brennan v. Brighton Beach Racing Assn.* 56 Hun, 188, 9 N. Y. Supp. 220; *L'Hote v. New Orleans*, 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788; *Humes v. Fort Smith*, 93 Fed. 863; Cooley, Const. Lim. 3d ed. p. 596; Cooley, Taxn. p. 403; *Houghton v. State*, 41 Tex. 136; *Rogers v. State*, 26 Ala. 76.

The restrictions contained in the law are reasonable in their nature, and are plainly designed to further the general object of the law by confining bookmaking and pool selling to such persons, places, and times as in the judgment of the legislature would best serve the public welfare.

Crouley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Re Ruth*, 32 Iowa, 250; *Trageser v. Gray*, 73 Md. 250, 9 L. R. A. 780, 20 Atl. 905; *Meyers v. Baker*, 120 Ill. 567, 12 N. E. 81; 14 Am. & Eng. Enc. Law, 2d ed. p. 672.

The act is not a delegation of legislative authority, but simply delegates power to determine the fact or state of things upon which the law intends to make its own action depend.

Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716; *Re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, 38 Pac. 981; *Crowley v. Christensen*,

137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Meyers v. Baker*, 120 Ill. 567, 12 N. E. 79; *State, Amerman, Prosecutor, v. Hill*, 52 N. J. L. 320, 19 Atl. 789; *State v. Barringer*, 110 N. C. 525, 14 S. E. 781.

Messrs. Edward C. Crow and Samuel B. Jeffries also for respondent.

Burgess, Ch. J., delivered the opinion of the court:

On the 19th day of January, 1900, the defendant was convicted in the St. Louis court of criminal correction, and fined \$1,000, under an information filed in said court against him and others by the prosecuting attorney of said court, charging them with bookmaking and pool selling in violation of an act of the general assembly of the state of Missouri entitled "An Act to Punish Bookmaking and Pool Selling by Unlicensed Persons, to Provide for the Issuance of Such a License, and to Dispose of the Funds Arising from Such License," approved April 7, 1897, at No. 112 North Fourth street, in the city of St. Louis and state of Missouri, on the 10th day of October, 1899, by unlawfully engaging in bookmaking by means of a system of gambling, commonly called a "book," upon the result of a certain contest of speed of beasts known as "horses," by certain persons, in the manner therein named, which was to take place thereafter, on the 10th day of October, 1899, beyond the limits of the state of Missouri, and by then and there betting money with certain persons therein named on the result of said contest, etc. Defendant appeals.

The only question raised by defendant on this appeal is with respect to the validity of the act of the legislature, which he contends is unconstitutional because violative of §§ 1 and 53 of article 4 of the Constitution of this state, and of § 1 of article 14 of the Amendments to the Constitution of the United States. Section 1 of article 4 of the state Constitution provides that "the legislative power subject to the limitations herein contained shall be vested in a senate and house of representatives to be styled 'the general assembly of the state of Missouri.'" The act provides that no person shall record or register, by mechanical or other means, bets or wagers, or sell auction pools, or engage in any bookmaking, by or through any device, book, instrument, or contrivance, upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, which is to take place within or beyond the limits of this state, without first having obtained a license as in the act provided. Section 2 provides that any person of good reputation desiring to obtain a license to sell auction pools, make books, or register wagers or bets by mechanical or other means, shall apply, in writing under oath, to the state auditor, for such license, stating that the contests upon which such pools, books, or wagers are made are actually to take place upon the race course or fair grounds where he desires to carry on business, the character of the business he desires to conduct, and the length of time;

and the state auditor, if satisfied with the good character of such applicant, and the good repute of the race course or fair ground upon which the applicant may desire to conduct such business, may issue a license authorizing him to do any or all of the things provided therein. The auditor may refuse to issue a license to any person to be used upon any race course or fair ground after such place or places have been operated for a period of ninety days in any one year. Section 3 requires that no license shall be issued for less than three nor more than ninety days, and it shall express upon its face the particular class of business which the applicant is permitted to conduct, and such license shall only authorize him to engage in pool selling, bookmaking, or registering bets as expressed therein. It shall also state the number of books and registers to be used, and the length of time and place where conducted, and no license shall be issued from the 1st day of November to the 1st day of April in each year. Section 4 prohibits the business being conducted at any other place than mentioned in the license, and prevents its being conducted at any other time than between 10 o'clock A. M. and 7 o'clock P. M.; and such person holding a license shall not be permitted to sell pools to, and accept or register bets from, any minor. Section 5 prescribes the penalty for the violation of any of the provisions of the act. Laws 1897, p. 100.

It is perfectly clear that bookmaking and pool selling, within the scope and meaning of this act, are gaming or gambling, which the state may, in the exercise of its police powers, prohibit altogether, or may regulate and control by restricting it to certain localities, or by prohibiting it from being practised in other localities. Thus it was held in *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471, that an ordinance of the city of St. Louis licensing bawdy houses was valid under the city charter, and that a license taken out in conformity with the ordinance would shield them from criminal proceedings by the state. Indeed, there is no conflict in the authorities upon this question, or the right of cities to suppress such houses, when authorized to do so by their charters. In *St. Louis v. Fitz*, 53 Mo. 585, it is said: "There is no doubt of the power of the legislature, or of municipalities deriving their power from the legislature, to make police regulations designed to promote the health and morals of the community. Laws to prohibit or regulate gaming, sales of intoxicating liquors, houses of prostitution, and thus indirectly advance the morals and good order of society, are beyond question." Any practice the tendency of which is to corrupt the morals of those who participate in or witness its practice is a proper subject of regulation by the state; and that bookmaking and pool selling and betting upon horse racing is demoralizing in its tendencies, and hence an evil which the law may legitimately suppress without infringing upon the constitutional rights of any citizen, is no longer an open question. In the case of *Es*

parte Tuttle, 91 Cal. 589, 27 Pac. 933, it is said: "Any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition by the state; and that gambling, in the various modes in which it is practised, is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure, is no longer an open question. The measures needful or appropriate to be taken in the exercise of this police power are determined by legislative policy, and for this purpose a wide discretion is committed to the lawmaking body. Whether it shall entirely prohibit, or only regulate by confining such practices within prescribed limits—whether the law shall apply to every kind of gambling, or only to those games or wagers in which evil effects appear with greatest prominence,—must be determined primarily by the legislative department of the state, or of the municipality authorized to exercise this great power, which is conferred for the purpose of securing the public safety and welfare; and unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of that department is conclusive." The same rule is announced in *State ex rel. Patterson v. Donovan*, 20 Nev. 75, 15 Pac. 783; *Cooley*, Const. Linn. p. 596. A similar question was before the Supreme Court of the United States in *L'Hotel v. New Orleans*, 177 U. S. 596, 44 L. ed. 903, 20 Sup. Ct. Rep. 791, in which it was said: "In this respect we premise by saying that one of the difficult social problems of the day is what shall be done in respect to those vocations which minister to and feed upon human weaknesses, appetites, and passions. The management of these vocations comes directly within the scope of what is known as the police power. They affect directly the public health and morals. Their management becomes a matter of growing importance, especially in our larger cities, where, from the very density of the population, the things which minister to vice tend to increase and multiply. It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. . . . Obviously, the regulation of houses of ill fame—legislation in respect to women of loose character—may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or, third, a restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt is, in a general way, conclusive upon all courts,

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state and Federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature."

But defendant claims that § 2 of the act delegates legislative power to an executive officer, namely, the state auditor, in that it confers upon him the right to say who are persons of good character, and what race courses or fair grounds are of good repute, and the right to grant a license to any person he believes of good reputation to make a book on A's race track, and upon the same person a license to make a book on C's track, etc. While the legislature could not delegate to the state auditor the power to make laws, it does not follow that it could not delegate to him the power to pass upon the character of persons applicants for license to sell auction pools, make books, or regulate wagers or bets upon contests to take place upon the race course where they desire to carry on the business, and to determine what race courses and fair grounds are of good repute, and to grant to persons whom he may find to be of good character licenses to sell auction pools thereon. The power delegated to the state auditor is not the power to make a law, but is the power to determine a fact or thing upon which the action of the law depends, and it cannot be said to be legislative in its character. The state, in the exercise of its police regulations, may prohibit gambling altogether, or regulate it in such manner as it may see proper, and for that purpose may vest such officers as it may see proper with the power to pass upon the character of persons who apply for licenses for that purpose, as well, also, as the place where to be conducted, and to grant license to such persons as he may think entitled thereto to conduct their business at such times and places as he may think proper, not prohibited by law. In passing upon a similar question in *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, it was said: "The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state, nor is it one which can be brought under the cognizance of the courts of the United States." So, in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716, it is said: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must

therefore be a subject of inquiry and determination outside of the halls of legislation.

. . . If the power to determine the expediency or necessity of granting licenses to sell liquors in a municipal division can be committed to a commission, a council, or a court,—which no one can dispute,—why cannot the people themselves be authorized to determine the same thing? If a determining power cannot be delegated, then there can be no power delegated to city councils, commissioners, and the like, to pass ordinances, by-laws, and resolutions in the nature of laws, binding and affecting both the persons and property of the citizens. If a determining power cannot be conferred by law, there can be no law that is not absolute, unconditioned, and peremptory; and nothing which is unknown, uncertain, and contingent can be the subject of law." In *State v. Barringer*, 110 N. C. 525, 14 S. E. 781, it was held that a law which prohibits the manufacture of spirituous liquors within 3 miles of the orphans' home, near Barium Springs, in that state, without the written permission of the superintendent of the home, was a constitutional exercise of the power of police regulations. The discretion vested in the state auditor is not arbitrary. He is by law made the state's agent, and is bound to exercise the discretion vested in him fairly and impartially, for the just purpose of carrying out the intention of the law. It is frequently the case that statutes require particular things to be done to make that legal which would otherwise be illegal, which depend upon the judgment and discretion of a designated agent, officer, or person; and under such circumstances the discretion is not arbitrary, but is lawful, when lawfully exercised. Statutes and ordinances have been sustained forbidding orations, etc., in a park without the prior consent of the park commissioners (*Com. v. Abrahams*, 150 Mass. 57, 30 N. E. 79), or upon the common or other grounds in the absence of the permission of the city committee (*Com. v. Davis*, 140 Mass. 485, 4 N. E. 577); prohibiting the occupancy of a place on the street for a stand in the absence of permission of the clerk of Faneuil Hall Market (*Re Nightingale*, 11 Pick. 168); prohibiting the keeping of swine without a permit in writing from the board of health (*Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860); forbidding the erection of wooden buildings without the permit of the commissioners of the town, through their clerk (*Easton Comrs. v. Covey*, 74 Md. 262, 22 Atl. 266); and forbidding the beating of drums in the traveled streets of a city without the permission of the president of the board of trustees of the municipality (*Re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, 38 Pac. 981). In all of these cases, and numerous others that might be cited, the power to grant permission (in other words, a license) was vested in some particular person or persons, committee or officers; and in none of them was it held that the power to do so was a delegation of legislative power. Our conclu-

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sion is that the act is not violative of § 1, art. 4, of the state Constitution.

A further contention is that the law in question violates § 53, art. 4, of the state Constitution, which provides that the "general assembly shall not pass any local or special law," in that it grants to corporations and individuals special or exclusive rights and immunities. *State v. Walsh*, 138 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112, and *State v. Thomas*, 138 Mo. 100, 39 S. W. 481, are relied upon as supporting these contentions. In *Walsh's Case* an act of the legislature (Laws 1895, p. 150) was held to be a special law, and void under § 53, *supra*, upon the ground that "it takes bookmakers, pool sellers and betmongers" as a class, and divides them into two portions, one of which, to wit, that portion which assembles "on the premises or within the limits or inclosure of a regular race course," it renders immune from punishment, while another portion of the same genus, bookmaker, pool seller, or betmonger, who pursue their avocation outside or immediately outside of the sacred precincts of "a regular race course," is subject to fine and imprisonment. In *Thomas's Case*, *Walsh's Case* was approved, and it was held that the act of 1891 (Laws 1891, p. 122), which prohibits the selling of bets, "upon the result of any trial or contest which is to take place beyond the limits of this state," but exempts by implication all persons who make such wagers on "contests which are to take place within this state," is a special law, and in conflict with § 53, *supra*, and that the act is a special law and void for the further reason that it separates offenders who gamble on events to occur outside of this state from those who do the same things as to events occurring within this state,—prescribes punishment for the former and protection to the latter,—thus dividing natural classes into two portions, making two classes out of one, and arbitrarily enacts different rules for the government of each. The act passed upon in *Thomas's Case* made it a criminal offense to wager upon horse races to take place out of this state, while wagering upon similar races to occur in this state was exempt; and it was correctly held that the law was special, and therefore void. The act adjudicated upon in the *Walsh Case* (Laws 1895, p. 150) provides "that any person who keeps any room, shed, tenement, tent, booth or building, or any part thereof, within this state, and who occupies same with any book, instrument, or device for the purpose of recording or registering bets or wagers, or selling pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, which is to be made or to take place within or without this state, or any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, which is to be made or take place within or without this state; or, being the owner, lessee, or occupant of any room, tenement, shed, tent, booth or building, or any part thereof,

knowingly permit the same to be used or occupied for any of the purposes hereinabove set forth, or therein keeps, exhibits, or employs any device or apparatus for the purpose of recording or registering such bets or wagers or selling of pools as are hereinabove set forth, or becomes the custodian or depositary for hire or privilege of any money, property, or thing of value which is staked, wagered, or pledged contrary to the provisions of this act, shall be guilty of a misdemeanor, and on conviction shall be punished by imprisonment in the county jail for a term of not less than six months or more than one year, and by a fine of not less than \$1,000, or by both such fine and imprisonment: provided, that nothing in this act shall be so construed as to prohibit or make it unlawful for any person to engage in or register bets and wagers, make books, sell pools or bet upon any trial or contest of speed of a horse, or between horses, on the premises or within the limits or inclosure of a regular racecourse on which such contest of speed is had, and at and prior to the time thereof: provided, that it shall be unlawful to make and sell said pools or book-bets to minors; and any person selling said pools and book-bets to any minor shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment in the county jail for a term of not less than three months or more than one year, and by a fine of not less than \$500." Now, the only material difference between the act of 1895, passed upon and held to be invalid in the *Walsh Case*, and the act in question in this case (Laws 1897, p. 100), is that under this act bookmaking and pool selling are prohibited at all places except upon race courses and fair grounds where the races are to be run, and then only upon the procurement of a license from the state auditor by any person who desires to engage in such business, while no license is provided for by the act of 1895. Gaming, sales of intoxicating liquors, houses of prostitution, and any practice which tends to demoralize, weaken, and corrupt the morals, may be regulated by the state, and confined to certain localities, or prohibited altogether, under its police powers, without infringing upon the inherent rights of any of its citizens. "And unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizens are assailed under the guise of a police regulation, the action of that department is conclusive." *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933. The sale of intoxicating liquors by retail is permitted in this state only under a license for that purpose,—the business to be conducted at some particular building,—and the power of the legislature to thus regulate its sale has never been called in question. So it was held by this court that a city ordinance licensing bawdy houses in the city of St. Louis was valid, under its charter. *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *State* 54 L. R. A.

v. Debar, 58 Mo. 395. In *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933, an ordinance of the city of San Francisco prohibiting the selling of pools on horse races, except within the inclosure of a race track where the race is to be run, is a valid police regulation, not in conflict with the Constitution of that state, and not void because its incidental effect may be to confer a special privilege or benefit upon those who own or control the race courses, by giving them the exclusive right to carry on the business, or of selling to others the privilege of the pool selling. It was held in *Brennan v. Brighton Beach Racing Assn.* 56 Hun, 188, 9 N. Y. Supp. 220, that by the laws of New York taxing race associations on their receipts, and declaring that such racing and pool selling in the state shall be confined to the period between the 15th day of May and the 15th day of October in each year, and all pool selling shall be confined to the tracks where the races take place, and the days when they take place, it was the intention of the legislature to sanction pool selling at the times and places fixed by the statute, and that a purchaser of a pool ticket at such a time and place may sue for his share in the pool. In *Debardeleben v. State*, 99 Tenn. 649, 42 S. W. 684, the defendant was tried, convicted, and fined for betting upon a horse race while without the inclosure within which the race was run, and appealed. The law under which the conviction was had provides, among other things, that "horse racing, without regard to the distance which may be run, trotted, or paced, where the same is run, trotted, or paced upon a race track, or path made or kept for the purpose, and inclosed by a substantial fence, . . . but it shall be unlawful gaming to bet or wager in any way upon any horse race, unless the race track upon which the race is run, trotted, or paced be inclosed by a substantial fence, and the bet or wager be made within said inclosure, upon a race to be run, trotted, or paced within said inclosure." Held, that horse racing is indictable as gaming under the laws of the state of Tennessee, unless the race is run within a substantial inclosure, and the bet made therein, and that the statute is not vicious class legislation; that the class legislation is not arbitrary or capricious, as the law embraces all persons, and affects alike all who are or choose to place themselves within its reach. So in the case at bar the law embraces all persons alike who choose to place themselves within its reach, and is not, therefore, vicious class legislation, either as to persons or place. And if bawdy houses, the sale by retail of intoxicating liquors, and gambling may be licensed by the state, in the exercise of its police powers, to be conducted by certain persons at specified places, and prohibited at all others, in regard to which there can be no question, for the same reasons it must follow that the act of 1897, in declaring betting on horse racing to be gambling, and in authorizing it, and the licensing of bookmaking and pool selling to be

carried on at certain race courses, and in prohibiting it at all other places, is a legitimate exercise of the police power of the state. The act is not in any way in conflict with § 1, art. 14, of the Amendments to the Constitution of the United States.

Our conclusion is that the law is valid, and that *the judgment should be affirmed.*

It is so ordered.

All concur.

NEW HAMPSHIRE SUPREME COURT.

Elmer J. WHEELER
v.

GRAND TRUNK RAILWAY COMPANY
OF CANADA.

(.....N. H.....)

1. A railroad company is liable for injuries to a drunken passenger caused by his fall from the door of a baggage car, near which he was permitted to dance and stagger, if, by exercising the care the situation required, it could have prevented the injury, and the passenger could not avoid it, although his inability resulted from his voluntary intoxication.
2. The jury must determine whether or not a railroad company could have prevented a drunken passenger staggering and dancing between the open doors of a baggage car without capacity to appreciate the danger, from falling out and being injured.
3. Whether or not the measure of care which a railroad company owed to a drunken passenger dancing and staggering between the open doors of the baggage car was such that by its exercise he could have been prevented from falling out to his injury is a question for the jury.
4. That incapacity of a passenger is caused by his voluntary intoxication will not absolve the carrier, upon discovering it, from using due care to prevent his being injured because he has placed himself in a dangerous position without ability to care for himself.
5. A general exception to the court's charge to the jury is unavailing without a specification calling the attention of the court to the particular error that it may be corrected.
6. A railroad company is chargeable with the knowledge of its conductor and baggageman as to the helpless condition of a passenger riding in the baggage car.
7. When proper instructions are given it is no ground of exception that they are not given in the form requested.
8. A requested instruction not true in its application to the case on trial should not be given, although stating a proposition true in general.
9. The failure to exercise due care for the protection of a drunken passenger on the part of a carrier having knowledge of his inability to realize the danger

from an exposed position which he has assumed, and not the passenger's incapacity which results from his voluntary intoxication, nor his placing himself in such position, is the legal cause of his falling from the train and being injured.

10. The rule of contributory negligence does not apply to an injury to a drunken passenger by falling from a train while staggering and dancing between the open doors of the baggage car, where, with knowledge on the part of the carrier of his inability to realize his danger and to care for himself, it makes no effort to protect him from injury.
11. Whether or not the intoxication of a passenger renders him incapable of understanding the danger of a position which he has assumed, or of protecting himself from its hazards, although he is able to talk, laugh, sing and dance about, is a question for the jury.
12. The duty of a railroad company may be found by the jury to include the doing of something to prevent injury to a drunken passenger who is in a dangerous position, the danger of which it knows he is ignorant of and powerless to avoid.
13. The duty of a carrier to protect an intoxicated passenger from falling from an exposed position on the cars is not changed by the fact that the intoxication is in violation of a statute.

(March 15, 1901.)

EXCEPTIONS by defendant to rulings of the Coos County Court made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. *Overruled.*

Plaintiff boarded defendant's train in an intoxicated condition, and entered the baggage car to ride there. While the train was in motion at the rate of 40 or 50 miles an hour he danced, staggered, and moved about in the car, the side doors of which were open. A lurch of the train caused him to fall from one of the open doors, whereby he received the injury complained of.

Messrs. C. A. Hight, L. L. Hight, and Chamberlin & Rich, for defendant:

The plaintiff was in law guilty of negli-

NOTE.—For cases in this series as to duty of carrier to intoxicated passenger generally, see *Missouri P. R. Co. v. Evans* (Tex.) 1 L. R. A. 476; *Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 6 L. R. A. 241; and *Fisher v. West Virginia & P. R. Co.* (W. Va.) 23 L. R. A. 758, and 33 L. R. A. 69.

As to liability for exposure of drunken person to danger by expulsion from cars, see *note* to 54 L. R. A.

Roseman v. Carolina C. R. Co. (N. C.) 19 L. R. A. 327; *Louisville & N. R. Co. v. Johnson* (Ala.) 31 L. R. A. 372; *Haug v. Great Northern R. Co.* (N. D.) 42 L. R. A. 664; and *Waldron v. Louisville & N. R. Co.* (Ky.) *ante*, 919.

For intoxication as affecting negligence of passenger, see *note* to *Kingston v. Ft. Wayne & M. R. Co.* (Mich.) 40 L. R. A. on page 134.

gence. His inexcusable negligence contributed to and was the proximate cause of his injury.

Messrs. Crawford D. Hening and Albert S. Twitchell for plaintiff.

Parsons, J., delivered the opinion of the court:

If the position occupied by the plaintiff at the time of his injury was dangerous to one in full control of his bodily powers, or dangerous to the plaintiff only because of his lack of such control, the plaintiff's own act produced the dangerous situation from which his injury resulted. If his failure to exercise the care of a person of ordinary prudence placed him in this situation, dangerous to him on either ground, the fact of his intoxication would not excuse him. If his act would have been negligence in a sober man, he was none the less guilty of negligence if intoxicated. For an injury resulting from prior or concurrent negligence of the defendants, to which his negligence contributed, he could not recover. But if the defendants, with knowledge of the plaintiff's danger, in the performance of the duty owed by them could have prevented the injury, they were bound to do so; and their breach of duty would be the legal cause of the injury, unless at the time of the injury the plaintiff, by the exercise of due care, could have avoided it. If the plaintiff could not have prevented the injury to himself, and the defendants could, by the care the situation required of them, they are liable if they did not, although the plaintiff's inability resulted from his prior negligence or intoxication. "If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. The latter . . . is the cause of the danger; the former is the cause of the injury." *Nashua Iron & Steel Co. v. Worcester & N. R. Co.* 62 N. H. 159, 164; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 558, 35 L. ed. 270, 272, 11 Sup. Ct. Rep. 653; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 429, 36 L. ed. 485, 493, 12 Sup. Ct. Rep. 679; *State v. Manchester & L. R. Co.* 52 N. H. 528, 537; *Bremner v. Jones*, 67 N. H. 374, 26 L. R. A. 408, 30 Atl. 411; 1 Shearm. & Redf. Neg. §§ 99, 100; Cooley, Torts, 674; Pierce, Railroads, 374. The plaintiff was not a trespasser to whom the defendants owed no duty except not actively to injure him. *Buch v. Armory Mfg. Co.* 69 N. H. 257, 44 Atl. 809. If he were, in spite of his prior misconduct the defendants would be liable for negligently running upon him. *Eagerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558. He was the defendants' passenger. Upon them was imposed the duty of carrying him safely, so far as it could be done by the exercise of the care demanded by the cir-

cumstances. *Taylor v. Grand Trunk R. Co.* 48 N. H. 304, 2 Am. Rep. 229. Whether the defendants, knowing the plaintiff's dangerous position, and his incapacity to protect himself or to appreciate the danger, could have prevented the injury, is a question of fact. Whether, under the circumstances, the care which the defendants owed the plaintiff was such that, by its exercise, the injury would have been prevented, was also a question for the jury. *Monroe v. Connecticut River Lumber Co.* 68 N. H. 89, 93, 39 Atl. 1019. The defendants' answer is that the plaintiff's incapacity was produced by his voluntary intoxication. But, if it were established that the plaintiff's incapacity and irresponsibility were known to the defendants, the cause of his condition is entirely immaterial. Intoxication will not of itself prevent a recovery. It will not excuse the plaintiff's nonexercise of care, and will not prevent his recovery if he exercised such care as the law required. *Maguire v. Middlesex R. Co.* 115 Mass. 239; *Alger v. Lowell*, 3 Allen, 402; *Kean v. Baltimore & O. R. Co.* 61 Md. 154; *Cincinnati, I. St. L. & O. R. Co. v. Cooper*, 120 Ind. 469, 6 L. R. A. 241, 22 N. E. 340; Wood, Railroads, § 319a; Beach, Contrib. Neg. § 146; 1 Shearm. & Redf. Neg. §§ 93, 94; Pierce, Railroads, 295; 2 Jaggard, Torts, 1091; Buswell, Personal Injuries, § 147. The declaration alleged the plaintiff's incapacity to care for himself, the defendants' knowledge of that fact and of the dangerous position he was in, their ability to prevent the injury by due care, and their failure to do so, and that the plaintiff's injury was due to the defendants' breach of duty. These facts constituted a cause of action, and the demurrer was properly overruled. It was conceded on argument that the formal allegation of the plaintiff's due care or absence of fault was unnecessary. Upon the questions of fact presented to the jury there was evidence tending more or less strongly in favor of the plaintiff's contentions. The motion for a verdict was properly denied. The general exception to the charge is unavailing without a specification calling the attention of the court to the particular error, that it may be corrected. *Emery v. Boston & M. R. Co.* 67 N. H. 434, 36 Atl. 367. A special exception was taken to the instruction that the defendants were chargeable with the knowledge of their conductor and baggage man. The defendants, a corporation, could act only through agents and servants, and the individuals named were in charge of its business on this occasion. The conductor was in charge of the train, and the baggage man of the car in which the injury happened. The instruction was proper.

The defendants requested the court to instruct the jury that if they found "that the plaintiff himself was negligent, and that his negligence materially contributed to produce the injury complained of, he cannot recover." This request was repeated in various forms involving the same principle of law. The instruction was not given in the form requested. The instruction asked correctly

states an elementary legal proposition, and the question is whether the rule asked for was in substance, so far as it was applicable to the evidence, included in the instructions given. We think that it was. When proper instructions are given, it is no ground of exception that they are not given in the form requested. *Walker v. Walker*, 64 N. H. 55, 5 Atl. 460. If a request to charge the jury states a proposition true in general, but not so in its application to the case on trial, the instruction should not be given. *Atherton v. Tilton*, 44 N. H. 452, 456; *Clark v. Wood*, 34 N. H. 447, 453. The contentions of the defendants are: (1) That such contributory negligence conclusively appears upon the evidence; and (2) if this contention is not sustained, that the specific instruction requested should have been given. It may be assumed that the plaintiff was negligent and careless in boarding the defendants' train in his intoxicated condition, and in occupying, in that condition, up to the moment of the accident, the exposed position which he did in the baggage car. This appears to have been conceded at the trial. The question is, Did this negligence, in a legal sense, contribute to the injury? If it did, the defendants are entitled to a verdict. The jury were instructed in part as follows: "In this case the plaintiff must show you that he was so much under the influence of liquor or so drunk at the time the accident happened that he was irresponsible, or incapable of taking care of himself under the circumstances in which he was placed; that the defendants knew of his condition at the time the accident happened; and that, after they knew of the plaintiff's condition and his danger, they could have prevented the accident by the exercise of due care. If the plaintiff fails to satisfy you of any of these facts, his case falls. When a man in his senses exposes himself voluntarily to apparent danger, he is not in the exercise of that care which the law makes it the duty of every man to take to prevent injury to himself; and drunkenness will not relieve the plaintiff from the exercise of the care required of people in general. But, while drunkenness will not excuse the exercise of due care on the plaintiff's part, still, if the plaintiff was so completely under the influence of liquor or so drunk at the very time of the accident that he was irresponsible, or incapable of taking care of himself, and the defendants knew of his condition and danger in time to prevent the accident, and did not use due care to prevent it, they were in fault. . . . In this case, while the defendants were not under obligation to accept the plaintiff as a passenger in the condition he tells you he was, still, if they did accept him when they knew he was so much under the influence of liquor that he was irresponsible, or incapable of taking care of himself, under the circumstances in which he was placed, or if they permitted him to remain on their train after they became aware of his condition, it was their duty to use due care to prevent injury to him; and due care would be the exercise of such care as a reasonably prudent man

would exercise, situated in precisely similar circumstances as the facts show you existed at the time of this accident. In this case, if the defendants knew the plaintiff's condition, and could have prevented the accident by the exercise of due care, they are in fault; but if the defendants, after they knew of the plaintiff's condition, could not have prevented the accident by due care, they are not in fault. This is predicated on the fact that you find that the plaintiff was so much under the influence of liquor that he was irresponsible, or incapable of taking care of himself." These instructions clearly and forcibly stated the rights and duties of the parties, and the legal principles involved were repeatedly impressed upon the attention of the jury. The instructions assume, in effect, the plaintiff's guilt of contributory negligence in occupying the position he did at the time of the accident; for the jury were told that the plaintiff must fail unless at the time of the accident he was incapable of taking care. What was said includes the instruction requested, and more; for the request left it to the jury to say whether, by the exercise of care at the time of the accident, the plaintiff could have avoided the injury, while the charge assumed that by the exercise of care at time he could have avoided the injury, because the jury were told that he could not recover unless incapable of care. Hence the charge was more favorable to the defendants than the requested instruction. It included that and more. Whether the charge is correct in assuming that a sober passenger, who stands in an open baggage car, and does not keep himself from being thrown out by the lurch of the train, is guilty of contributory negligence under all circumstances, we need not inquire, because the defendants cannot complain of an error in their favor. *Mandigo v. Healey*, 69 N. H. 94, 96, 45 Atl. 318. The question in the case is: Was the plaintiff's negligent conduct in becoming intoxicated, and placing himself while intoxicated in a position where, by reason of his intoxication, he was incapable of preventing injury to himself, the legal cause of the injury? It must be conceded that the defendants were bound to exercise care for the plaintiff's safety, having accepted him as a passenger. If, in a given situation, they could, by the exercise of the care demanded by the situation, save him from harm, which by like care he could not avoid, they are liable. One element requisite to the determination of the care required is the knowledge of the danger possessed by each party. The plaintiff's intoxication may be laid entirely out of the case, except upon that question. Take the case of a sober passenger standing between the open doors of a car, or dancing about in the car, who does not know that what he is doing is attended with danger, while the railroad officials standing by know both the danger and the passenger's ignorance of it. It was decided in 1808, in *Dudley v. Smith*, 1 Campb. 167, that the driver of a stage coach, before passing through any place that is dangerous, is bound to inform the passen-

gers of the full extent of the danger; and if he proceeds without giving them this information the proprietor is liable for any injury which they may suffer which they might have escaped by alighting. The failure of the railroad employees to warn the passenger of the danger, to him, to their knowledge, unknown, but to them known, would be clearly a breach of duty which would render the carrier liable for an injury due to the lack of warning. The case supposed differs from the present only in the fact that the plaintiff's want of knowledge, incapacity, and irresponsibility was produced by his own negligence. But one's inability to escape danger because of his negligence does not authorize another negligently to injure him. "The law no more justifies . . . an avoidable injury to the person of one who carelessly exposes himself to danger than to his property similarly situated in his absence. He who cannot prevent an injury negligently inflicted upon his person or property by an intelligent agent, 'present and acting at the time,' . . . is legally without fault; and it is immaterial whether his inability results from his absence, previous negligence, or other cause. . . . *Nashua Iron & Steel Co. v. Worcester & N. R. Co.* 62 N. H. 159, 163." *Brember v. Jones*, 67 N. H. 374, 376, 26 L. R. A. 408, 30 Atl. 411. In such case the legal cause of the injury is not the negligence of carelessly exposing his person to injury which he cannot avoid, but the negligence of him who might have avoided the injury, but did not. It is urged that, as intoxication is no excuse for want of care, if the plaintiff was incapable of taking care of himself because he was drunk, he was simply failing to exercise due care without due excuse. This is only saying that he was negligent in occupying the position he did in the condition he was in. But his negligence did not excuse or justify negligence in the defendants in their care of him, and if, by the exercise of due care, they could have avoided injury to him, they were bound to do so, and their failure to do so if they could is the legal cause of the injury.

It is urged that the remaining in the car up to the very moment of the accident was negligence continuing to the very moment of the accident. Up to the very time of the accident, it is said, the plaintiff could have ceased his dance. When things came to such a pass that he could no longer prevent the accident, which was not until the accident itself began to happen, it was too late for the defendants to interfere; that it was, at most, a case of coincident negligence, and therefore the rule of contributory negligence ought to have been given. It is conceded that the rule given at the trial might apply to the man asleep on the track, but not to this case. The argument leaves out of consideration the material point of the defendants' knowledge of the danger and of the plaintiff's incapacity. If the negligence claimed were that the defendants negligently ran their train upon the curve at an excessive speed, whereby the plaintiff was thrown off, the defendants being ignorant of the

plaintiff's peculiar danger, the plaintiff's negligent occupation of an exposed position would defeat his recovery, if contributing to his injury. The rule as to contributory negligence would apply. The plaintiff's intoxication would be no excuse. If what he did or was doing would defeat the action of a sober man, it would defeat him. To such a state of facts the defendants' argument and request for instructions would be entirely applicable. The present case, in principle, is exactly that of an intoxicated man who wanders upon the track without care for his safety. His intoxication does not relieve him from the result of his negligence, but it does not excuse the defendants for the breach of their duty not carelessly to injure him, nor authorize the engineer, who sees him upon the track, and knows he is incapable of saving himself, to run over and kill him. *Keen v. Baltimore & O. R. Co.* 61 Md. 154, 157. The failure of the drunken man to see and avoid the train at the time of the accident is not the legal cause of an injury which, in spite of his negligence, the engineer could have foreseen and avoided by ordinary care, as in *Brember v. Jones*, 67 N. H. 374, 26 L. R. A. 408, 30 Atl. 411. The negligence of the defendant in being upon the wrong side of the road at the time of the collision was not the legal cause of the injury, if the collision could have been avoided by the exercise of ordinary care by the plaintiff. In this case the legal cause of the injury is not the plaintiff's failure to care for himself when incapacitated to do so by his intoxication, if, by the exercise of ordinary care, the defendants could have prevented it. The plaintiff, to the defendants' knowledge, being incapacitated from exercising any care, the question of contributory negligence is not involved. *Bisaillon v. Blood*, 64 N. H. 565, 15 Atl. 147. In this case the plaintiff's irresponsibility and incapacity to take care, to the defendants' knowledge, is the determining element upon the question of the care of both parties. The case was so put to the jury.

It is also claimed that the evidence does not warrant a finding that the plaintiff had so far lost his bodily powers as to be incapable of exercising care. Reference to the reserved case answers this claim. It is there stated that "the plaintiff's evidence tended to show that . . . he was received as a passenger by the defendants when so much under the influence of liquor as to be both physically and mentally incapable of taking care of himself." Whether there was or not such evidence is a question of fact settled at the trial term. *Edwards v. Tilton Mills* (N. H. March 15, 1901) 50 Atl. 102; *Gamsby v. Columbia*, 58 N. H. 60. It is conceded the plaintiff was drunk. Whether his drunkenness so affected him as to render him incapable of appreciating or understanding the dangerous position in which he was, or of protecting himself from its hazards, although he was able to talk, laugh, sing, and dance about, is a question of fact, and not of law. It cannot be said, as matter of law, that a man may not be able to do all that

the plaintiff did, and still be so affected by the intoxicants of which he had partaken as not to appreciate or understand the danger of riding in a car with open side doors, or of stepping near the doors. The defendants took no precautions to guard their passenger. They did not even warn him of the danger to which he was exposed, when they knew he was irresponsible, and incapable of taking care of himself. The case does not present the question of the general duty of a railroad to take care to guard an intoxicated passenger from running into danger. The question is simply whether, knowing he is in danger which he is incapable of understanding or guarding against, they are not bound to save him, if they can by ordinary care. Leaving out of sight the immaterial fact of the cause of the plaintiff's incapacity, the question is whether a jury may not find that, in the exercise of the care in transportation required of them, a railroad corporation, knowing that a passenger is in a dan-

gerous position,—the danger of which he does not know, and which they know he is ignorant of and powerless to avoid,—are under obligation to do something to prevent the injury. To this question there can be but one answer upon reason and the authorities. *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241; *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353; *Strand v. Chicago & W. M. R. Co.* 67 Mich. 380, 34 N. W. 712; *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 366, 23 L. R. A. 758, 19 S. E. 578, 42 W. Va. 183, 33 L. R. A. 69, 24 S. E. 570. Whether the plaintiff's intoxication was or was not in violation of the statute is immaterial upon the question of the defendants' breach of duty. *Brember v. Jones*, 67 N. H. 374, 26 L. R. A. 408, 30 Atl. 411.

Exceptions overruled.

Young, J., did not sit. The others concurred.

GEORGIA SUPREME COURT.

Elizabeth IVEY, *Plff. in Err.*,

v.
STATE of Georgia.

(113 Ga. 1062.)

*1. The state, as accuser in a criminal proceeding, does not seek to have one of its citizens convicted unless the evidence shows his guilt beyond a reasonable doubt; nor will it permit its prosecuting officer to use any unfair means in the trial, or illegal argument in his address to the jury, to the prejudice of the accused.

2. Where, therefore, a solicitor general, in his address to the jury, uses highly improper language, not authorized by the evidence or any fair deduction therefrom, and the counsel for the accused objects thereto, and moves the court to declare a mistrial, which the court refuses, and exception is taken to the ruling, this court will reverse the judgment, and grant a new trial, in the interest of justice and of fair and impartial trials.

(July 23, 1901.)

ERROR to the Superior Court for Whitefield County to review a judgment convicting defendant of illegally selling intoxicating liquors. *Reversed.*

The facts are stated in the opinion.

Messrs. Jesse A. Glenn and George G. Glenn for plaintiff in error.

Mr. Samuel F. Maddox for the State.

SIMMONS, Ch. J., delivered the opinion of the court:

The record discloses that Mrs. Elizabeth Ivey was tried and convicted for the offense of selling intoxicating liquor without

*Headnotes by **SIMMONS**, Ch. J.

NOTE.—For another case in this series as to right to new trial on account of objectionable remarks by prosecuting attorney, see *State v. Hull* (R. I.) 20 L. R. A. 609.

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a license. She made a motion for a new trial, which was overruled by the court, and she excepted. From her motion it appears that the solicitor general, in his address to the jury, used the following language: "Gentlemen of the jury, I want you to stand by me, and help me break up this vile den;" and: "Gentlemen of the jury, if you could go over this town, and see the good mothers whose pillows have been wet with tears over their boys who have been intoxicated by the acts of this woman." Defendant's counsel objected to these remarks as being highly improper, and without evidence to authorize them, and asked the court to declare a mistrial on account of them. This motion the court overruled, simply remarking, "Go on with the case, and confine your argument to the facts in the case." The motion for a new trial complains of the refusal of the court to grant a mistrial as asked. We think that the ruling complained of was erroneous. While the state is the accuser in every criminal case, it does not seek the conviction or punishment of any one of its citizens unless the evidence shows beyond a reasonable doubt that he is guilty. An officer is appointed to represent the state in the courts, and it is his duty, when the evidence shows or tends to show the guilt of one on trial for crime, to argue to the jury that the evidence is sufficient to authorize a conviction, and that the jury should return a verdict of guilty. The state, however, will in no case permit its representative to go outside of the evidence to find a basis for appealing to the sentiments, passions, or prejudices of the jury in order to obtain a conviction. *Jesse v. State*, 20 Ga. 169. The solicitor general, appointed to represent the interest of the state in the trial of offenders, does not occupy the position of counsel generally. His duty does not require him to insist upon the conviction of the accused unless the evidence is sufficient to authorize

it. His office is quasi judicial, and, while it is his duty, if he honestly believes that the evidence shows the guilt of the accused, to insist upon this view before the jury, and to use in his argument all his ability and skill in presenting the case as made by the pleadings and the evidence, still it is under no circumstances his duty either to go outside of the case, and state facts not in evidence, or to appeal to the passions or prejudices of the jury. The motion for a new trial shows that the solicitor general stated as facts things to which no witness had testified,—that good mothers had wet their pillows with their tears over their boys who had been intoxicated by the acts of the accused. These remarks were not warranted by the evidence, and were plainly calculated to prejudice the accused. While, as before remarked, the state is the accuser in criminal cases, it will not permit its representatives to use unfair means against the accused pending the trial, or to comment upon facts not put in evidence, or to make remarks calculated to prejudice the accused in the minds of the jurors. This is not a new question in this court. Similar conduct was condemned by this court in no uncertain terms in the case of *Berry v. State*, 10 Ga. 522. In *Mitchum v. State*, 11 Ga. 615, where the court had refused to restrain the solicitor general from commenting on facts not in evidence, Nisbet, J., said, in reference to the habit of counsel in addressing the jury of going outside of the evidence, and commenting on facts not growing out of the evidence or the pleadings: "We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal, and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments; and in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial." In *Forsyth v. Cothran*, 61 Ga. 278, this court approved the grant of a new trial by the lower court upon this ground. In *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 315, 11 S. E. 706, this court granted a new trial in a civil case because counsel for the plaintiff, in his concluding address to the jury, stated facts which were not in evidence, and inferences which could not be deduced from anything properly in the case. In *Bennett v. State*, 86 Ga. 401, 12 L. R. A. 449, 12 S. E. 806, a new trial was granted because the trial judge allowed the solicitor general to argue, over objection, that the accused was of bad character, when there was no evidence of such character. In *Washington v. State*, 87 Ga. 12, 13 S. E. 131, in which the accused was tried on a charge of arson, it was held that it was error to allow the solicitor general, over objection of defendant's counsel, 54 L. R. A.

to state that frequent burnings had occurred throughout the country, and to urge the jury, in consequence thereof, to strictly enforce the law in the case then on trial. In that case a new trial was granted. In *Johnson v. State*, 88 Ga. 606, 15 S. E. 667, a new trial was granted because the solicitor general was allowed, over the objections of the counsel for the accused, to argue to the jury that the failure of the counsel for the accused to examine the state's witnesses concerning a fact which the court had ruled to be inadmissible was an admission of such fact; and also that the failure of the accused to introduce these witnesses as his own amounted to such an admission. Mr. Justice Lumpkin, speaking for the court, said: "We feel constrained to allow the accused another hearing. The conclusions drawn . . . from the premises stated were unauthorized, and were highly injurious to the accused." In some of the foregoing cases it does not appear that any objection was made in the lower court to the improper language, or that any motion for a mistrial was made on account of it. The rule which now prevails in this court is that a new trial will not be granted upon such grounds unless objection is made by counsel for the accused, and some ruling invoked thereon in the court below. *Farmer v. State*, 91 Ga. 720, 18 S. E. 987. In the case of *Bowens v. State*, 100 Ga. 760, 764, 32 S. E. 666, 667. Mr. Justice Lumpkin lays down the rule as follows (with numerous citations of the decisions of this court): "Where counsel make unauthorized and improper statements in their arguments before juries, opposing counsel should call attention to the same, and either move for a mistrial or request the court to instruct the jury to disregard such statements." Even in cases where this court has refused to grant a new trial on this ground because of the failure to invoke a ruling in the court below, and make the point properly, it has almost invariably condemned the practice of commenting on facts not in evidence, and making improper remarks to the jury. In the present case the solicitor general made statements to the jury which were highly improper, the court failed to rebuke him, or to charge the jury with reference to the matter, and refused to grant a mistrial when asked so to do by the counsel for the accused. Under these circumstances, and the doctrine announced in the above-cited cases, we feel constrained to grant a new trial upon this ground. It may be that the accused was guilty of the offense charged, but certainly she cannot be said to have had a fair and impartial trial, and, in the interest of impartiality and of justice and of the dignity and decorum of the courts, a new trial should be had.

Judgment reversed.

All the Justices concur.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Second Quarter of the Judicial Year Beginning with October 1, 1901, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; GIFTS; WILLS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Equal protection of laws; discrimination.

The equal protection of the laws is held not to be denied to a foreign railroad corporation operating a portion of its road within the state by compelling it to become domesticated as a condition to its continuing such operation. (Ky.) 916.

A statute prohibiting bookmaking or pool selling at all places except upon grounds where the races are to be run, and by all except licensed persons, is held not to be unconstitutional as a grant of special and exclusive rights and immunities. (Mo.) 650.

A restriction of the number of persons which lodging-house keepers may permit to occupy one room during the same night is held to be a deprivation of property without due process of law, because of the discrimination in limiting the provision to lodging-house keepers. (Ill.) 838.

A statute prohibiting the letting of public printing to papers which have been established less than a year is held to violate constitutional provisions that all laws of a general nature shall have a uniform operation, and that no citizen shall be granted privileges which upon the same terms shall not be granted to all citizens. (Cal.) 771.

Police power.

A statute prohibiting the sale of cream that contains less than 20 per cent of fat is held to be a valid exercise of the police power, and constitutional. (Minn.) 466.

A statute making it unlawful to herd or graze sheep within two miles of an inhabited dwelling is held to be a valid exercise of the police power of the state, and not unconstitutional. (Id.) 785.

A statute making railroad companies liable to all employees for injuries caused by negligence of any of their servants in charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train, is held to be constitutional as an exercise of the police power. (Ind.) 787.

Jury.

A statute providing that three fourths of the jurors sitting in a civil case may concur in and render a verdict is held not to be
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authorized by a constitutional provision providing that in civil cases the jury may consist of less than twelve men, since the legislature is given no power to dispense with the unanimity of a verdict. (Wyo.) 549.

Physicians.

A statute authorizing the state board of health to revoke a physician's license for grossly unprofessional conduct likely to deceive or defraud the public, without fixing any standard by which such fact shall be determined, is held to be void. (Ky.) 415.

Cottolene.

A statute providing that any person who manufactures or sells any substance made in resemblance of lard, or as an imitation thereof, shall cause the package containing it to be labeled "Lard substitute," is held to forbid the sale of cottolene unless the package is labeled as provided in the statute. (Minn.) 468.

Heavy vehicles on parkway.

An ordinance providing that no vehicle which, together with its load, weighs more than 2,000 pounds, and which has tires less than 6 inches in width, shall pass or enter upon any park or parkway, is held to be void as applicable to a parkway. (Minn.) 947.

Public improvements.

Assessments for paving, made by apportioning the total cost of the work to the abutting lands according to frontage, is held not to constitute a taking of property for public use without compensation or due process of law. (Mo.) 492.

License and regulation of business.

A vessel having no propelling power of her own, and in charge of a tug having on board a licensed pilot, is held to be subject to the provisions of a state statute requiring vessels entering a certain port to take a licensed pilot, or, in case of refusal, to pay his regular fee. (C. C. A. 4th C.) 236.

The amount of the bond to be executed by a person making application for a license to sell intoxicating liquors, which is fixed by statute, is held to be a penalty, and not in
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the nature of liquidated damages, to be recovered as an entire sum in case any of the conditions of the bond are violated. (Minn.) 487.

Taxes.

Green-going tugboats are held not to be exempt from taxation by the state in whose waters they are exclusively employed, by the fact that they are registered and taxed at a port in another state where their owner is domiciled. (Wash.) 212.

The promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup is held to be a private purpose, and not a public one which will authorize the creation of a public debt to be paid by taxation. (C. C. A. 8th C.) 242.

A farmer who, to give his children school facilities, takes a house in town in which he places some of his household effects and lives with his family, is held not to be subject to taxation there, where he keeps his country house at all times in readiness to receive the family, and performs his duties as a citizen where his country house is located, claiming that as his home. (Ky.) 214.

An armory "owned" and occupied by any command of the volunteer military forces of the state is held not to be public property within the meaning of the constitutional provision authorizing the exemption from taxation of all public property; and a statute declaring that it shall be to all intents and purposes public property and exempt from taxation is held to be void. (Ga.) 806.

Eminent domain.

The condemnation of land for a public wharf is held not to be prevented by the fact that it is already in use by a common carrier as a landing place in connection with its business as such carrier. (Iowa) 859.

Municipal corporations.

A municipal corporation owning land on a navigable lake and its non-navigable outlet is held to have no right to appropriate the waters of the lake for a municipal water supply, even under permission of the state, to the injury of a riparian owner whose rights vested before the adoption of the state Constitution, which asserted ownership in the state of the beds of all navigable lakes, but provided that it should not debar any person from asserting his claim to vested rights. (Wash.) 190.

Under statutory authority to prevent the running at large of dogs, a municipal corporation is held to have a right to exact a fee for the privilege of keeping a dog, and, in case of its nonpayment, to impose a fine upon the owner and provide for the killing of the dog. (Ark.) 268.

Neither the general police power, nor charter authority to provide for the health and cleanliness of the city, is held to authorize a municipal ordinance prohibiting all interments within the city limits unless such prohibition is reasonable. (Or.) 636.

Making the mere possession of a lottery ticket a misdemeanor is held to be within 54 L. R. A.

the power of a municipal corporation where, by the Constitution, it has authority to make and enforce such by-laws and other regulations as are not in conflict with general laws. (Cal.) 779.

Failure of a municipality to attempt to enforce its ordinance limiting the speed at which bicycles may be ridden on its streets is held to render it liable for injuries to a pedestrian knocked down by a bicycle which is being ridden at an immoderate rate of speed. (Md.) 940.

Bankruptcy.

The voluntary conveyance by an insolvent for the use of his wife, without actual fraud, of all his real estate, the value of which is not greater than is subject by law to a homestead exemption, is held not to deprive him of the right to have the homestead set off to him in a bankruptcy proceeding, in case he obtains a reconveyance after the adjudication of his bankruptcy, and includes the land in his schedule of property. (C. C. A. 6th C.) 222.

Liability upon a penal bond conditioned for the payment of rents and annuities to another during life is held to be within the provisions of the bankruptcy act of 1898 allowing the proving against the bankrupt's estate of a fixed liability, evidenced by instrument in writing, absolutely owing at the time of filing the petition, whether then payable or not. (C. C. A. 4th C.) 369.

Schools.

Power to make vaccination a condition to admission to the schools is held not to be conferred by statutory authority to make suitable rules and regulations for their government and management, and to determine the qualifications for admission thereto, where the children are in good health, and there is no smallpox in the town, although there are some cases in other parts of the state. (Mich.) 736.

Voters and elections.

The inmates of a soldier's home are held not to acquire, by reason of their presence in such home and while kept at public expense, the right to vote in the county and precinct in which such institution is located. (Id.) 378.

Constitutional requirements of a written vote, and provisions for sorting and counting, are held not to preclude the use of a voting machine. (Mass.) 430.

Officers.

Officials in charge of the financial affairs of a county are held to have no authority to purchase vaccine matter, and to make the cost of the same a charge against the county. (Ga.) 292.

The salaries of public officers receiving no more than \$5,000 per year are held to be exempt, on grounds of public policy, from the payment of their debts. (Ky.) 566.

Promotion of a police officer for acts of personal heroism is held not to be prohibited by the constitutional provision that promotions shall be made, when practicable, upon competitive examination. (N. Y.) 589.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Public policy; illegality.

An agreement that for a pecuniary consideration a person will withdraw opposition to the granting of a pardon, and will endeavor to induce the pardoning authority to grant a pardon to one who has been convicted of a crime, is held to be against public policy, and void. (Kan.) 410.

Remedy for breach.

A party to a contract, who has received and retained the benefits of a substantial partial performance by the other party, is held to have no right to rescind the contract because of the breach of complete performance by the other party; but he is held to be limited to compensation therefor in damages. (C. C. A. 8th C.) 247.

Contract not to engage in certain business.

A contract not to engage in the barber business in any manner in a certain town, made by the owner of a barber shop on the sale of his furniture, tools, and fixtures, is held to be violated by his working as an employee in another barber shop in the town. (Kan.) 913.

Covenant.

A covenant in a conveyance of land for a college campus, that it shall be devoted exclusively as a part of the campus, and that no buildings shall be erected thereon except those devoted to university purposes, is held not to be broken by the placing thereon of sheds, engines, oil tanks, etc., for exploration for oil supposed to be beneath the surface, where such occupation will probably be temporary, and the general purposes of the grant may be materially advanced by the pecuniary results of development. (C. C. A. 9th C.) 262.

Bonds.

The failure to require an agent to make weekly reports of a business transacted by him as stipulated in the terms of the agency contract, to secure the faithful performance of which a bond was given, is held to be such a material departure from the contract as will release and discharge the sureties from liability on the bond. (Minn.) 945.

The killing by a deputy sheriff of a person under the mistaken belief that he is one for whose arrest on a charge of felony he has a warrant, and that the killing is necessary to prevent his escape, is held to render the sheriff liable on his bond, where the statute provides that he shall be liable on his bond for any misconduct or default of his deputies. (Ky.) 220.

Bills and notes.

Upon the transfer to a third person for value without recourse of a promissory note for the purchase money of personal property, which contains a reservation of title to the property in the payee until the note is paid, it is held that the title reserved for securing the payment of the debt is divested, and that, if, at the time of such transfer, the title so held was not likewise transferred to the purchaser of the note as a
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security in his hands, it vests in the maker, and the transferee becomes an ordinary creditor of such maker. (Ga.) 808.

A payee of a promissory note, who sells it to an innocent third person, and afterwards repurchases it for value, is held to have no better right as against the maker than he possessed in the first instance. (Wis.) 673.

One who signs a promissory note in the name of another, by himself as attorney in fact, but who, to the knowledge of the payee and a subsequent indorsee has no authority to use the other's name, and who refuses their solicitation to sign his own name and bind himself personally, is held not to be liable upon the note as his contract, although it is given in a transaction of his own, and the name signed to the note is generally used by him as a tradename. (Kan.) 408.

The fact that at the time of signing a note the maker is voluntarily intoxicated to the extent that he cannot give proper attention to it, is held not to render the note void. (Ala.) 440.

Insurance.

An agent who secures an application for insurance at a time when he has not complied with the statute prohibiting, under penalty, the soliciting of insurance without a license, is held not to be entitled to recover commissions thereon, although the policies are not issued until after the license is procured, and the statute does not expressly prevent recovery of the commissions. (Me.) 939.

Recovery upon a contract of life insurance not procured by the insured with the intention of committing suicide is held not to be defeated by his suicide, unless the contract so provides in express terms. (N. J. Err. & App.) 576.

An illegitimate child is held not to be a child or relative of her father as those words are used in a statute designating the persons who may be beneficiaries in certificates of mutual benefit associations. (Mass.) 814.

An assignment of a policy upon a person's own life to another, having no insurable interest, is held to be lawful, if done in good faith, and not by way of cover for a wager policy. (Neb.) 338.

The existence of a law imposing upon a son the duty of supporting his father in case the latter becomes unable to support himself is held to give the son no insurable interest in the father's life, in the absence of any expenditures, past or prospective, towards such support. (C. C. A. 3d C.) 225.

Recovery on a policy insuring against sickness, which limits liability to the period when insured is continuously confined to his house and subject to the personal calls of a physician, is held not to be defeated by the fact that the insured went out by direction of his physician for an occasional and

necessary airing, if by reason of his illness he was continuously confined to the house for a large portion of the time. (Mich.) 746.

The temporary absence of a competent watchman regularly employed for a mill, during which the mill is destroyed by fire, is held not to avoid a policy of insurance on the property, which stipulates that statements in the application shall be a part of the contract, although in the application the insured agrees to keep a watchman on the premises at such times as that when the fire occurs. (Mich.) 739.

Liability for loss resulting from destruction by fire of a building insured by a policy exempting the insurer from liability for loss caused by explosions of any kind, unless fire ensues, and in that event for the damage by fire only, and providing that if the building or any part thereof falls, except as the result of fire, the insurance shall immediately cease, is held to attach under the former clause, and not to be defeated by the latter, where one corner of the building is knocked down by an explosion in a neighboring building, and fire immediately appears in the exposed part, caused either by the flame of the explosion or by fires liberated thereby in the building insured. (C. C. A. 7th C.) 706.

The recovery for loss of prospective earnings awarded because of injury to a vessel by a collision is held to be within the rule entitling an insurer who has received an abandonment of the vessel to the fund recovered on account of the collision from the vessel in fault. (C. C. A. 6th C.) 700.

Gas.

A gas company required by statute to furnish gas to all persons within a certain distance of its mains is held to have the right to refuse to do so unless the customer agrees to pay a reasonable rent for a meter, where the value of gas required by him will not amount to one sixth of such rent. (Cal.) 769.

III. CORPORATIONS AND ASSOCIATIONS.

Corporations.

Minority stockholders of a corporation, who, by filing an equitable petition against it and its officers, succeeded in enjoining it from doing *ultra vires* acts which would have required the expenditure of money, are held not to be entitled to a judgment for their attorney's fees against the corporation, when the litigation did not result in the recovery of any property, and the corporation itself repudiated the efforts of the plaintiffs to thus protect its interests, and, in defense to their petition, contended that the acts in question were not *ultra vires*, but authorized by its charter. (Ga.) 305.

Dividend.

Under a writing entitled "escrow," instructing a depository to deliver stock to a third person in case he pays therefor on or before a certain date, it is held that no title passes to the vendee until payment is made, so as to entitle him to dividends on 54 L. R. A.

Release of judgment.

Payment of part of a judgment by a third person for the benefit of the debtor is held to be a sufficient consideration for a release of the entire judgment. (Iowa) 862.

Waiver of delay.

When time is made of the essence of a contract for the shipment of oranges under a contract of sale, acceptance of them when shipped after the stipulated time is held not to waive a right to damages caused by the delay. (Mo.) 718.

Carriers.

The duty of a railroad company to one as a passenger is held not to have arisen when, with the ticket in his pocket, he is crossing the tracks on a public highway for the purpose of boarding a train standing on the further track, and when he has not reached the platform provided for passengers. (Ill.) 827.

A carrier who, having engaged to transport imported goods in bond, pays duties and takes the goods out of bond without authority, is held to be liable for the damages caused thereby. (La.) 923.

Stoppage in transitu.

The right of stoppage *in transitu* of a carload of lumber is held not to be lost by the storage of the lumber by the carrier for failure to unload within the time required by its rules, when the freight charges remain unpaid and the carrier has made no agreement to hold the property for the consignee. (Mass.) 435.

Warehousemen.

A warehouseman to whom are delivered spirits in defective casks is held to be under no obligation to exercise any care to discover and cure the defect or prevent loss by leakage, where, by the storage contract, the risk of loss by leakage is placed on the owner of the spirits. (Cal.) 774.

the stock declared between the times of deposit and payment. (Utah) 508.

Partnership.

Members of an insolvent partnership, if in good faith, and all the partners consent, are held to be entitled to appropriate their own interest in the partnership property to the payment of their individual debts in preference to those of the partnership. (Kan.) 412.

A partner who, upon dissolution of the partnership and exhaustion of the social assets, pays a judgment subsequently recovered against it on partnership debts, is held to be entitled to be subrogated to the rights of creditors whose judgments he has satisfied against the real estate of his copartner in the hands of a subsequent purchaser to the extent to which his payments exceed his proportional part of the liability. (Va.) 614.

(DOMESTIC RELATIONS.—FIDUCIARY RELATIONS.—TORTS; NEGLIGENCE; INJURIES.)

Benefit societies.

A requirement of the constitution of a mutual benefit society, that its privileges shall be limited to members of a specified religious denomination, is held not to violate a provision of the state Constitution as to religious liberty. (Mo.) 723.

One who joins a mutual benefit society whose by-laws provide that no one can be a member of it who is a member of a society not approved by a particular church is held to have no right to complain if he is expelled from the society for membership in a society prohibited by such church. (Mich.) 727.

A provision in a certificate of membership in a benefit society, that the holder shall comply with the constitution and by-laws of the association, is held to refer to such laws as they then exist, and not to bind him to submit to a change subsequently made depriving him of the right to dispose of the benefit by will. (Ill.) 836.

A mere general consent by a member of a mutual benefit society, that the constitution and by-laws may be amended, is held to apply only to such reasonable regulations as may be within the scope of its original design, and not to authorize changes which

will destroy the value of his contract. (N. C.) 605.

A provision in the constitution of a benefit society, that members shall become such subject to the power of the corporation to change its by-laws, is held not to permit the society to change at will the contract it has made with each member. (N. C.) 602.

Building associations.

The rule that the minimum premium which a building and loan association may fix, to be deducted in advance or paid in instalments, must in any case be a certain definite sum, fixed and determined at the time of the making of the loan, is held to apply to a foreign building association; and a contract which does not conform to this requirement is held not to be within the exemption from the operation of the usury laws given by statute to domestic building and loan associations. (W. Va.) 536.

While a building association may fix a minimum premium, payable in advance or in periodical instalments, it is held that such premium must be a lump sum, certain and definite, and not a percentage payable for an indefinite time, at fixed periods. (W. Va.) 217.

IV. DOMESTIC RELATIONS.

A mutual agreement between husband and wife to separate on friendly terms and to make no future demands upon each other's property, carried out until the wife's death, is held not to prevent the husband from claiming his rights in her estate. (N. H.) 554.

A man's heirs at law are held to have no

right to maintain a suit to set aside a fraudulent divorce from a third person of a woman whom he afterwards attempts to marry, for the purpose of defeating her claims upon his estate, where they were not parties to the divorce proceedings, and had no interest therein. (Conn.) 758.

V. FIDUCIARY RELATIONS.

A contract binding upon the ward or upon his estate, however beneficial to the ward it may be, is held to be beyond the power of a guardian, and to impose a personal liability upon himself. (Utah) 354.

A person charged with the duty of selling corporation stock in order to raise a fund with which to pay encumbrances upon the

property of the corporation, and who is himself the owner of one of the encumbrances, is held not to be the trustee as to the property of the corporation covered by the encumbrances, and forbidden to protect his own interests by buying the prior liens upon it. (Kan.) 405.

VI. TORTS; NEGLIGENCE; INJURIES.

Libel.

Libelous words in a pleading, which are entirely foreign to the issues, and not pertinent to the subject of the controversy, are held not to be within the rule protecting averments in judicial proceedings as privileged. (La.) 930.

In the absence of anything to show ill-will or malice, it is held that a verdict must be directed for defendant in an action for the publication in a newspaper of an article ridiculing in exaggerated and uncomplimentary terms a public entertainment which is not only childish, but ridiculous in the extreme. (Iowa) 855.

Trespass in cutting lumber.

One who hires a gang of workmen and furnishes them to a third person together

with a time keeper, who is to impart to them the latter's orders as to the time and place to work, is held not to be liable for trespasses committed by them in cutting timber upon a stranger's land under direction of such third person, although he is to pay the wages and has power to discharge the men, where he is ignorant of the trespass, and has no voice in directing the laborers when and where to work. (Or.) 625.

Wrongful death; alien's right of action for.

A woman suing to recover damages for the negligent killing of her husband, for the benefit of herself and her minor children by him, is held not to be compelled to testify on cross-examination to the fact that she has given birth to an illegitimate child since his death, for the purpose of affect-

ing her credibility as a witness. (R. I.) 646.

Under a statute giving a right of action for wrongful death, to the next of kin of deceased if dependent on him for support, it is held that an action may be brought by a nonresident alien for the negligent killing of her son. (Mass.) 934.

Telegraph companies.

A telegraph company is held to be liable for losses caused by a false telegram willfully transmitted by an operator employed in its office, directing a bank to pay money on account of a correspondent bank. (C. C. A. 9th C.) 711.

Mental anguish resulting from failure to promptly deliver a telegram is held not to be sufficient to support an action against the telegraph company for such failure. (Ind.) 846.

Nuisance.

Damages for injuries growing out of a continuing nuisance, which have accrued within the statutory period before the commencement of the action, although more than the statutory period has elapsed since the completion of the work, are held to be recoverable. (Wash.) 532.

Compliance with the specific directions for the abatement of the nuisance in a decree enjoining the conducting of a business in such a way that the dust and fumes therefrom constitute a nuisance, is held not to absolve defendant from liability to punishment for contempt in failing to obey the general clause of the decree in case such directions prove insufficient. (Mich.) 454.

Injuries on highway.

The macadamized portion alone of a street 40 feet wide, of which about 25 are paved with cobble stones and the remainder macadamized, is held not to be the traveled part within the meaning of a statute requiring travelers by carriage to keep to the right of the center of the traveled part of the road; and therefore a traveler injured by collision while needlessly on the left of the center of the whole width of road is held not to absolve himself from fault by showing that he was to the right of the center of the macadamized part. (R. I.) 643.

Injury from gasoline.

A merchant who fills a jug with gasoline for a customer, without complying with the statute providing that no gasoline shall be sold unless the package containing it is marked "gasoline," is held to be liable for injuries to a member of the customer's family by its explosion when she attempts to use it believing it to be kerosene. (Iowa) 854.

Explosion of gas machine.

Damages for personal injuries caused by an explosion of an acetylene gas machine are held to be recoverable in an action for breach of warranty of its safety. (Ky.) 417.

Injury by driving logs.

One attempting to float logs down a stream is held to be liable to an abutting owner for injuries to his land by a jam 54 L. R. A.

caused by the careless manner of driving the logs. (Wash.) 199.

Injuries by dogs.

Injury inflicted by savage dogs upon one who entered the premises of the owner by his request is held to render the latter liable. (La.) 420.

Druggists.

Negligence in putting up a prescription is held to render a druggist liable for injuries caused thereby, although the negligence is that of a registered pharmacist employed by him, which class alone is allowed by statute to fill prescriptions. (Iowa) 364.

Combined negligence of master and servant.

In an action against a railroad company and its conductor for an injury caused by the alleged negligence of the conductor a verdict in favor of the latter is held to preclude a judgment against the company. (Wash.) 649.

Injury by servant to third person.

An assault and battery inflicted by a station agent and another upon a third person is held not to render the railroad company liable for damages when it appears that the difficulty arose out of a personal quarrel, and that the agent was acting upon his individual responsibility. (Ga.) 810.

Injuries to employees.

A foreman authorized to purchase, inspect, and direct the use of lumber for the temporary structure of a bridge which his employer is engaged in constructing is held to represent the master in respect to the duty of inspecting to ascertain if the lumber used is reasonably suitable for the purpose intended, so as to render the master liable for injuries to other employees due to failure to perform that duty. (C. C. A. 7th C.) 33.

A master's liability for injury to a servant by a defective tool furnished for his use is held not to be defeated by the fact that the defective condition was known to a fellow servant who procured the tool for use by himself and the injured one. (Mich.) 456.

A railroad company which fails to provide suitable rules and regulations for the control and operation of hand cars used by bridge gangs in coming to and from a station to places where they are engaged in the repair and construction of bridges is held to be guilty of negligence. (Minn.) 481.

A shed of a third person under which a railroad company runs a spur track is held to be within the rule that the working place furnished by the master must be reasonably safe. (Mich.) 461.

Injury to lineman of electric company.

An electric company is held not to be able to relieve itself from liability for injuries caused by its failure to warn of the danger an employee unacquainted with the dangerous character of the work of a lineman, upon ordering him to ascend a pole and scrape a wire, by delegating the performance of such duty to a foreman who is in a gen-

eral sense a fellow servant of the person injured. (Cal.) 85.

Injuries by fellow servants.

A foreman and a servant engaged in deepening a canal are held to be fellow servants in attempting to extinguish a fire spreading over adjacent lands towards property of the master on the canal bank, so that the master is not liable for injuries to the servant from the negligence of the foreman in failing to warn him of the impending fall of burning trees. (N. Y.) 52.

The failure of a foreman to keep cleaned and oiled an automatic stop designed to prevent the trolley from running off the end of the track of a traveler used to convey metal plates from one place to another in the shop, because of which the stop fails to work and falls upon an employee, is held not to render the master liable for the injury. (N. Y.) 62.

A foreman of water supply of a railroad, whose duty requires him to be carried from place to place along the road, is held, when riding on a detached engine to a place where machinery needs repairing, to be a fellow servant of the engineer, for whose negligence the master is not liable. (C. C. A. 6th C.) 696.

A section foreman in charge of a crew on a hand car, with power to determine where the car should be stopped, is held not to be, in the act of applying the brakes, a fellow servant of one of the crew, so as to relieve the railroad company from liability for injuries to the latter by his negligent application of the brakes. (Ky.) 78.

One operating a body maker in a can factory, having authority to direct the actions of the machine tender, is held to represent the master in directing the tender to remove a can body which has caught in the machine, and not to become the fellow servant of the tender by reason of the fact that it is his duty to start the machinery with his own hand, so as to release the master from liability for injuries caused thereby. (Ill.) 842.

Injury to passenger.

Injury to a passenger caused by the overturning of a car is held to render the railroad company liable, where it leaves her in the car without warning because she cannot understand the language in which other passengers are warned, after the engine has been overturned by a washout and water is running along the track in such a way as to undermine one side of it and render the overturning of the car probable. (C. C. A. 5th C.) 240.

A railway company which permits a drunken passenger to dance and stagger near the door of a baggage car is held to be liable for injuries caused by his falling from the car. (N. H.) 955.

Permitting a drunken passenger who has been removed from a street car for turbulence and an assault upon a fellow passenger, to return to and remain upon the car, although his turbulence continues, is held to render the street-car company liable for

injuries inflicted by him upon a passenger. (Md.) 942.

Assault by conductor.

An assault by a street-car conductor on a passenger because the latter, after being carried past his station, in order to stop the car pulled the bell rope so hard that he broke it and jerked the conductor several feet along the car floor, is held to render the company liable. (Ala.) 752.

Ejection of drunken trespasser.

The ejection from a train of one who, without right and while in a drunken and helpless condition, has boarded at night a train standing in a cut, by trainmen who know that a passenger train will soon pass through the cut, is held to render the company liable for injuries by the latter train. (Ky.) 919.

Injuries to children.

The owner of an uninclosed lot adjacent to a highway in a thickly populated part of the city, who leaves unguarded thereon a heavy section of cement pipe of unstable equilibrium, which is an attractive plaything for children to roll about, and who knows that they resort there for that purpose, is held to be liable to a child who is injured by the pipe toppling over onto him while he is playing with it. (Colo.) 284.

One who makes an excavation upon his land is held not to be bound to so guard it as to prevent injury to children who come upon the premises without his invitation, express or implied, but who are induced to do so merely by the alluring attractiveness of the excavation and its surroundings. (Ga.) 313.

A municipal corporation which, in constructing a sewer in a public street, leaves a manhole uncovered for several weeks and near it a pile of sand with knowledge that children are accustomed to play in the sand, is held to be liable for injuries to a child who, while at play, falls into the manhole and is injured. (Ind.) 396.

Injury in escaping danger.

A woman who, seeing a car which had been derailed while a flying drill was being made, coming out of the limits of a freight yard and across a public street at great speed towards the place where she was standing, ran for safety and fell, is held to be entitled to recover for the injury thereby received. (N. J. Err. & App.) 582.

Contributory negligence.

The modification of the rule that one guilty of contributory negligence cannot recover for injuries negligently inflicted, which permits a recovery in case defendant might, after discovering plaintiff's peril, have avoided the injury, is held to be inapplicable, where plaintiff, in attempting to put a parcel on the front platform of a street car, negligently stood on the side toward the other track, and upon perceiving a car approaching became confused and got caught between the cars and was injured. (Md.) 424.

Failure to exercise ordinary care on the part of the person injured, before the neg-

ligence complained of is apparent or should have been reasonably apprehended, is held not to preclude a recovery, but to authorize the jury to diminish the damages in proportion to the fault attributable to the person injured. (Ga.) 802.

The question whether or not a boy ten years old is guilty of negligence contributing to his injury, is held to be for the jury, where, at a street crossing, he attempts to ride a bicycle across street-railway tracks, and in so doing passes behind one car and comes immediately in front of another approaching from the opposite direction, which, because of its defective condition, cannot be stopped in time to avoid collision with him. (Wash.) 184.

In an action for the death of a child, the father as administrator being plaintiff, it is held to be error to instruct the jury that contributory negligence of the father is no defense. (Neb.) 321.

Unforeseen result of wrongful act.

One who beats a horse in violation of the statute for prevention of cruelty to animals is held not to be able to escape liability for an injury caused by a blow falling on a bystander, on the ground that he used reasonable care to avoid the accident, which was caused by the shying of the horse and the slipping of his own foot, and that such result of his acts was not anticipated. (Iowa) 367.

Unforeseen result of lawful act.

The accidental shooting of a man upon a highway by an employee in a slaughter house who was shooting at dogs that had caused annoyance and trouble about the place is held not to render either employer or employee liable, as the shooting of the man was entirely accidental, and was due to the deflection of the course of the bullet in some manner, except for which it could never have reached the highway. (Kan.) 402.

VII. PROPERTY RIGHTS; GIFTS; WILLS; LIENS.

Adverse possession.

Adverse possession of a portion of a railroad right of way for a period exceeding that designated by the statute of limitations for the recovery of real property is held to bar a right of action to recover possession thereof. (Wash.) 526.

A railroad right of way is held to be of such a public nature that title thereto cannot be acquired against the company by prescription or the running of the statute of limitations. (Cal.) 522.

An agent's occupancy of a house on his principal's property as a part merely of the contract for services is held not to establish the relation of tenant and landlord between him and the principal so as to preclude him from acquiring an adverse title to the property. (Ala.) 749.

Mortgage.

A power of sale inserted in a real-estate mortgage is held to be a power coupled with an interest, and is not revoked or suspended by the death of the mortgagor. (N. D.) 610.

A purchaser of a parcel of a tract of land, the whole of which is subsequently mortgaged, is held not to be entitled to take advantage, after foreclosure of the mortgage, of a clause therein by which any parcel may be released upon payment of a certain sum, where he has unsuccessfully sought to cast the burden of the whole mortgage on subsequent purchasers of the remaining parcels who purchased before the prior conveyance was recorded. (Mich.) 731.

Deeds.

Delivery of a deed in escrow sufficient to pass title is held to be made where the grantor turns the deed over to his housekeeper with instructions to deliver it to the grantee on his death, with no subsequent attempt to control or take possession of it, although for safe keeping she places it in the grantor's trunk, which is locked and 64 L. R. A.

the key to which he retains until his death. (Ill.) 865.

Gift.

A gift of personality placed in the possession of a third person for delivery to the donee is held not to be defeated by the fact that the delivery is not effected until the donor has become finally unconscious in his last illness. (C. C. A. 9th C.) 708.

Waters.

The riparian owners along a stream of water, the flow of which has been diverted from its natural channel or obstructed by a permanent dam which has continued for the time necessary to establish a prescriptive right to perpetually maintain the same, who have improved their property in reliance upon the continuance thereof, are held to acquire a reciprocal right to have the artificial conditions remain undisturbed. (Minn.) 473.

The right to appropriate the water of a spring which has no natural stream flowing therefrom is held to exist under a statute providing that all ditches constructed for the purpose of utilizing the spring waters of the state shall be governed by the same laws as ditches constructed for the purpose of utilizing the waters of running streams. (Or.) 628.

The right of a riparian proprietor to use the water for irrigating purposes is held not to be limited to the tract of land bordering on the stream as first segregated and sold by the government, but to extend to lands lying back of such tract and purchased by him from other persons. (Or.) 630.

Wills.

A paper reading: "This is good to Miss Rubie Ferris for eight hundred dollars for care and attendance rendered by her to me in my last sickness. This eight hundred dollars is to be collected out of my estate after my death, provided, however, I die

a bachelor,"—is held to be a will when it is duly executed as such. (Mich.) 464.

A bequest by name to an unincorporated educational society, which has an existing organization governed by a constitution and by-laws, and having officers to conduct its business affairs and carry out its objects, is held to be valid. (Cal.) 281.

An absolute gift, and not a trust, is held to be created by a will bequeathing a fund to a church, and "suggesting" that it be used to complete the spire, or invested and the income used to carry on a church mission, or for the benefit of the church poor. (Md.) 427.

Liens.

A stipulation in a lease of a farm for a term of years, that all property of every kind and description belonging to the tenant that shall be on the premises, or brought thereon during the term of the lease, shall be held as security for the payment of the rent, and that there shall be a lien on the same for the payment of such rent, is held to be ineffectual to create a lien for rents due and in arrears, on the crops grown on the leased premises, and other property not *in esse* at the time of the lease, but afterwards brought thereon by the lessee. (Neb.) 328.

VIII. CIVIL REMEDIES.

Comity.

A written promise of a married woman made in a foreign state, where it is valid, is held to be enforceable in New Jersey, although it would be void if made in the latter state. (N. J. Err. & App.) 585.

A judgment against a nonresident, entered on a note containing a power of attorney to confess judgment which is valid in the state where entered, is held to be entitled to full faith and credit in other states. (Mo.) 502.

That a judgment for alimony in a divorce proceeding is subject to alteration from time to time by the court which rendered it is held not to prevent its being a final decree which may be enforced in the courts of another state. (Wash.) 204.

Jurisdiction of probate court.

A cause of action against a railroad company for negligently killing a person, which is created by statute for the benefit of persons named, and is enforceable only by his administrator, is held to give jurisdiction to the probate court of the county where the killing occurred to grant letters of administration on the estate, although the deceased was not a resident of the state and owned no other estate within its limits at the time of his death, and the statutes provide in case of a nonresident for administration only in the county where the greater part of his estate may be. (S. C.) 660.

Injunction.

An injunction to restrain a representative of a labor union from enticing apprentices to break their contract and become members of the union is held to be properly granted at the instance of a manufacturer whose apprentices are under express contract not to join a labor union. (Pa.) 640.

To warrant an injunction restraining, as a threatened nuisance, the erection of a building proposed to be used for legitimate purposes, it is held that the fact that it will be a nuisance if so used must be made clearly to appear beyond all ground of fair questioning. (W. Va.) 545.

Abatement of nuisance.

Save as to those things which are by the common or statute law declared to be nuisances, or which are in their very nature palpably and indisputably such, it is held

that a municipal corporation has no legal right summarily to compel the abatement of a particular thing or act as a nuisance, without reasonable notice to the person alleged to be maintaining the same of the time and place for hearing, and determining whether such thing or act does in law constitute a nuisance. (Ga.) 294.

The fact that all places where intoxicating liquors are sold are declared by statute to be nuisances is held not to justify their abatement by any person or persons without process of law. (Kan.) 910.

A public nuisance consisting of a fence across a navigable stream is held not to be abatable at the suit of a private individual, unless he has some special interest in the abatement different from and greater than the interest of the community. (Wash.) 178.

Attachment.

An attachment levied on real estate fraudulently alienated by the attachment debtor, even though the legal title of record is in another, is held to create a lien in favor of the attachment creditor upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovering a judgment. (Neb.) 333.

An attachment creditor, claiming that an assignment for creditors is fraudulent as to him, and maintaining a hostile attitude toward the receiver of the estate, and who allows the receiver to insure the attached property for the benefit of the estate, is held to have no right, after money is collected on the insurance policy, to claim a trust in his favor on account of his attachment on the burned building which might have satisfied its execution had it not been burned. (Utah) 343.

Set-off.

A creditor of an insolvent debtor, who bids in the debtor's property at an execution sale for an amount in excess of the judgment, is held to have no right to set off his claim against the amount of his bid, to which the debtor is entitled. (Cal.) 272.

Judicial sale.

A sale of a section of a railroad under a decree of court separate from the franchise is held not to be warranted for the purpose

of enforcing a contractor's lien. (C. C. A. 6th C.) 687.

Attorneys' fees.

That the fund reached by a creditor's bill against an insolvent building and loan association is all absorbed by prior claims not secured by mortgage or other fixed lien, so that the one who has instigated it will receive nothing, is held not to prevent the allowance of a reasonable attorney's fee to his solicitors out of the fund. (Tenn.) 817.

Habeas corpus.

A writ of habeas corpus directed to a wife on the application of her husband touching the custody of a minor child is held not to be a suit within the meaning of a statute prohibiting suits between husband and wife except in special permitted cases. (La.) 927.

Limitation of actions.

In case a defendant, once a resident of the state, departs and resides out of it before a personal judgment against him, the time of his residence abroad is held not to excuse the judgment from the statute of limitations, although he was a resident when the cause of action on which the judgment rests, arose or accrued. (W. Va.) 215.

The substitution of plaintiff as administrator with the will annexed after the filing and probate of the will, for himself as simple administrator in an action on an insurance policy, is held not to constitute a new action so as to give the insurer the

benefit of the expiration of the time limited for the bringing of the suit which occurs before the substitution is made. (C. C. A. 6th C.) 680.

An action by a father to recover damages for the seduction of his daughter is held to be barred by the statute of limitations, unless brought within two years from the time the right of action accrued. (Ga.) 811.

Evidence.

Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor is held to be competent as an admission of weakness in his case. (N. Y.) 592.

Evidence of good character, while not a defense, is held to be a circumstance tending to strengthen the legal presumption of innocence, and to be weighed and estimated by the jury according to the weight of the testimony by which it is supported in connection with that to which it is opposed. (Del.) 286.

Military tribunal.

A military examining board provided by the Constitution and statutes to determine the moral character, capacity, or general fitness of officers of the militia, and having within its jurisdiction the powers of a court martial, and upon whose findings the governor may dismiss an officer from the service, is held to be a judicial body whose determination may be reviewed by a common-law writ of certiorari. (N. Y.) 597.

IX. CRIMINAL LAW AND PRACTICE.

Forgery.

The alteration of a memorandum as to the grade of grain, indorsed on the back of an elevator receipt given by a railroad company for grain to be stored and shipped, is held not to constitute forgery, since the memorandum is not part of the receipt, and the alteration does not change the legal effect of the receipt. (Ind.) 794.

An instrument in the following form: "Mr. Sage: Please let this boy have a single rig—a good one—and oblige. I will bring it back myself. (Signed) George Clinger,"—is held to be the subject of forgery. (Neb.) 327.

Perjury.

False testimony given in the course of proceedings which are merely erroneous or voidable, even if there are such irregularities or defects as would require a reversal of the cause on appeal, is held to constitute perjury, if material. (Okla.) 513.

Homicide.

In the absence of actual malice manslaughter, and not murder, is held to be committed by killing a man while reasonably believing from the circumstances that he is in the act of adultery with assailant's wife, although the assailant is in fact mistaken. (Conn.) 780.

Prison breach.

Breaking a prison is held not to be effected by a prisoner's concealing himself in a

crevice in a stone quarry to which he has been taken to work until the guards withdraw, and then walking forth without impediment, although to aid the concealment a cover is placed over the crevice, which is removed when the escape is effected. (Iowa) 823.

Intoxication to excuse crime.

Upon trial of an indictment for conspiring to commit murder the fact of defendant's intoxication at the time of the commission of the offense is held to be properly considered by the jury as bearing upon the existence of the felonious intent necessary to render him guilty. (Ind.) 391.

Drunkenness of juror.

The conviction of a person of a crime which the Constitution requires should be tried by a jury of twelve, though nine jurors concurring might render a verdict, is held not to be a legal conviction, though twelve jurors were physically present during the trial and all concurred in a verdict of guilty, if one of the jurors was in a drunken condition during the trial. (La.) 933.

Prejudicial remarks of prosecuting attorney.

Remarks of the solicitor general in a criminal proceeding, calculated to prejudice the jury, and not authorized by the evidence or any fair deduction therefrom, are held to require the reversal of the judgment and the granting of a new trial. (Ga.) 959.

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2. Although an owner of an animal is not responsible when damage is caused by an unforeseen accident, or an accident he could not guard against,—as, when it arises from *vis major*,—he is responsible when he is chargeable with the least fault. Id.

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prior to the adoption of the Delaware Constitution of 1897, and they will not be departed from by the supreme court unless it be satisfied that they are clearly erroneous. *Daniels v. State* (Del.) 286

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2. One of two defendants cannot assign errors upon a general exception by both to the overruling by the court of demurrers to the complaint, filed, one by both defendants demurring generally to each paragraph of the complaint, and others by the complaining defendant attacking specified paragraphs of it. *South Bend v. Turner* (Ind.) 396

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3. Appeal by defendant against whom judgment is rendered in an action against two for an injury caused by the alleged negligence of one acting as agent for the other, in which judgment is rendered against one and in favor of the other, will take up only that part of the judgment which affects appellant, and the appellate court will have no power over the other judgment on such appeal. *Doremus v. Root* (Wash.) 649

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5. A general exception to the court's charge to the jury is unavailing without a specification calling the attention of the court to the particular error that it may be corrected. *Wheeler v. Grand Trunk R. Co.* (N. H.) 955

6. Objectionable remarks of counsel in arguing to the jury must be preserved by bill of exceptions, to be the subject of review on appeal. *Illinois C. R. Co. v. Josey* (Ky.) 78

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7. Findings of facts by the district judge, affirmed by the court of appeal, will, except in case of manifest error, be treated and considered as true. *Delisle v. Bourriague* (La.) 420

8. The appellate court is not precluded from considering the correctness of the overruling of a demurrer to an amended complaint by the fact that the original and amended complaints as they appear in the transcript are alike, on the theory that the original complaint was erroneously copied where the amended one should appear, where the clerk has certified that the amended complaint was correctly copied, and his duty required the copying of only that paper. *Indianapolis Union R. Co. v. Houlihan* (Ind.) 787

9. The court on appeal will not interfere with the discretion of the trial court as to the extent of the cross-examination of wit-

cesses, where a just verdict has been rendered and the testimony objected to could not have improperly affected the result. *Lafayette Bridge Co. v. Olsen* (C. C. A. 7th C.) 33

10. Error in continuing a temporary injunction until final hearing cannot be corrected on appeal from the final judgment, where the trial court itself dissolved the injunction at the final hearing. *Watkins v. Dorris* (Wash.) 109

11. Action of the appellate court not assigned as error is not subject to review in the supreme court. *Peterson v. Gibson* (Ill.) 836

12. The refusal to instruct the jury that the burden of proving that the insured did not come to his death through causes from liability for which the policy excepts the insurer is upon the one suing on the policy cannot be questioned for the first time on appeal. *Fidelity & C. Co. v. Freeman* (C. C. A. 6th C.) 680

13. Although the statute allows complaint for the first time in the appellate court, in case of absence from the complaint of averments essential to the cause of action, or the presence of some averment which absolutely destroys the right to recover, yet mere uncertainty or inadequacy of averment, which might have been amended or cured, will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection. *South Bend v. Turner* (Ind.) 396

14. Failure to object to an instruction that three fourths of the jury may return a verdict does not waive the right to have the validity of the verdict considered on appeal, where the receiving and entering of the verdict are objected to, and an exception taken to the decision of the court in overruling the objection. *First Nat. Bank v. Foster* (Wyo.) 549

15. An exception to a refusal to take a case from the jury at the close of plaintiff's evidence is waived by the introduction of evidence by defendant. *United Railways & E. Co. v. State use of Deane* (Md.) 942

16. A verdict for \$15,000 in favor of an employee of an electric company, who was badly injured by falling from a pole on account of contact with a live wire, for which the company was responsible, will not be set aside by the appellate court as excessive. *Tedford v. Los Angeles Electric Co.* (Cal.) 85

17. The circuit court of appeals may review the question whether or not a finding of facts in an action at law in the circuit court has any evidence to support it. *King v. Smith* (C. C. A. 9th C.) 708

18. The admission of incompetent evidence does not constitute reversible error when without the evidence the decision must have been the same. *Barber Asphalt Paving Co. v. French* (Mo.) 492

19. A judgment will not be reversed for failure of the trial court to expressly state 54 L. R. A.

that certain requested instructions are given, where it states that counsel have handed it some requests as stating propositions of law by which the jury should be guided in determining their verdict, and proceeds to read them to the jury. *Noble v. Bessemer S. S. Co.* (Mich.) 456

20. When proper instructions are given it is no ground of exception that they are not given in the form requested. *Wheeler v. Grand Trunk R. Co.* (N. H.) 955

21. It is not error for the court to refuse to instruct the jury under a request which assumes the existence of a fact to be established by evidence. *Daniels v. State* (Del.) 286

22. In an action for the death of a child the father, as administrator, being plaintiff, it is error to instruct the jury that contributory negligence of the father is no defense. *Tucker v. Draper* (Neb.) 321

23. It is reversible error to refuse defendant in an action by a child for personal injuries an order for a physical examination of plaintiff by physicians to be appointed by the court, where defendant has no other method of determining the extent of the injury, and the examination may be made without pain or danger to the plaintiff. *South Bend v. Turner* (Ind.) 396

Judgment.

24. Judgment absolute must be entered upon appeal, in favor of the principal, in an action against principal and agent for an injury caused by the alleged negligence of the agent, where judgment was entered in the trial court in favor of the agent and against the principal, and the principal alone appeals, since the judgment in favor of the agent precludes a recovery against the principal, and the appellate court has no power to revise such judgment. *Doremus v. Root* (Wash.) 649

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APPROPRIATIONS.

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ASSIGNMENT FOR CREDITORS.

See also ATTACHMENT, 6.

1. While a creditor is under no obligation to accept the provisions of an assignment made for his benefit, yet he cannot hold an assignment good in part and bad in part; nor can he receive the benefits of the assignment while he is in actual hostility to it, claiming in the courts that it is fraudulent and void, and refusing to accept its benefits. *McLaughlin v. Park City Bank* (Utah) 343

2. A creditor is not entitled to two in-

consistent, adverse, or conflicting rights, and if he accepts the benefit of an assignment knowing the facts, he cannot, ordinarily, impeach or repudiate it thereafter on the ground that it is illegal and fraudulent; nor can he, having repudiated it, take under its provisions as other creditors who have accepted it. Id.

3. While an assignee, or a receiver as his successor, holds the assigned property in trust for such creditors as accept the provisions of the assignment, the trust relation cannot exist between the receiver and a creditor who repudiates the assignment as well as the trust relation. Id.

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ATTACHMENT.

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1. An attachment levied on real estate fraudulently alienated by the attachment debtor and grantor for the purpose of hindering, delaying, and defrauding creditors, even though the legal title of record is in another, gives the attachment creditor a lien upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovery of judgment. *Westervelt v. Hagge* (Neb.) 333

2. The lien of an attachment levied on land fraudulently alienated becomes effective and enforceable after the real estate is reconveyed and restored to the fraudulent grantor, the same as though the conveyance in the first instance had not been made. Id.

3. No valid lien is acquired by an attachment on real estate by a creditor of a fraudulent grantee to whom the legal title has been conveyed in fraud of the rights of the creditors of the fraudulent grantor, and who has no actual interest therein, and who restores and reconveys the real estate to the fraudulent grantor, who voluntarily encumbers the same for the benefit of his creditor. 54 L. R. A.

ors, as against such creditors of the grantor under their liens thus acquired. Id.

4. An attachment lien on land, the legal title to which is in the attachment debtor, is subject to every equity which exists against the debtor at the time of the levy of the attachment, and courts of equity will limit the lien to the actual interest of the attachment debtor in such real estate. Id.

5. An attachment creditor cannot be deemed guilty of laches such as will forfeit his lien where he obtains judgment in his action within two years after the attachment is levied and within five months thereafter sets up his attachment in a suit to which he is made a defendant, which is brought to foreclose a mortgage on the property upon which he claims a lien. Id.

6. An attachment creditor who sits back during the pendency of legal proceedings, and allows the receiver of the estate to insure the attached property for the benefit of the estate, and who all the time is maintaining a hostile attitude towards the receiver and the assignment under which he holds, cannot, after money is collected by the receiver on an insurance policy, claim a trust in his favor on account of his attachment on the burned building, which might have satisfied his execution had it not burned. *McLaughlin v. Park City Bank* (Utah) 344

7. One who has acquired a lien on real estate, pending litigation, after the levy of an attachment thereon, is charged with notice and takes subject to the rights of the plaintiff in the action wherein the attachment was levied and final judgment rendered. *Westervelt v. Hagge* (Neb.) 333

8. Leaving a copy of an order of attachment with the actual occupant of lands attached, having possession of the premises and apparent authority over and control of the same, is a compliance with the provisions of a statute requiring that, "where the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order," although such occupant be not the owner or lessee of such premises. Id.

9. An execution creditor is not entitled to possession and rents of the property levied upon, before sale and before the time for redemption has expired. *McLaughlin v. Park City Bank* (Utah) 343

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BANKRUPTCY.

1. The voluntary conveyance by an insolvent, for the use of his wife, without actual fraud, of all his real estate, the value of which is not greater than is subject by law to a homestead exemption during the life of himself and wife and the minority of his children, will not deprive him of the right to have the homestead set off to him in a bankruptcy proceeding, in case he obtains a reconveyance after the adjudication of his bankruptcy, and includes the land in his schedule of property. *Re Tollett (C. C. A. 6th C.)* 222

2. Liability upon a penal bond conditioned for the payment of rents and annuities to another during life is within the provisions of § 63a of the bankruptcy act of 1898, allowing the proving against the bankrupt's estate of a fixed liability, evidenced by instrument in writing, absolutely owing at the time of filing the petition, whether then payable or not, but the claim proved must be limited to the penalty of the bond, where the computed value of the expectancy exceeds that amount. *Cobb v. Overman (C. C. A. 4th C.)* 369

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See also **DAMAGES**, 3; **INSURANCE**.

1. A requirement of the constitution of a mutual benefit society that its privileges shall be limited to members of a specified religious denomination, and that members neglecting to comply with the rules governing that denomination shall be suspended or expelled, does not violate a provision of the state Constitution securing the right to worship God according to the dictates of one's own conscience, and providing that no human authority can control or interfere with the rights of conscience. *Franta v. Bohemian Roman Catholic C. Union (Mo.)* 723

2. A by-law prohibiting members from being connected with societies not approved by a particular church is authorized by a provision in the statute authorizing the incorporation of mutual benefit societies, that they shall have power to establish rules for 64 L. R. A.

the regulation of the affairs of the corporation not contrary to the laws of the state or United States, and to decide the necessary qualifications of membership. *Mazurkiewicz v. St. Adelburtus Aid Society (Mich.)* 727

3. One who joins a mutual benefit society whose by-laws provide that no one can be a member of it who is a member of a society not approved by a particular church cannot complain if he is expelled from the society for membership in a society prohibited by such church. *Id.*

4. The financial secretary of a subordinate lodge of a benefit society, who is designated by the supreme lodge to receive and forward assessments from certificate holders, is for that purpose the agent of the supreme lodge, so that the standing of certificate holders will not be affected by his failure to forward assessments paid him. *Bragaw v. Supreme Lodge K. & L. of H. (N. C.)* 602

5. A provision in the constitution of a benefit society, that members should become such subject to the power of the corporation to change its by-laws, cannot be construed into liberty to change at will the contract of insurance it has made with each member. *Id.*

6. A mere general consent by a member of a mutual benefit society, that the constitution and by-laws may be amended, applies only to such reasonable regulations as may be within the scope of its original design, and does not authorize changes which will destroy the value of his contract. *Strauss v. Mutual Reserve Fund L. Asso. (N. C.)* 605

7. The contract evidenced by a certificate of membership in a mutual benefit society cannot, after the holder has paid large sums thereon, be altered by resolutions of the society without the holder's consent so as to place him in a class and assess that class in a manner different from the rule applied to newer members, the result of which is to destroy the value of the contract. *Id.*

8. A provision in a certificate of membership in a benefit society, that the holder shall comply with the constitution and by-laws of the association, a copy of which is attached to the certificate, refers to such laws as they then exist, and will not bind him to submit to a change subsequently made, depriving him of the right to dispose of the benefit by will, although the constitution provides for amendment. *Peterson v. Gibson (Ill.)* 836

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1. A note is not rendered void by the fact that at the time of signing it the maker is voluntarily intoxicated, merely to the extent that he cannot give proper attention to it,—that attention that a reasonably prudent man would be able to give. *Wright v. Waller* (Ala.) 440

2. The general rule that if a person, with knowledge of facts which will defeat a promissory note in the hands of the payee, purchases it from a bona fide holder thereof, he may recover thereon upon the strength of such bona fides, does not apply to a purchaser who is the payee of the note. If he sells such paper to an innocent third person and repurchases it for value, he does not thereby become possessed of any better right as against the maker than he possessed in the first instance. *Andrews v. Robertson* (Wis.) 673

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Bills and notes; fraud as affecting payees as bona fide holders; drafts for future delivery of goods, discounted by bank; contemporaneous collateral written agreement as affecting third person. 676

Intoxication of maker as affecting bona fide holder. 451

Rights of payee of note after repurchasing from bona fide holder. 673

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BLACKSMITH SHOP.

See NUISANCES, 1.

BONDS.

See also BANKRUPTCY, 2; DAMAGES, 2; INTOXICATING LIQUORS.

1. A sheriff is liable on his bond for the 54 L. R. A.

killing by a deputy of a third person under the mistaken belief that he is one for whose arrest on a charge of felony he has a warrant, and that the killing is necessary to prevent his escape, where the statute provides that the sheriff shall be liable on his bond for any misconduct or default of his deputies. *Johnson v. Williams* (Ky.) 220

2. The sureties on a bond given by an agent to his principal, to secure the faithful performance of a contract by the terms of which the agent was required to make weekly reports to his principal of the business transacted by him, are released from liability on the bond where the principal, without the knowledge or consent of the sureties, permitted the agent to continue in its employ, and to transact its business under the agency, without requiring him to make such weekly reports, since this constituted a material departure from the terms of the contract and one affecting the substantial rights of the sureties. *Fidelity Mut. Life Assco. v. Dewey* (Minn.) 945

3. Township bonds issued for the promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup, and the act of March 1, 1889, authorizing their issue, are beyond the powers of the legislature and the township, and are void. *Dodge v. Mission Twp.* (C. C. A. 8th C.) 242

NOTES AND BRIEFS.

See also BANKRUPTCY; INTOXICATING LIQUORS.

Bonds; municipal aid; validity of statute authorizing; what business public in nature. 243

BOOKMAKING.

See CONSTITUTIONAL LAW, 2, 6.

BRIBERY.

As an Admission, see EVIDENCE, 13.

BRIDGE.

See MASTER AND SERVANT, 4, 5; TRIAL, 15.

BUILDING AND LOAN ASSOCIATIONS.

See also CONFLICT OF LAWS, 1, NOTES AND BRIEFS; USURY.

1. A fixed minimum premium in a building association which may be paid in advance or in periodical instalments must be a lump sum certain and definite, and not a percentage payable indefinitely at fixed periods. *Gray v. Baltimore Bldg. & L. Assco.* (W. Va.) 217

2. A building and loan association may fix a minimum premium to be deducted in advance or paid in periodical instalments, but in either case such premium must be a certain, definite sum, fixed and determined at the time of the making of the loan. *Floyd v. National Loan & Invest Co.* (W. Va.) 536

3. Only the principal of the loan, with legal interest thereon, together with such

sums as have been necessarily expended in preserving the property, less the amounts paid into the association by the borrower as dues, interest, premium, and fines, to be treated in the settlements as partial payments, can be collected by a building and loan association on a contract for a premium which the law deems usurious. *Id.*

BUILDINGS.

Increasing Insurance Rates, see *INJUNCTION*, 1.

BURIAL.

See also *NUISANCES*, 2.

1. Neither the general police power, nor charter authority to provide for the health and cleanliness of the city, will authorize a municipal ordinance prohibiting all interments within the city limits, unless such prohibition is reasonable. *Wygant v. McLaughlan (Or.)* 636

2. The prohibition of the interment of dead bodies within the city limits is unreasonable where they include large tracts of land used exclusively for farming purposes, some of which contain several hundred acres on which interments could be made, which would be distant a half mile or more from any human habitation or thoroughfare. *Id.*

3. An ordinance prohibiting the interment of dead bodies within the city limits, which is unreasonable as applied to sparsely inhabited sections, and general in its scope and operation, must fall in its entirety. *Id.*

BY-LAWS.

See *BENEVOLENT SOCIETIES, NOTES AND BRIEFS*.

CANALS.

See *MASTER AND SERVANT*, 8, 12.

CARRIERS.

Liability for Paying Duties instead of Transporting in Bond, see *DAMAGES*, 7.

Condemnation of Landing for Public Wharf, see *EMINENT DOMAIN*, 1.

Failure to Establish Alleged Relation of Passenger, see *EVIDENCE*, 24.

See also *DAMAGES*, 1, 6; *PROXIMATE CAUSE*, 2; *RAILROADS*; *TRIAL*, 3-6.

1. The duty of a railroad company to one as a passenger has not arisen when, with a passage ticket in his pocket, he is crossing its tracks on a public highway for the purpose of boarding a train standing on the track farthest from him, and when he has not yet reached the platform provided for passengers. *Chicago & E. I. R. Co. v. Jennings (Ill.)* 827

2. A railroad company is chargeable with the knowledge of its conductor and baggage-man as to the helpless condition of a passenger riding in the baggage car. *Wheeler v. Grand Trunk R. Co. (N. H.)* 955

3. The duty of a railroad company may be found by the jury to include the doing of 54 *L. R. A.*

something to prevent injury to a drunken passenger who is in a dangerous position, the danger of which it knows he is ignorant of and powerless to avoid. *Id.*

4. The duty of a carrier to protect an intoxicated passenger from falling from an exposed position on the cars is not changed by the fact that the intoxication is in violation of a statute. *Id.*

5. That incapacity of a passenger is caused by his voluntary intoxication will not absolve the carrier, upon discovering it, from using due care to prevent his being injured because he has placed himself in a dangerous position without ability to care for himself. *Id.*

6. A railroad company is liable for injuries to a drunken passenger caused by his fall from the door of a baggage car, near which he was permitted to dance and stagger, if, by exercising the care the situation required, it could have prevented the injury, and the passenger could not avoid it, although his inability resulted from his voluntary intoxication. *Id.*

7. A railroad company is liable for injuries to a passenger by the overturning of the car, where it leaves her in the car without warning because she cannot understand the language in which other passengers are warned, after the engine has been overturned by a washout, and the water is running along the track on which the car stands, in such a way as to undermine one side of it and render an overturning of the car probable. *Southern Pac. Co. v. Tarin (C. C. A. 5th C.)* 240

8. A street-car company is liable for an assault by its conductor on a passenger because the latter, after being carried past his station, in order to stop the car, pulled the bell rope so hard that he broke it, and jerked the conductor several feet along the car floor, notwithstanding the passenger, upon the conductor's following him to the platform, attempted an assault on him. *Birmingham R. & E. Co. v. Baird (Ala.)* 752

9. Failure of employees of a street-railway company to overpower or remove from the car a drunken passenger whose conduct is such as to indicate danger to other passengers if he is permitted to ride unrestrained is negligence which will render the company liable for injuries which he inflicts upon a passenger, although there is nothing to indicate that the one injured is in especial peril. *United Railways & E. Co. v. State use of Deane (Md.)* 942

10. Permitting a drunken passenger who has been removed from a street car for turbulence and an assault upon a fellow passenger, to return to and remain upon the car without further effort to remove him, although his turbulence continues, is negligence which will render the street-car company liable for injuries inflicted by him upon a passenger. *Id.*

11. The rule of contributory negligence does not apply to an injury to a drunken passenger by falling from a train while

staggering and dancing between the open doors of the baggage car, where, with knowledge on the part of the carrier of his inability to realize his danger and to care for himself, it makes no effort to protect him from injury. *Wheeler v. Grand Trunk R. Co.* (N. H.) 955

12. A carrier which pays the duties on imported goods at the place of entry, when it has agreed to receive and transport them in bond to another place, where there may be a market for the goods in bond for purposes of export or for sale to the United States government, is liable to the owner for the damages which he sustains on account of such unauthorized payment of the duties by the carrier. *Smith Bros. & Co. v. New Orleans & N. E. R. Co.* (La.) 923

NOTES AND BRIEFS.

See also TRIAL.

Carriers; duty to passenger; liability where proximate cause act of God. 240

Liability for injury to one passenger by another. 942

Liability for assault by employees on passenger. 752

Ejection of passenger; time and place; exposure to danger. 919

Necessity of purchase of ticket or entry of car to create relation of passenger; liability for running down intending or departing passenger crossing tracks; duty to look and listen; wanton and wilful negligence. 828

Provision against liability for leakage or breakage; against negligence. 774

CATERER.

See FOOD, NOTES AND BRIEFS.

CERTIORARI.

1. A military examining board provided by the Constitution and statutes to determine the moral character, capacity, or general fitness for office of officers of the militia, and having within its jurisdiction the powers of a court-martial, and upon whose findings the governor may dismiss an officer from the service, is a judicial body whose determination may be reviewed by a common-law writ of certiorari. *People ex rel. Smith v. Hoffman* (N. Y.) 597

2. No implied exception from the provisions of a statute authorizing the use of the common-law writ of certiorari when not expressly forbidden by statute can be made in case of the decisions of state military tribunals in proceedings for the discipline of militia officers in time of peace, on the ground that if civil courts were permitted to interfere with the judgment of military courts the discipline of the militia might be injured. *Id.*

3. The appeal which, under N. Y. Code Civ. Proc. § 2122, will preclude review by writ of certiorari, means one that can be brought, argued, and heard as matter of right, and not a secret review of a judgment, as of 54 L. R. A.

that of a military examining board, the existence of which cannot be known to the defeated party until after the review has been made and the judgment executed. *Id.*

4. The governor is not a proper party to a writ of certiorari to review a determination of a military examining board as to the fitness of a militia officer for his office. *Id.*

NOTES AND BRIEFS.

Certiorari; to review action of military board of examination; governor's approval as affecting. 597

CHARITIES.

NOTES AND BRIEFS.

Charities; bequest to unincorporated society; taking by subsequent corporation. 281

CIVIL SERVICE.

See POLICE, NOTES AND BRIEFS.

COMMERCE.

Compelling a foreign railroad corporation operating a portion of its road within the state to become domesticated is not an unlawful interference with interstate commerce. *Com. v. Mobile & O. R. Co.* (Ky.) 916

NOTES AND BRIEFS.

Commerce; interstate, interference with, by tax on vessel elsewhere than in state of home port. 212

CONFLICT OF LAWS.

Doctrine of Fellow Service, see COURTS, 4.

1. The contract of a foreign building association, made with a citizen of West Virginia, secured by a deed of trust upon real estate situated in this state, and by its terms to be performed in the domiciliary state, must conform to the requirement of the local law with respect to premiums, and, if it does not, such contract is not within the exemption from the operation of the usury laws given by the statute to domestic building and loan associations. *Floyd v. National Loan & Invest. Co.* (W. Va.) 536

2. The statute of New Jersey that regulates the right of married women to make contracts of suretyship is not a declaration of a public policy that closes the courts of that state to rights of action arising in other jurisdictions where the law is different. *Thompson v. Taylor* (N. J. Err. & App.) 585

3. The written promise of a married woman domiciled in New Jersey, to pay a sum of money to the order of her husband, signed by her at her domicile, and carried by him, with her acquiescence, to New York, and there indorsed, and delivered in exchange for other notes of like import, is a contract made in the state of New York; and the capacity of the wife to bind herself by a contract of suretyship is to be de-

terminated by the law of that state, so that if valid in the state of New York it may be enforced against her in New Jersey, although the contract, if made there, would be void. Id.

NOTES AND BRIEFS.

See also JUDGMENT.

Extra-territorial operation of statutes; on nonresident aliens. 935

Law of place of performance of contract; as to note or bill; law of forum as to enforcement; as to status of married woman and capacity to do business in foreign state. 585

As to contracts between husband and wife. 555

As to contracts of building and loan associations. 536

CONSTITUTIONAL LAW.

Religious Liberty, see BENEVOLENT SOCIETIES, 1-3.

Impairment of Obligation, see CONTRACTS, 12, 13.

Summary Abatement of Nuisance, see NUISANCES, 4.

Validity of Part of Statute as to Public Printing, see STATUTES, 1.

Publication as to Nonresidents, see WRIT AND PROCESS.

See also TAXES, 4; TRIAL, 1, 2; VOTERS AND ELECTIONS, 2.

Construction.

1. Where the language of a constitutional provision is plain and free from ambiguity, the ordinary signification of the words employed, as used in common parlance, must be considered, and the intent of the provision gathered from the words themselves, giving to them their usual meaning and signification. *Powell v. Spackman* (Idaho) 378

Delegation of power.

2. An unconstitutional delegation of legislative power is not effected by conferring upon the state auditor the right to issue licenses for bookmaking on horse races to persons of good character, to be exercised on grounds of good repute. *State v. Thompson* (Mo.) 950

Equal protection and privileges.

See also *infra*, 12.

3. The equal protection of the laws is not denied to a foreign railroad corporation operating a portion of its road within the state, by compelling it to become domesticated as a condition to its continuing such operation. *Com. v. Mobile & O. R. Co.* (Ky.) 916

4. A statute is not void for granting special rights, privileges, immunities, or exemptions, which, by not being applicable to companies doing business on the assessment plan, thereby exempts them from a provision that false representations in applications for life or casualty insurance shall not avoid the policy unless made with actual intent to deceive or unless they increase the

risk. *Fidelity & C. Co. v. Freeman* (C. C. A. 6th C.) 680

5. A statute prohibiting the letting of public printing to papers which have been established less than a year violates the constitutional provisions that all laws of a general nature shall have a uniform operation, and that no citizen shall be granted privileges which upon the same terms shall not be granted to all citizens. *Van Harlingen v. Doyle* (Cal.) 771

6. A statute prohibiting bookmaking or pool selling at all places except upon grounds where the races are to be run, and by all except licensed persons, is not an unconstitutional special law on the ground that it grants special and exclusive rights and immunities. *State v. Thompson* (Mo.) 950

7. An accident insurance company cannot insist on the invalidity of a statute for unconstitutional discrimination against fire insurance companies. *Fidelity & C. Co. v. Freeman* (C. C. A. 6th C.) 680

Due process of law.

8. Assessments for paving, made according to the provisions of a city charter, by apportioning the total cost of the work to the abutting lands according to frontage, do not constitute a taking of property for public use, or a violation of U. S. Const. 14th Amend., as a taking of property without due process of law. *Barber Asphalt Paving Co. v. French* (Mo.) 492

Police power.

9. The prohibition of the sale of cream that contains less than 20 per cent of fat, by Minn. Gen. Stat. 1894, § 7002, is a valid exercise of the police power, and constitutional. *State v. Crescent Creamery Co.* (Minn.) 466

10. The police power will not justify the restriction of the number of persons which lodging-house keepers alone may permit to occupy one room during the same night, since they are thereby deprived of their property, and the discrimination in limiting the provisions to lodging-house keepers prevents the regulation being due process of law. *Bailey v. People* (Ill.) 838

11. A statute making it unlawful to herd or graze sheep within 2 miles of an inhabited dwelling, and making the owner of sheep so herded or grazed liable for damages to the injured party, is a valid exercise of the police power of the state, and not unconstitutional. *Sifers v. Johnson* (Idaho) 785

12. A statute making railroad companies liable to all employees for injuries caused by negligence of any of their servants in charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train, is not unconstitutional as unequal, but is sustainable as an exercise of the police power for the protection of persons exposed to dangerous agencies in the hands of others. *Indianapolis Union R. Co. v. Houlihan* (Ind.) 787

NOTES AND BRIEFS.

As to Jury Trial, see TRIAL.

See also EMINENT DOMAIN; TRIAL.

Constitutional law; police power; exercise of, in grant to board of power to grant or refuse physicians license; right to property in profession; exercise of judicial power in correction of mistake or removal. 415

Police power; regulation of sale of cream; standard for; preventing sale of property. 467

Regulation or suppression of vice and exercise of police power; reasonableness of regulations; delegation of legislative authority. 950

Tax on dogs under municipal ordinance; exercise of police power. 269

Due process; what constitutes. 295

What constitutes due process; front-foot rule in assessment as due process of law. 494

Abridgement of right of liberty and property without due process; restraint on trade or business; what is due process; discrimination between businesses of the same general nature; police power, what is; rights both tangible and intangible subject to; classification based on distinctions differentiating individuals or class from others. 840

Due process in statutory regulation of supply of gas by corporation. 770

Benevolent society by-law limiting membership to certain religious denomination as denial of religious liberty. 723

Right of laborer or mechanic to fix value of services. 640

Preservation of health, governmental function; delegation of municipality. 295

CONTEMPT.

Compliance with the specific directions for the abatement of the nuisance, in a decree enjoining the conducting of a business in such a way that the dust and fumes therefrom constitute a nuisance, will not absolve defendant from liability to punishment for contempt in failing to obey the general clause of the decree, in case such directions prove insufficient. *Northwood v. Barber Asphalt Pav. Co.* (Mich.) 454

CONTRACTS.

Consideration, see EVIDENCE, 10.

Restraining Breach of, see INJUNCTION, 2.

Notice in Warehouse Receipt as Part of, see WAREHOUSEMEN, 1.

See also CORPORATIONS, 2; HUSBAND AND WIFE, 2-4; LABOR UNION; PRINCIPAL AND AGENT, 3; SPECIFIC PERFORMANCE, 1.

Construction.

1. The situation of the parties when a contract is made, its subject-matter, and the purpose of its execution, are always material to determine the intention of the parties and the meaning of the terms they used, 64 L. R. A.

and when these are ascertained they must prevail over the dry words of the agreement. *Kauffman v. Raeder* (C. C. A. 8th C.) 347

2. Commercial contracts must be interpreted in the light of commercial usages, and their performance must be such as business men would naturally contemplate. *Id.*

Validity.

3. An agreement that, for a pecuniary consideration, a person will withdraw opposition to the granting of a pardon, and will, by solicitation and the exercise of personal influence, endeavor to induce the pardoning authority to grant a pardon to one who has been convicted of a crime, contravenes public policy and is void. *Deering & Co. v. Cunningham* (Kan.) 410

Performance; breach.

See also *supra*, 2.

4. All that is ordinarily required of a party to a contract who has agreed to deliver personal property upon the payment of a debt or price is that he shall put the property in some convenient place, subject to the disposal of the payer upon his compliance with the terms of the contract, and that he shall notify the promisor of the fact. *Kauffman v. Raeder* (C. C. A. 8th C.) 247

5. A sufficient offer to perform a contract is made where, nine parties having agreed to pay a certain sum and interest to plaintiff on or before a certain day, he agreeing to assign and deliver to them certain stock in a corporation upon payment of the money, plaintiff deposits the stock in a bank in the city where the contract was made, and more than forty days before the day named causes the parties to be notified that the stock is in the bank, subject to their disposition, upon payment of the debt, and some of the parties reside in the city while others reside at a place more than 300 miles distant. *Id.*

6. A contract not to engage in the barber business in any manner in a certain town so long as another person shall continue in business, made by the owner of a barber shop upon a sale of his furniture, tools, and fixtures to such person, is violated by working at the barber trade as an employee. *Pohlman v. Dawson* (Kan.) 913

7. A breach of an independent covenant which does not go to the whole consideration of a contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, or warrant its rescission by the injured party; but the latter is still bound to perform his part of the contract, and his only remedy for the breach is compensation in damages. *Kauffman v. Raeder* (C. C. A. 8th C.) 247

8. One party to a contract who has received and retained the benefits of a substantial partial performance thereof by the other party cannot rescind it, but the contract must stand, and he must perform his part of it, and his remedy for the breach of complete performance by the other party

is limited to compensation therefor in damages. Id.

9. A party to a contract who has conferred upon the other party thereto the benefits of a substantial partial performance thereof, but who has not completely performed the agreement, may maintain an action against the other party for specific performance, or for damages for the latter's failure to perform, upon plea and proof of his own partial performance, without plea or proof of his complete performance; and the defendant in such an action may recoup his damages for the plaintiff's failure of complete performance, or may recover them in an independent action therefor. Id.

Rescission and reformation.

See also *supra*, 7, 8.

10. The breach of a dependent covenant which goes to the whole consideration of a contract gives to the injured party the right to rescind the contract, or to treat it as broken and to recover damages for a total breach. Id.

11. When the facts are within the knowledge of both parties to a written contract, and the language used is such as they intended, a mistake as to the legal effect of the contract, or that its legal effect is different from that intended, is not available as a defense at law, and is not ground for a reformation of the contract in a court of equity. *Andrus v. Blazzard* (Utah) 354

Impairment of obligations.

12. The legislature may provide that no breach of condition in an insurance policy shall avoid it, as to an insurer not injured thereby, without interfering with any constitutional right of contract, or, as to future contracts, impairing their obligation, since, insurance companies being the creatures of the legislature, it may prescribe limitations in relation to forfeiture of their contracts. *McGannon v. Michigan Millers' Mut. F. Ins. Co.* (Mich.) 739

13. A statute permitting a foreign railroad corporation to extend its road through the state, subject to the restrictions prescribed by its charter for its government within the state of its domicile, when accepted, constitutes a contract which will preclude the state from subsequently requiring it to become domesticated as a condition to its continued enjoyment of the privilege. *Com. v. Mobile & O. R. Co.* (Ky.) 916

NOTES AND BRIEFS.

See also **CONFLICT OF LAWS; CONSTITUTIONAL LAW; HUSBAND AND WIFE; SALE.**

Contracts; as to validity of contract made with intoxicated person:—(I.) Degree of intoxication; (II.) taking advantage of intoxicated person; (III.) fraud; (IV.) intoxication produced by the other party; (V.) ratification; (VI.) habitual drunkards; (VII.) as affecting a bona fide holder of note; (VIII.) implied contracts; (IX.) obtaining relief; (X.) who may show intoxication of party; (XI.) summary. 440
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In fictitious name or name of another; liability of real signer. 408

Construction given by the parties themselves. 527

In restraint of trade; working as employee as engaging in business. 913

Effect of rescission of terms not agreed on; signature without knowledge of deception. 503

Police regulations as impairment of obligation. 740

CONTRIBUTORY NEGLIGENCE.

See **CARRIERS; NEGLIGENCE; STREET RAILWAYS.**

CORPORATIONS.

Regulation Interfering with Commerce, see **COMMERCE.**

Deposit of Stock for Delivery on Condition, see **ESCROW.**

Taking Request to Unincorporated Society, see **WILLS, 3.**

See also **COSTS AND FEES, 1; TRUSTS.**

1. Foreign corporations, upon complying with the conditions required by W. Va. Code, chap. 54, § 30, have the same rights, powers, and privileges respecting their contracts and remedies, if not otherwise repugnant to the policy of the state, as domestic corporations of like character, whether, under the general law of comity, they would have had such rights, powers, and privileges or not, but they can exercise no greater powers in this state than its domestic corporations. *Floyd v. National Loan & Invest. Co.* (W. Va.) 536

2. A foreign corporation coming into West Virginia to transact business must conform to the law of the state, if there be any, regulating similar corporations organized under the laws of that state; and its contract, although in terms solvable in the foreign state in which such corporation has its domicile, must be such a contract as a similar domestic corporation is authorized to make, or the courts of this state cannot enforce, or permit the enforcement of, its performance. Id.

NOTES AND BRIEFS.

Costs of Suit to Restrain *Ultra Vires* Acts, see **COSTS AND FEES.**

See also **JUDGMENT; TRUSTS.**

Corporations; what represented by stock; rights of corporation in property; dividend; right of vendee to. 510

Responsibility for crimes of servant; torts. 712

Assets of insolvent as trust fund. 690

Admission by agent; implied duties; scope of authority; inferred discretion. 593

COSTS AND FEES.

1. Minority stockholders of a corporation, who, by filing an equitable petition against it and its officers, succeeded in enjoining it

and them from doing *ultra vires* acts which would have required the expenditure of money belonging to it, were not entitled to a judgment for their attorney's fees against the corporation when there was, as a result of the litigation, neither a recovery of property for the corporation, nor administration or distribution by the court of any fund brought into its hands for this purpose, and when the corporation itself repudiated the effort of the plaintiffs to thus protect its interests, and, in defense to their petition, stood squarely upon the proposition that the acts in question were not *ultra vires*, but authorized by its charter. *Alexander v. Atlanta & W. P. R. Co. (Ga.)* 305

2. That the fund reached by a general creditors' bill against an insolvent building and loan association is all absorbed by prior claims not secured by mortgage or other fixed lien, so that the one who instigated it will receive nothing, will not prevent the allowance of a reasonable fee to his solicitors out of the fund, since their work was done for the benefit of all the distributees. *Campbell v. Provident Sav. & L. Soc. (Tenn.)* 817

3. Costs may be awarded against one who has constructed a ditch with the avowed purpose of diverting a certain quantity of water from a stream, in an action to enjoin him from so doing, although at the time of trial he has not done so and in fact has caused no injury to the complaining party. *Jones v. Com. (Or.)* 630

NOTES AND BRIEFS.

Costs and fees; payment of expenses by corporation in suit by stockholders to restrain *ultra vires* acts; fees of plaintiff's attorneys. 306

Allowance of attorneys' fees out of fund for attorneys of creditors who sue in behalf of themselves and other creditors:—(I.) In general; (II.) suit to have conveyance set aside: (a) in general; (b) from what part of fund allowance made; (III.) suit for administration of decedent's estate: (a) in general; (b) from what part of fund allowance made; (c) where plaintiff's debt not reached; (IV.) suit for appointment of receiver and to wind up insolvent corporation: (a) in general; (b) from what part of fund allowance made; (c) where plaintiff's debt not reached; (V.) suit to enforce stockholders' liability; (VI.) proceedings in bankruptcy cases: (a) in general; (b) amount of fee; (VII.) conclusion. 817

COTTOLENE.

See FOOD, NOTES AND BRIEFS.

COUNTIES.

See also CONSTITUTIONAL LAW, 5.

Officials in charge of the financial affairs of a county have no authority in law to purchase vaccine matter, and make the cost of the same a charge against the county. *Daniel v. Putnam County (Ga.)* 292

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Counties; power other than expressly 54 L. R. A.

granted; common-law liability; action against, on contract within power. 292

COURTS.

Agreed Statement as Binding, see AGREED CASE.

Review of Military Board, see CERTIORARI, 1, 2.

See also INCOMPETENT PERSONS; NUISANCES, 3.

1. The decision of the question whether a tax or a public debt is for a public or private purpose is not a legislative, but a judicial, function, and a legislature cannot make a private purpose a public purpose, or draw to itself or create the power to authorize a tax or a debt for such a purpose by its mere fiat. *Dodge v. Mission Twp. (C. C. A. 8th C.)* 242

2. The doctrine of *stare decisis* applies with peculiar force to decisions respecting real property, vested rights, and those matters of general commercial importance which tend to influence future business transactions; but questions where the decisions do not constitute a business rule—as where personal liberty is involved—will be met by considerations which favor certainty and stability in the law. *Daniels v. State (Del.)* 236

3. The question respecting the proper relation of character evidence to the other evidence in the case does not involve any of those essentially important rights and interests favored by the doctrine of precedents. *Id.*

4. The question of fellow service, in an action by an employee in a Federal court to recover from his employer for personal injuries inflicted through negligence, is not one of local law to be settled by the decisions of the highest courts of the state in which the cause of action arose. *Louisville & N. R. Co. v. Stuber (C. C. A. 6th C.)* 696

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Courts; Federal; effect of construction of state statute by state courts. 237

Power to declare unreasonable what legislature has specifically declared may be done. 638

Interference by; with military tribunals. 597

Jurisdiction and custody of property in suit to enforce mechanics' liens; proceeding *in rem*; conflict of jurisdiction between state and United States court; enforcement of United States court decree; control of decree by state court; conflict of jurisdiction as to insolvent corporation; state insolvency laws. 690

COVENANT.

See also SPECIFIC PERFORMANCE, 3.

1. A covenant, and not a condition, is created by a clause in a conveyance of land for a college campus, which states that the conveyance is upon express condition that the land shall be devoted exclusively as part

of the campus, although another condition is that it shall revert to the grantor if abandoned or devoted to other uses before a certain date, after which a forfeiture is not to occur under any circumstances. *Los Angeles University v. Swarth* (C. C. A. 9th C.) 262

2. A covenant in a conveyance of land for a college campus, that it shall be devoted exclusively as a part of the campus, and that no buildings shall be erected thereon except those devoted to university purposes, is not broken by the placing thereon of lumber, tools, sheds, derricks, engines, and oil tanks for the exploration for oil supposed to be beneath the surface, where such occupation will probably be of a temporary character, even if oil is found, and the general purposes of the grant may be materially advanced by the pecuniary results of the development. *Id.*

NOTES AND BRIEFS.

Covenants; restrictive, as to use of land; enforcement; necessity of continuance of plaintiff's interest; change of condition as affecting. 265

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See COSTS AND FEES, 2; OFFICERS, NOTES AND BRIEFS.

CRIMINAL LAW.

Change of Venue, see ACTION OR SUIT, 7.

Character, see EVIDENCE, 22.

See also HOMICIDE; NEW TRIAL, 2; TRIAL, 2.

One who is present at the commission of a malicious trespass, advising or encouraging the destruction of property, is equally guilty with those actually committing the offense, although he may not in person injure the property, since in misdemeanors all concerned, if guilty at all, are principals. *State v. Stark* (Kan.) 910

NOTES AND BRIEFS.

Acts of Servants, see CORPORATIONS. See also TRIAL.

Criminal law; intoxication as affecting responsibility for crime. 391

DAMAGES.

See also APPEAL AND ERROR, 16; DEATH, 5; INTOXICATING LIQUORS; SALE, 2.

1. Punitive damages may be awarded in an action against a street-car company for an assault by its conductor upon a passenger. *Birmingham R. & E. Co. v. Baird* (Ala.) 752

2. Punitive damages cannot be awarded against a sheriff's bond for the wrongful

act of the sheriff's deputy in killing a third person under the mistaken belief that he is a felon for whose arrest the deputy has a warrant, and that the killing is necessary to prevent his escape. *Johnson v. Williams* (Ky.) 220

*3. The rule that the damages for breach of a contract insuring a life are the premiums paid prior to the breach, with interest thereon from the date of each payment, is applicable to contracts in mutual benefit associations. *Strauss v. Mutual Reserve Fund L. Asso.* (N. C.) 605

4. Counsel fees expended in good faith in an effort to recover the money are not properly part of the damages to be recovered from a telegraph company by a bank which has been induced to pay out money by a false telegram forwarded by an employee of the company, either at common law or under a statute allowing as damages for the conversion of property a fair compensation for the money properly expended in pursuit of it. *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto* (C. C. A. 9th C.) 711

5. Damages for personal injuries caused by the explosion of an acetylene gas machine may be recovered in an action for breach of warranty of its safety. *Tyler v. Moody* (Ky.) 417

6. Twenty-five hundred dollars is not an excessive award against a street-car company for the act of its conductor in striking a passenger several times in the face merely because, in order to stop the car, he pulled the bell rope so hard as to break it. *Birmingham R. & E. Co. v. Baird* (Ala.) 752

7. Damages resulting to the owner of imported goods from the unauthorized payment of duties thereon at the port of entry, by a carrier which had agreed to transport them in bond, are such as might have been foreseen by the carrier, within the meaning of La. Civ. Code, arts. 1934-1943. *Smith Bros. & Co. v. New Orleans & N. E. R. Co.* (La.) 923

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For Breach of Bond, see INTOXICATING LIQUORS.

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Damages; for breach of warranty on sale. 418

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For injuries caused by negligence and fright; natural and probable consequence. 583

Punitive, for assault by railroad employees. 752

Money properly spent in pursuit of property as part of; attorneys' fees in attachment proceedings; injunction. 713

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Declarations of Deceased as to Claimant's Dependence, see EVIDENCE, 17, 18.

Appointment of Administrator and Attack on, see EXECUTORS AND ADMINISTRATORS, 2, 3.

See also ACTION OR SUIT, 4; EVIDENCE, 6, 12; MORTGAGE, 1; PLEADING, 4.

1. A new action for the benefit of persons named, and not a continuation of that belonging to decedent, is created by Rev. Stat. 1893, §§ 2315, 2316, 2318, which provide that, in case of death by wrongful act which, had death not ensued, would have entitled the injured party to maintain an action, the person causing the death shall be liable to an action, notwithstanding the death, for the benefit of the next of kin and heirs at law, to the extent of their injury, to be brought by the executor or administrator, in case the injured person has not recovered judgment before death. *Re Mayo* (S. C.) 660

2. An action for negligent killing of her son may be brought by a nonresident alien under Mass. Stat. 1887, chap. 270, § 2. *Mulhall v. Fallon* (Mass.) 934

3. Minors have a cause of action for a personal injury which resulted in the death of their mother, as the right of action of the mother is made to survive in the name of her children. *Delisle v. Bourriague* (La.) 420

4. Partial dependence upon her son for the necessities of life is sufficient to enable a woman to maintain a suit for his negligent killing, under the Massachusetts statutes. *Mulhall v. Fallon* (Mass.) 934

5. Under the Kentucky statutes, gross negligence is not necessary to entitle an administrator to compensatory damages for the negligent killing of his intestate. *Illinois C. R. Co. v. Josey* (Ky.) 78

NOTES AND BRIEFS.

See also EXECUTORS AND ADMINISTRATORS; JUDGMENT; TRIAL.

Death; right of alien nonresident to maintain statutory action for death of other person. 934

Contributory negligence of beneficiary to defeat statutory action. 322

Minor's right of action for mother's death where father survives. 421

Suit for, by administrator of estate; non-resident administrator. 661

DEDICATION.**NOTES AND BRIEFS.**

Dedication; of land to public use; form of deed; railroad as public highway; dedication to public use; grant of right of way for railroad. 522

DEEDS.

See also COVENANT.

Delivery of a deed in escrow sufficient to 54 L. R. A.

pass title is made where the grantor turns the deed over to his housekeeper, with instructions to deliver it to the grantee on his death, with no apparent intention of retaining control thereof and no subsequent attempt to control or take possession of it, although it is placed by her for safekeeping, together with other papers of hers, in the grantor's trunk which is locked, and the key to which he retains until his death. *Munro v. Bowles* (Ill.) 865

NOTES AND BRIEFS.

Deeds; delivery of deed to third person; or record, or delivery for record, by grantor:—(I.) Delivery to person previously authorized or designated by grantee; (II.) delivery to person not previously authorized or designated by grantee; recording: (a) general rule as to delivery to third person: (1) in general; (2) when not to be delivered to grantee until after grantor's death; (b) requisites on part of grantor: (1) general statement; (2) particular instances and illustrations: (a) delivery without directions to await grantor's death: (1) when held effective; (2) when held ineffective; (b) delivery with directions to await grantor's death: (1) when held effective; (2) when held ineffective; (c) deed remaining within physical power of grantor; (d) effect of grantor's purpose to avoid his obligations; (e) reservation of life estate as illustrating grantor's intent; (3) recording or delivery for record: (a) in general; presumption from record; (b) grantor's intent; (c) effect of return of deed to grantor; (d) acceptance; how and when deed takes effect; status of title: (1) necessity of acceptances; (2) what sufficient to show actual acceptance; effect of assent or dissent; (3) different theories with respect to acceptance: (a) in general; their relation to the time when, and manner in which, the deed takes effect; (b) theory of relation back; (c) presumption of acceptance: (1) in general; (2) deed to person *non sui juris*; (3) trust deeds; (4) deed not beneficial to grantee; (d) cases illustrative of the nature of the instrument and of the time when it takes effect; (e) right of grantor to revoke; (f) rights of third persons; (g) grantor's interest in, and rights respecting the property; (III.) summary. 865

DE FACTO.

See OFFICERS, 1, 2.

DELIVERY.

See DEEDS.

DESCENT AND DISTRIBUTION.

1. A mutual agreement between husband and wife to separate on friendly terms, and to make no future demands upon each other's property, carried out until the wife's death, will not prevent the husband from claiming his rights in her estate. *Foot v. Nickerson* (N. H.) 554

2. A husband separating from his wife

by agreement is not within the terms of a statute depriving of his interest in his wife's estate a man who willingly abandons, absents himself from, or wilfully neglects to support, his wife for a certain time. *Id.*

NOTES AND BRIEFS.

Descent and distribution; waiver of right by contract between husband and wife. 555

DIVORCE.

See also JUDGMENT, NOTES AND BRIEFS.
Action by Heirs to Set Aside, see JUDGMENT, 4.

Enforcing in Other State Judgment for Alimony, see JUDGMENT, 7, NOTES AND BRIEFS.

See also PLEADING, 1, 2.

DOGS.

See ANIMALS, NOTES AND BRIEFS;
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DRUGGISTS.

A druggist is not relieved from liability for injuries caused by a prescription negligently put up by the fact that the negligence was that of a registered pharmacist employed by him, which class alone is allowed by statute to fill prescriptions. *Burgees v. Sims Drug Co. (Iowa)* 364

NOTES AND BRIEFS.

Druggists; liability for negligence of registered pharmacists employed by. 365

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As Affecting Notes, see BILLS AND NOTES, 1.

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See also CARRIERS; CRIMINAL LAW, NOTES AND BRIEFS; HOMICIDE, 2.

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Payment of, instead of Carrying in Bond, see CARRIERS, 12.

Carrier's Liability for Paying, instead of Transporting in Bond, see DAMAGES, 7.

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See also WATERS, 5.

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Easements: by prescription; essentials; character and extent; prescription for common privilege. 475

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See MASTER AND SERVANT, 3.

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EMINENT DOMAIN.

1. The condemnation of land for a public wharf is not prevented by the fact that it is already in use by a common carrier as a landing place in connection with its business as such carrier. *Diamond Jo Line Steamers v. Davenport (Iowa)* 859

2. Condemnation by a city of land for a public wharf cannot be defeated by the fact that it intends to grant a railroad right of way over the property after it has acquired title. *Id.*

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Eminent domain; municipal water supply as public purpose and paramount necessity; necessity of compensation to riparian proprietors for diversion of water of navigable streams and lakes. 190

Exercise of, dependent on express grant or necessary implication; condemnation of land devoted to public use. 859

Right of riparian owner to compensation on making stream public highway. 201

EQUITABLE CONVERSION.

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Equitable conversion; application of doctrine to proceeds of insurance on property; rights of vendee of property and creditors. 350

EQUITY.

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Equity; doubtful legal remedy; bill in, as most convenient remedy; chance for legal relief speculative. 641

Power as to sale of railroad property separate from franchise. 690

Interference by, to prevent abuse of power by public officer. 295

ESCAPE.

1. A statute providing for the punishment of one who, being confined in the penitentiary, "breaks such prison and escapes therefrom," does not apply to an escape from a state quarry 2 miles from the prison, to which the prisoner has been taken to work. *State v. King (Iowa)* 853

2. Breaking a prison is not effected by a prisoner's concealing himself in a crevice in a stone quarry to which he has been taken to work, until the guards withdraw, and then walking forth without impediment, although to aid the concealment a cover is placed over the crevice, which is removed when the escape is effected. *Id.*

NOTES AND BRIEFS.

Escape; what constitutes prison breaking as escape. 853

ESCROW.

See also DEEDS.

Under a writing entitled "Escrow," instructing a depository to deliver stock deposited with the writing to a third person

in case he pays therefor on or before a certain date, no title passes to the vendee until payment is made, so as to entitle him to dividends on the stock declared between the time of deposit and payment. *Clark v. Campbell* (Utah) 508

NOTES AND BRIEFS.

Escrow; what constitutes; effect on property deposited; necessity of consideration; rights of beneficiary on fulfilling condition. 509, 510

ESTOPPEL.

Of insurer to intervene, see ACTION OR SUIT, 5.

See also SPECIFIC PERFORMANCE, 2; WATERS, 5.

A railroad company is estopped to assert title to a portion of its right of way upon which third persons have, with its knowledge, placed valuable improvements under a claim of title from the government, and in possession of which they have been for a period exceeding that designated by the statute of limitations for the recovery of real property, and the streets upon which were located with reference to others established by the railroad company. *Northern P. R. Co. v. Ely* (Wash.) 526

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Estoppel; equitable. 510

In pais; essentials; estoppel against restoration of water artificially changed. 474

Of tenant to deny landlord's title; application and suit to compel performance by landlord. 749

By silence; waiver, what constitutes. 550

As to right claimed under agreement *ultra vires* and against public policy; by laches. 526

EVIDENCE.

See also DEEDS; PLEADING, 1.

1. Upon a question arising under the Federal laws requiring full faith and credit to be given in each state to the judicial proceedings of every other state, courts will take judicial notice of the local laws of the state from which the record comes. *Trowbridge v. Spinning* (Wash.) 204

2. The jury may make use of their own knowledge and experience, in considering conflicting evidence of experts upon the question whether or not proper inspection of material furnished by an employer for the temporary structure of a bridge which he was building would have disclosed a defect which caused an injury to an employee. *Lafayette Bridge Co. v. Olsen* (C. C. A. 7th C.) 33

Presumptions and burden of proof.

3. A person is conclusively presumed to have had notice, actual or constructive, of all the doings of his agent within the actual or apparent scope of the agency, and to be bound thereby. *Andrews v. Robertson* (Wis.) 673

4. Although the burden is upon a warehouseman to excuse failure to deliver spirits deposited with him for storage in accordance with the terms of the contract, yet, when he shows a return of the packages stored, and that the contents were lost by leakage, the owner must, in order to hold him liable for the loss, prove that the leakage was caused by his fault. *Tausaig v. Bode* (Cal.) 774

Documentary evidence.

5. A written assignment of a real-estate mortgage, the execution of which is acknowledged before a notary public of another state, is entitled to be read in evidence under the provisions of N. D. Rev. Codes, § 5696, without further proof, when the certificate of acknowledgment attached thereto is authenticated by the signature and official seal of such notary; and it is not necessary to have attached thereto the certificate of an officer of a higher rank to the official character and signature of such notary. *Grandin v. Emmons* (N. D.) 610

6. Upon the question whether or not a woman was dependent upon her son for support, interrogatories are admissible as to whether he contributed to her support, and, if so, how much. *Mulhall v. Fallon* (Mass.) 934

Parol.

7. Testimony of the writer may be admitted to explain the meaning of a letter which contains statements that are confusing, ambiguous, and seemingly contradictory. *Smith Bros. & Co. v. New Orleans & N. E. R. Co.* (La.) 923

8. Parol evidence is proper to explain the meaning of words used in a writing which are ambiguous when applied to the subject which gave rise to such paper, as well as when the meaning of the writing is uncertain looking only at the language thereof. *Andrews v. Robertson* (Wis.) 673

9. Parol evidence is inadmissible to show a different understanding of the parties to a note, where its terms were such as they intended to use, and their legal effect was to bind personally one who signed it as guardian. *Andrus v. Blazard* (Utah) 354

10. The consideration for a release by an injured employee to his employer, expressed as being "in consideration of the employer's agreement to pay physician's and hospital charges" and a specified cash payment to the employee, is contractual so that it cannot be contradicted by parol. *Indianapolis Union R. Co. v. Houlihan* (Ind.) 787

11. Parol evidence is admissible to show that a will was properly executed and witnessed according to the requirements of the statute. *Ferris v. Neville* (Mich.) 464

Conclusions.

12. A woman's testimony that she was almost entirely dependent on her son for support is not inadmissible in a suit by her for his negligent killing, because it is a conclusion which the jury is to draw, or

because it is law rather than fact. *Mulhall v. Fallon* (Mass.) 934

Admissions.

13. Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor is competent as an admission of weakness in his case. *Nowack v. Metropolitan Street R. Co.* (N. Y.) 592

Acts and declarations.

14. Declarations of the manager of a theater that he is acting under instructions of the owner in preventing the service of process on an actor engaged in the theater are not admissible in a suit to hold the owner liable for such act. *Paulton v. Keith* (R. I.) 670

15. The manager of a theater has no implied authority from the owner to prevent the service of process upon actors employed in the theater, so as to make his declarations while doing so admissible against the owner as part of the *res gestæ*. Id.

16. Evidence that an agent of a corporation employed as investigator, to see witnesses and take their statements in actions against the corporation, attempted to bribe a witness in such case, is admissible against the corporation, without proof of his authority to do such act. *Nowack v. Metropolitan Street R. Co.* (N. Y.) 592

17. Declarations of one killed by negligence, that his mother was poor, and that he sent money to her repeatedly, are admissible under Mass. Stat. 1898, chap. 535, in a suit by her to recover for the killing. *Mulhall v. Fallon* (Mass.) 934

18. Evidence of a son's declarations that his mother was very poor, and that he sent her money repeatedly, corroborated by her testimony that she bought food with his money, sufficiently shows her dependence on him for support to carry to the jury a suit by her to recover for his negligent killing, under Mass. Stat. 1887, chap. 270, § 2. Id.

Res gestæ.

19. Evidence of the use, by the wife of accused, of an endearing expression in regard to one whom her husband had killed for alleged criminal intimacy with her, uttered after she had left the scene of the murder, is not admissible in favor of accused, although she could not be compelled to become a witness in the case. *State v. Yanz* (Conn.) 780

Privileged communications.

20. A waiver of the patient's privilege as to communications made to his physician must be confined to the trial in which it is made, and cannot avail to make the testimony of the physician competent at a subsequent trial. *Burgess v. Sims Drug Co.* (Iowa) 364

21. Answering questions on cross-examination as to a matter of privilege between physician and patient will not waive the patient's right to object on the ground of privilege to the physician's answering questions as to communications made to him by the patient. Id.

tions as to communications made to him by the patient. Id.

Character.

22. While character evidence is not a defense, it is a circumstance in the antecedent conduct and habits of the accused, its purpose being to strengthen the legal presumption of innocence, and is to be weighed and estimated by the jury according to the weight of the testimony by which it is supported, in connection with that to which it is opposed. *Daniels v. State* (Del.) 286

Similar appliances.

23. Upon the question of liability of a master for injury to a servant by failure of an appliance furnished for his use to operate as intended, evidence is not admissible of the successful working of another device intended for the same purpose, where it is not shown to be a standard article, and the failure of the one furnished was due to lack of oiling and cleaning, and not to faulty design. *Quigley v. Levering* (N. Y.) 62

Variance.

24. Under a declaration seeking to recover from a carrier for the negligent killing of a passenger no recovery can be had unless the relation of carrier and passenger is shown, although the facts are such as to warrant a recovery in the absence of such relation. *Chicago & E. I. R. Co. v. Jennings* (Ill.) 827

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Evidence; presumption of nuisance from passing of ordinance as to. 638

Presumption of negligence from happening of accident. 583

Presumption as to gift; admission by donor to prove. 708

Burden of proof as to malice where libelous matter privileged. 857

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Parol, to vary clear and settled legal effect of contract; to show who bound; as to note signed by one as executor; as to statement of payee's understanding that maker not liable. 355

Parol; to show nature and qualities of subject-matter of written instrument under plea of no consideration. 789

Privileged communication to physician; disclosure by testimony of patient as affecting. 364

Admissibility of, as to character in criminal cases. 287

Admissibility of document duly acknowledged; foreign acknowledgment. 611

Admission by conduct; by act of agent; admissibility. 593

Admissibility of declarations of agent. 671

To impeach or discredit female witnesses. 646

EXECUTORS AND ADMINISTRATORS.

See also ACTION OR SUIT, 4.

1. Nonresidents are within the protection of S. C. Rev. Stat. §§ 2315, 2316, creating a right of action for wrongful death to be enforced by the administrator, so as to justify the appointment of an administrator to enforce the liability, without requiring a resort for such appointment to the state of decedent's residence,—especially where there is no statutory permission for a suit by an administrator appointed there. *Re Mayo* (S. C.) 660

2. A cause of action against a railroad company for negligently killing a person, which under the statutes is not the old one belonging to decedent, but a new one created for the benefit of the persons named, and is enforceable only by his administrator, will give jurisdiction to the probate court of the county where the killing occurred and where the railroad company had its residence, to grant letters of administration on the estate, although the deceased was not a resident of the state, and owned no other estate within its limits at the time of his death, and the statutes provide, in case of a nonresident, for administration only in the county where the greater part of his estate may be. *Id.*

3. A railroad company against which a cause of action exists for negligently killing a person can attack the appointment of an administrator upon his estate for non-residence or want of assets only in case want of jurisdiction appears on the record, under a statute forbidding the contesting of jurisdiction assumed by the probate court, so far as it depends on place of residence or location of the estate, except by appeal, or when the want of jurisdiction appears on the record, since it is not entitled to be made a party to the proceedings so as to have a right to appeal. *Id.*

NOTES AND BRIEFS.

See also COSTS AND FEES; DEATH.

Right of foreign administrator to sue; death claim as assets giving jurisdiction to appoint; damages for death as part of estate; right of action by railroad liable for death to revoke letters of administration; collateral attack on appointment in damage suit. 661

EXEMPTIONS.

See OFFICERS, 4.

FENCES.

See WATERS, 4.

FISHERIES.

The right of fishing in fresh water non-navigable streams is in the riparian owners. *Griffith v. Holman* (Wash.) 178

NOTES AND BRIEFS.

Fisheries; public right; private ownership; liability for fish taken. 179
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FOOD.

See also CONSTITUTIONAL LAW, 9.

The sale of cottolene which is manufactured so as to resemble lard is forbidden by Minn. Gen. Stat. 1894, §§ 7028, 7037, unless the package containing it is labeled, "Lard Substitute." *State v. Hanson* (Minn.) 468

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Food; regulation of sale; cottolene as lard substitute; inherent resemblance as imitation; requiring or prohibiting artificial coloring to prevent resemblance. 468

Liability of caterer for injury from unwholesome food. 854

FORGERY.

1. A written instrument in the following form: "Mr. Sage: Please let this boy have a single rig,—a good one,—and oblige. I will bring it back myself. [Signed] George Clinger,"—is the subject of forgery, as it is not only an order or request for the delivery of chattels over which Clinger had no control, but is also a writing obligatory, within the meaning of Neb. Crim. Code, § 145. *Hickson v. State* (Neb.) 327

2. Forgery by alteration of an elevator receipt given by a railroad for grain to be stored and shipped is not committed where the alteration is of a memorandum of the weigher's judgment as to the grade of the grain, indorsed on the back of the receipt to enable a purchaser to fix the price to be paid for the grain, since the memorandum is not part of the receipt, so that its alteration will not change the legal effect of the receipt. *State v. Hendry* (Ind.) 794

NOTES AND BRIEFS.

Forgery; by making or altering mere memorandum:—(I.) Scope; (II.) the general rule; (III.) application to particular kinds of memoranda: (a) in the nature of a promise or order; (b) in the nature of a receipt or acquittance; (c) in the nature of certificates or statements of fact; (d) falsification of dates and addresses; (IV.) conclusion. 794

FRAUD AND FRAUDULENT CONVEYANCES.

See also ATTACHMENT, 1-3; COSTS AND FEES, NOTES AND BRIEFS.

FRIGHT.

See NEGLIGENCE, 2.

GAMING.

See CONSTITUTIONAL LAW, NOTES AND BRIEFS.

GARNISHMENT.

A safe-deposit company having valuables of a debtor in its vaults is subject to garnishment therefor, although it has no access

to the contents of the box in which they are kept, under a statute commanding a garnishee to answer as to the personal property or effects of the defendant in his possession or under his control. *Trowbridge v. Spinning* (Wash.) 204

NOTES AND BRIEFS.

See also JUDGMENT.

Garnishment; what constitutes possession and control of property. 205

GAS.

A gas company required by statute to furnish gas to persons within a certain distance from its mains may refuse to do so unless the customer agrees to pay a reasonable rent for a meter, where the value of gas required by him will not amount to one sixth of such reasonable rent, although other consumers are not charged such rent, where it does not appear that any other consumer fails to consume gas enough to pay the meter rent. *Smith v. Capital Gas Co.* (Cal.) 769

NOTES AND BRIEFS.

Gas; validity of statutory regulation of supply by company; duty to furnish meter; compulsory service. 769

GASOLINE.

See NEGLIGENCE, 7.

GIFTS.

See also WILLS, 4.

A gift of personalty placed in possession of a third person for delivery to the donee is not defeated by the fact that the delivery is not effected until the donor has become finally unconscious in his last illness. *King v. Smith* (C. C. A. 9th C.) 708

NOTES AND BRIEFS.

Gift; essentials; presumption; revocation; death before completion. 708

GOVERNOR.

As Party to Review of Military Board's Determination, see CERTIORARI, 3.

GUARDIAN AND WARD.

See also INCOMPETENT PERSONS.

1. A guardian has no power to make a contract binding upon the ward or upon his estate, however beneficial to the ward the contract may be; and such contracts made by him impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditures to the ward's estate in his account. *Andrus v. Blazzard* (Utah) 354

2. A guardian may not mortgage the real estate of his ward under Utah Rev. Stat. 1898, § 4007, authorizing this to be done if the estate is insufficient for the comfortable and suitable maintenance and support of the ward and his family, unless 54 L. R. A.

it is necessary to provide for the suitable maintenance of the ward and his family. Id.

NOTES AND BRIEFS.

Guardian; who bound by note signed by; note signed by one as guardian. 355

HABEAS CORPUS.

An application for a writ of habeas corpus to inquire into the cause of the detention of a minor, although brought against a mother in the name of the state on the relation of a father, is not a suit by the husband against the wife which is prohibited by La. Code Civ. Prac. art. 105. *State ex rel. Lasserre v. Michel* (La.) 927

NOTES AND BRIEFS.

Habeas corpus; by husband against wife for custody of child; statutory provision prohibiting suits between. 927

HEALTH.

Revocation of License by State Board, see PHYSICIANS AND SURGEONS.

NOTES AND BRIEFS.

Health; Delegation of Power to Municipality, see CONSTITUTIONAL LAW.

HIGHWAYS.

Regulation as to Tires, see MUNICIPAL CORPORATIONS, 3.

Liability for Injury by Bicyclist in, see MUNICIPAL CORPORATIONS, 4.

Requirement of Maintenance and Repair, see PUBLIC IMPROVEMENTS.

See also WATERS, 1.

1. The macadamized portion alone of a street 40 feet wide, of which about 25 are paved with cobble stones and the remainder macadamized, cannot be treated as the traveled part within the meaning of a statute requiring travelers by carriage to keep to the right of the center of the traveled part of the road, and therefore a traveler injured by collision while needlessly on the left of the center of the whole width of road cannot absolve himself from fault by showing that he was to the right of the center of the macadamized part. *Winter v. Harris* (R. I.) 643

2. A municipal corporation which, in constructing a sewer in a public street, leaves a manhole uncovered for several weeks, and near it a pile of sand, with knowledge that children are accustomed to play in the sand, will be liable for injuries to a child of tender years who, while at play in the sand, falls into the manhole and is injured. *South Bend v. Turner* (Ind.) 396

3. A municipality constructing a sewer in a public street is not relieved from liability for injuries to persons using the street by the fact that it was in the exclusive possession of the contractor, if it had notice, or might have had notice by the exercise of proper oversight, that its licensee had acted in a negligent manner and left

the street in an unsafe and dangerous condition. Id.

NOTES AND BRIEFS.

Improvement Assessment by Frontage, see CONSTITUTIONAL LAW.

Highways; what constitutes traveled part of road. 643

Liability of municipality for personal injury; construction of sewer; independent contractor. 397

Right of municipal authorities to divest themselves of power or control over, in absence of special authorization. 948

HOMESTEAD.

See BANKRUPTCY, 1.

HOMICIDE.

Res Gestæ, see EVIDENCE, 19.

1. Manslaughter, and not murder, is, in the absence of actual malice, committed by killing a man while reasonably believing from the circumstances that he is in the act of adultery with assailant's wife, although the assailant is in fact mistaken. *State v. Yanz* (Conn.) 780

2. Upon trial of an indictment for conspiring to commit murder, the fact of defendant's intoxication at the alleged time of the commission of the offense may be considered by the jury as bearing upon the existence of the felonious intent necessary to render him guilty. *Booher v. State* (Ind.) 391

NOTES AND BRIEFS.

See also CRIMINAL LAW.

Homicide; adultery as reducing crime to manslaughter. 781

HUSBAND AND WIFE.

Custody of Minor, see HABEAS CORPUS; INFANTS.

See also CONFLICT OF LAWS, 2, 3; DESCENT AND DISTRIBUTION.

1. Disposition by will is not within the terms of a statute permitting the wife of a nonresident to convey her property as though sole. *Foote v. Nickerson* (N. H.) 554

2. The statutes extending the power of husband and wife to contract as to property matters gives them no authority to enter into an agreement renouncing marital rights. Id.

3. A man and wife cannot make a valid contract for a separation. Id.

4. If covenants for separation and touching property rights occur in the same agreement between husband and wife, the legal part of the agreement touching the property rights will be upheld if the promises are separate and the consideration is divisible; but if the consideration is entire the whole must fail. Id.

NOTES AND BRIEFS.

See also CONFLICT OF LAWS; HABEAS CORPUS; JUDGMENT.

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Husband and wife; contracts between; separation and waiver of property rights. 555

ILLEGITIMATE PERSON.

See INSURANCE, 7, 8, NOTES AND BRIEFS.

INCOMPETENT PERSONS.

Neither guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the person or estate of such persons unless expressly authorized to do so by law. *Andrus v. Blazard* (Utah) 354

INDEPENDENT CONTRACTOR.

As Affecting Municipal Liability for Injury in Street, see HIGHWAYS, 3.

INFANTS.

Custody of, see HABEAS CORPUS.

Assumption of Risk, see MASTER AND SERVANT, 9, 10.

Negligence of Parent as Affecting Recovery, see NEGLIGENCE, 8.

See also HABEAS CORPUS, MASTER AND SERVANT, NEGLIGENCE, 10-12, NOTES AND BRIEFS; TRIAL, 10.

The right of a father to the custody of his minor children is not absolute, but may be limited by other considerations, such as the welfare of the child. *State ex rel. Lasserre v. Michel* (La.) 927

INJUNCTION.

See also APPEAL AND ERROR, 10; COSTS AND FEES, 3.

1. That the erection of a building will increase the rates of insurance upon neighboring property is not ground for injunction to restrain such erection. *Chambers v. Cramer* (W. Va.) 545

2. Injunction will be granted at the instance of the manufacturer whose apprentices are under express contract not to join a labor union, to restrain representatives of such union, who are not employed by him, from enticing his apprentices to break their contracts and become members of the union to the injury of the business. *Flacus v. Smith* (Pa.) 640

3. A suit to enjoin threatened diversion of water to a certain amount for irrigating purposes, under a claim of absolute right, through a ditch already constructed, will not be dismissed merely because that amount has not been used and the complaining party has not proved actual injury. *Jones v. Conn* (Or.) 630

4. Equity will not interfere as a general rule when a thing complained of is not a nuisance *per se*, but may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, the presumption being that a person entering into a legitimate business will conduct it in a proper way, so that it will not constitute a nuisance. *Chambers v. Cramer* (W. Va.) 545

5. To warrant the perpetuation of an injunction restraining, as a threatened nuisance, the erection of a building proposed to be used for legitimate purposes, the fact that it will be a nuisance if so used must be made clearly to appear, beyond all ground of fair questioning. *Id.*

6. The collection of a tax cannot be enjoined because the person by whom it was assessed had no right to the office of assessor, if he was a *de facto* assessor properly exercising the functions of the office. *Northwestern Lumber Co. v. Chehalis County (Wash.)* 212

NOTES AND BRIEFS.

See also DAMAGES.

Injunction; against nuisances. 545

By private individual specially injured, against public nuisance; interference with riparian rights; navigation. 474

Against one inducing servant or apprentice to break contract. 641

Against infringement of right irrespective of damage; to prevent repeated trespasses and multiplicity of suits; to restrain diversion of water for irrigation of land, riparian or nonriparian, where no injury done other proprietors. 631

Necessity of irreparable damage or insolvency of defendant; preventing abatement of nuisance; municipal power as to nuisances; abatement by municipal board of health. 295

Change of condition authorizing refusal of, to enforce restrictive covenants as to use of land. 265

INSOLVENCY.

As Affecting Homestead Exemption, see *BANKRUPTCY*, 1.

See also *PARTNERSHIP*; *SET-OFF AND COUNTERCLAIM*, 2, 3.

NOTES AND BRIEFS.

See also *CORPORATIONS*; *JUDGMENT*; *PARTNERSHIP*.

Insolvency; preference of creditors by sale or mortgage of partnership property. 413

INSURANCE.

Intervention by Insurer, see *ACTION OR SUIT*, 5.

Impairment of Obligation, see *CONTRACTS*, 12.

Construction of Building Increasing Rates, see *INJUNCTION*, 1.

See also *BENEVOLENT SOCIETIES*; *CONSTITUTIONAL LAW*, 4, 7; *TRIAL*, 14.

1. No recovery of his commissions can be had by one who secures applications for insurance at a time when he has not complied with the statute prohibiting, under penalty, the soliciting of insurance without a license, although the policies are not issued until after the license is procured, and the statute does not expressly prevent recovery of the commissions. *Black v. Security Mut. L. Assn. (Me.)* 930
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Insurable interest.

2. An attaching creditor as well as a receiver has an insurable interest in the attached property, but in either instance the insurance would be a personal contract between the company and the party insuring, and, unless there be some contract or trust relation between them, in the event of loss the insurance money collected would belong to each in his individual or official right. *McLaughlin v. Park City Bank (Utah)* 343

3. One may lawfully insure his own life, and afterwards assign the policy to another having no insurable interest, if done in good faith, and not by way of cover for a wager policy. *Chamberlain v. Butler (Neb.)* 338

4. An adult son has not, from the bare fact of relationship, an insurable interest in the life of his father. *Life Ins. Clearing Co. v. O'Neill (C. C. A. 3d C.)* 225

5. Ability on the part of the father to support his adult son in case of the latter's inability to support himself is necessary to give the son an insurable interest in the father's life, under a statute imposing upon fathers the duty of caring for their indigent children. *Id.*

6. The existence of a law imposing upon a son the duty of supporting his father in case the latter becomes unable to support himself gives the son no insurable interest in the father's life, in the absence of any expenditures, past or prospective, towards such support. *Id.*

7. An illegitimate child is not a child or relative of her father, as those words are used in a statute designating the persons who may be beneficiaries in certificates of mutual benefit associations. *Lavigne v. Ligue Des Patriotes (Mass.)* 814

8. No relation of dependency exists between an illegitimate child of a married woman and her putative father so as to entitle her to become a beneficiary in a benefit certificate issued to him, under a statutory provision as to "persons dependent," where he merely boards with her mother, paying his board when able, and is under no legal obligation to support the child. *Id.*

Construction.

9. Liability for loss resulting from destruction by fire of a building insured by a policy exempting the insurer from liability for loss caused by explosions of any kind (unless fire ensues, and in that event for the damage by fire only) and providing that if the building or any part thereof falls, except as the result of fire, the insurance shall immediately cease, will attach under the former clause, and not be defeated by the latter, where one corner of the building is knocked down by an explosion in a neighboring building, and fire immediately appears in the exposed part, caused either by the flame of the explosion or by fires liberated thereby in the building insured. *Leonard v. Orient Ins. Co. (C. C. A. 7th C.)* 706

10. Recovery on a policy insuring against illness, which limits liability to the period when insured is continuously confined to his house and subject to the personal calls of a registered physician in good standing, is not defeated by the fact that the insured went out by direction of his physician for an occasional and necessary airing, if, by reason of the illness, he was continuously confined to the house the larger portion of the time. *Hoffman v. Michigan Home & Hospital Asso.* (Mich.) 746

Breach of condition.

11. All policies, whether standard or not, are covered by a statute declaring that no policy of fire insurance shall be declared void by the insurer for breach of any condition if the insurer has not been injured by it. *McGannon v. Michigan Millers' Mut. F. Ins. Co.* (Mich.) 739

12. The temporary absence of a competent watchman regularly employed for a mill, during which the mill is destroyed by fire, will not avoid a policy of insurance on the property, which provides that statements in the application shall be a part of the contract, although in the application the insured agrees to keep a watchman on the premises at such times as that when the fire occurs. *Id.*

Proofs of loss.

13. Failure to comply with the requirements of a policy insuring against illness, as to time of furnishing proofs of disability and as to allowing time for investigating the claim, will not defeat an action on the policy when liability is denied because the disease is not covered by the policy, and insured is not confined to the house. *Hoffman v. Michigan Home & H. Asso.* (Mich.) 746

Defenses.

See also *supra*, 9, 10, 12, 13.

14. Suicide will not defeat recovery upon a contract of life insurance not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms. *Campbell v. Supreme Conclave I. O. H.* (N. J. Err. & App.) 576

Subrogation.

15. The recovery for loss of prospective earnings awarded because of injury to a vessel by collision is within the rule entitling an insurer who has received an abandonment of the vessel to the fund recovered on account of the collision from the vessel in fault, and the fact that the insurance did not cover the full value of the injured vessel will not require the insurer to share such recovery with the vessel owner. *Mason v. Marine Ins. Co.* (C. C. A. 6th C.) 700

Suit.

16. A new action is not brought by the substitution of plaintiff as administrator with the will annexed after the finding and probate of the will, for himself as simple administrator, in an action on an insurance policy, so as to give the insurer the

benefit of the expiration of the time limited for the bringing of the suit, which occurs before the substitution is made. *Fidelity & C. Co. v. Freeman* (C. C. A. 6th C.) 680

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See also **ASSUMPSIT; BENEVOLENT SOCIETIES; DAMAGES; MANDAMUS.**

Insurance; who are legal beneficiaries; relatives or persons dependent; next of kin; illegitimate child; what constitutes dependency. 815

Policy on own life; assignment to one having no insurable interest; wagering policy; rights of administrator of insured; rights of assignee. 339

Insurable interest in life of parent or child or other relative by blood:—(I.) The rule that pecuniary interest is necessary: (a) its origin and extent; (b) what pecuniary interest is sufficient; (II.) the rule that close relationship is sufficient: (a) origin, general statement and scope; (b) application to interest of child in life of parent; (c) application to interest of parent in life of child; (d) application to interest in lives of brothers or sisters; (e) application to interest in lives of other relatives; (III.) consent of the insured; (IV.) conclusion. 225

Action of company dispensing with notice; airing by physician's directions, under policy limited as to time continuously confined. 746

Insurable interest of receiver; tracing property into proceeds; rights of vendee of property; rights of creditors; insurable interest of attachment creditor; of owner of equity of redemption. 348

Extent of right of insured to damages from wrongdoer; rights of insured; extent of abandonment to insurer. 701

Literal performance of warranty; knowledge of truth immaterial; as to watchman on premises; temporary absence; avoiding policy. 739

INTEREST.

See **USURY.**

INTERVENTION.

See **ACTION OR SUIT, 5, 6.**

INTOXICATING LIQUORS.

The bond to be executed by a person making application for a license to sell intoxicating liquors, in accordance with Minn. Gen. Stat. 1894, § 2026, is one of indemnity, given to protect the state, as well as such private parties as are authorized to maintain actions under the provisions of § 1992; and the amount thereof, fixed by statute at \$2,000, is a penalty, and not in the nature of liquidated damages, to be recovered as an entire sum in case any of the conditions of the bond are violated. *State v. Larson* (Minn.) 487

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Intoxicating liquors; measure of damage

ges for breach of bid to state; penalty or liquidated damages. 487

IRRIGATION.

See INJUNCTION, 3; WATERS, 6-9.

JUDGMENT.

See also ACCORD AND SATISFACTION; LIMITATION OF ACTIONS, 5, 6; PLEADING, 1, 2; SUBROGATION.

1. In an action against a railroad company and its conductor for an injury caused by the alleged negligence of the conductor a verdict in favor of the latter will preclude a judgment against the company. *Doremus v. Root* (Wash.) 649

2. The action of the trial court in construing a verdict silent as to one of two sued jointly for injuries caused by the alleged negligence of one acting as agent for the other, as a verdict in his favor, and rendering judgment to that effect, is, at most, error rendering the judgment voidable if properly attacked, but leaving it conclusive against collateral attack. *Id.*

3. An order of a probate court, made without authority of the statute, is void. *Andrus v. Blazzard* (Utah) 354

4. A man's heirs at law cannot maintain a suit to set aside a fraudulent divorce from a third person of a woman whom he afterwards attempted to marry, for the purpose of defeating her claims upon his estate, where they were not parties to the divorce proceedings and had no interest therein. *Tyler v. Aspinwall* (Conn.) 758

5. One cannot defeat liability on a judgment entered on a note authorizing an attorney to confess judgment, which he signed without reading, on the ground that he did not know that it contained such authority, in the absence of any fraud, misrepresentation, or concealment in procuring his signature. *Crim v. Crim* (Mo.) 502

6. A judgment against a nonresident, entered on a note containing a power of attorney to confess judgment, which is valid in the state where entered, is entitled to full faith and credit in other states, so as to support an action to enforce the judgment in such other states. *Id.*

7. That a judgment for alimony in a divorce proceeding is subject to alteration from time to time by the court which rendered it, as may seem proper upon new facts occurring after the trial, does not prevent its being a final decree which may be enforced in the courts of another state. *Trowbridge v. Spinning* (Wash.) 204

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In favor of employee as bar to recovery against employer for employee's act or default:—(I.) The general rule; (II.) identity or privity as to parties; (III.) identity of issues; (IV.) effect of action beyond or without authority; (V.) the rule in the principal case; (VI.) conclusion. 649

Who may sue or take other proceedings to set aside judgments against other parties:—(I.) Decrees of divorce; (II.) judgments on confession; (III.) matters of administration, probate, heirs, guardian; (IV.) assignment for creditors; (V.) garnishment; (VI.) foreclosure of mortgage; (VII.) judgments against partners; (VIII.) judgments against corporations; (IX.) for death of party; (X.) for usury; (XI.) application by surety or guarantor; (XII.) application by party claiming property affected; (XIII.) application by creditors seeking relief; (XIV.) application by other persons; (XV.) summary. 758

Law of the case; material changes since prior decision. 473

Construction of decree. 455

JUDICIAL SALE.

Intervention by Purchaser, see ACTION OR SUIT, 6.

Action against Purchaser, see ACTION OR SUIT, 1, 2.

See also LIMITATION OF ACTIONS, 2; SET-OFF AND COUNTERCLAIM, 1.

1. A section of a railroad cannot be sold under a decree of court, separate from the franchises, for the purpose of enforcing a contractor's lien. *Connor v. Tennessee C. R. Co.* (C. C. A. 6th C.) 687

2. The return of the officer selling property under execution, that it sold for a certain sum, is not conclusive in favor of the purchaser that the price was paid. *Meherin v. Ambrose* (Cal.) 272

3. Receipt of the officer's deed is not a condition to liability to comply with a bid at execution sale by one who has received the officer's certificate of sale. *Id.*

4. That the property had been sold at a former execution sale under another judgment will not absolve a purchaser at execution sale from complying with his bid. *Id.*

5. A purchaser at execution sale cannot defeat an action to compel him to comply with his bid, on the ground that the sale was not wholly for cash, as required by statute. *Id.*

6. A suit to compel a purchaser at execution sale to comply with his bid cannot be defeated because the statute, upon such failure, requires a resale of the property, making the purchaser liable for the costs and deficiency, where he induced the officer to forego that course, gave his check for the balance, and received and retained a certificate of sale. *Id.*

NOTES AND BRIEFS.

Judicial sale; validity, other than for cash; taking of check; who may maintain action on bond; option to resell rests in officer. 273

Sale of railroad roadbed separate from franchise. 690

JURISDICTION.

See **APPEAL AND ERROR**, 4; **COURTS**, 1; **JUDGMENT**, 3.

LABORERS.

See **CONSTITUTIONAL LAW, NOTES AND BRIEFS.**

LABOR UNIONS.

Injunction Restraining Breach of Apprentice's Contract, see **INJUNCTION**, 2.

Statutory authority to workmen to form associations for mutual aid, and to refuse to work for any employer under certain conditions without being subject to prosecution for conspiracy, will not justify members of a labor union in enticing employees to break their contracts not to become members of such unions to the injury of their employer's business. *Flaccus v. Smith* (Pa.) 640

LACHES.

See **ATTACHMENT**, 3.

LANDLORD AND TENANT.

See also **ADVERSE POSSESSION**, 1; **ESTOPPEL, NOTES AND BRIEFS**; **SPECIFIC PERFORMANCE**, 1, 2.

A stipulation in a lease of a farm for a term of years, that all property of every name, character, and description belonging to the lessees that shall be on said premises, or brought thereon by the lessees during the term of the lease, shall be held as security for the payment of the rents until all be paid, and the same shall be and remain a lien upon the same from year to year until payments of the rents for the entire term have been fully discharged and paid, is ineffectual to create a lien, legal or equitable, in favor of the lessor for rents due and in arrears, on the crops grown thereafter on the leased premises, and other property not *in esse* at the time, and afterwards brought thereon by the lessee. *Brown v. Neilson* (Neb.) 328

LARD.

See **FOOD, NOTES AND BRIEFS.**

LAW.

Judicial Notice, see **EVIDENCE**, 1.

LEASE.

See **BANKRUPTCY, NOTES AND BRIEFS.**

LEGISLATURE.

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LEVY AND SEIZURE.

Right to Possession and Rents of Property, see **ATTACHMENT**, 9.

LIBEL AND SLANDER.

See also **TRIAL**, 13.

1. Probable cause for making defamatory allegations in an answer to a cause of action does not exist where the allegations are such as could not constitute a defense if true. *Grant v. Hayne* (La.) 930

2. Absence of malice is not a complete defense against a demand for damages by one who uselessly charges another with having failed in a duty or with having transgressed the law in a manner in which he, as defendant in a suit, cannot be held to have been particularly concerned. *Id.*

3. An attack on the character or reputation of the plaintiff in an answer to his suit for commissions on subscriptions obtained by him, by alleging that his reputation in the community was so bad that he could not procure subscriptions, and that many persons failed to subscribe because of his connection with the enterprise, is not privileged because contained in a pleading, since his right to commissions on the subscriptions, if any, that he actually did obtain, could not be affected by the alleged fact of his bad reputation. *Id.*

NOTES AND BRIEFS.

See also **DAMAGES**; **PLEADING**.

What constitutes libel; privileged communications; what subject to newspaper criticism; necessity that special damages be natural and proximate consequence of the libel. 855

What is libel; necessity of malice and want of probable cause; privileged communications in judicial proceedings; in pleadings; inferring malice and injury from nature and falsity of words. 931

LIENS.

Intervention by Purchaser of Railroad, see **ACTION OR SUIT**, 6.

See also **ATTACHMENT**, 1-5, 7; **JUDICIAL SALE**, 1; **LANDLORD AND TENANT**.

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Liens; suit for enforcement of mechanics' lien, proceeding *in rem*; sale of part of railroad roadbed; priority of liens; work constructed in sections. 690

LIMITATION OF ACTIONS.

See also **ADVERSE POSSESSION**, 2; **INSURANCE**, 16.

1. The statute of limitations runs against a right of action to recover possession of a portion of a railroad right of way in adverse possession of a third person. *Northern P. R. Co. v. Ely* (Wash.) 526

2. In case an officer selling property at an execution sale takes a check for the excess of the bid over the judgment, the right of the judgment debtor as an equita-

ble assignees to enforce payment of the check is governed by the statute applicable to the limitation of actions on written instruments, and not by that applicable to actions not founded on instruments in writing. *Meherin v. Ambrose* (Cal.) 272

3. An action by a father to recover damages for the seduction of his daughter is barred by the Georgia statute of limitations, unless for an injury to the person and brought within two years from the time the right of action accrued. *Hutcherson v. Durden* (Ga.) 811

4. The statute of limitations does not begin to run against all actions for injuries to adjoining property, growing out of the negligent erection by a municipality of a bulkhead so as to constitute a continuing nuisance, at the time of its completion, but damages may be recovered for injuries which have accrued within the statutory period before the commencement of the action, although more than the statutory period has elapsed since the completion of the work. *Doran v. Seattle* (Wash.) 532

5. A personal judgment upon any cause of action merges and ends that cause of action, so that thereafter the statute of limitations runs against the judgment. *Hogg v. Hartley* (W. Va.) 215

6. The time of the residence abroad of one who was a resident of the state when the cause of action arose, but who departs from it before the entry of a personal judgment against him, will not excuse the judgment from the statute of limitations, under a provision that the time of obstructing the prosecution of the right by a departure from the state shall not be computed. *Id.*

7. Removal from the state and residence abroad before the birth of a cause of action or the accrual of a right of action against the person will not save the cause of action from the statute of limitations. *Id.*

8. One who departs from the state and resides abroad before any cause of action against him has arisen will not thereby save a subsequently accruing action from the statute of limitations, under a provision that obstructing the prosecution of a right of action by departure from the state will prevent the time of such obstruction from being computed. *Id.*

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Limitation of actions; as to continuing trespass or nuisance. 533

Statute of repose; bar not dependent on presumption or prescription. 528

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See CONSTITUTIONAL LAW, 10.

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MACHINE SHOP.

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MASTER AND SERVANT.

Statute Making Railroad Liable for Fellow Servant's Negligence, see CONSTITUTIONAL LAW, 12.

Doctrine of Fellow Service, see COURTS, 4.

Consideration for Release, see EVIDENCE, 10.

Evidence as to Successful Working of Similar Device, see EVIDENCE, 23.

Restraining Breach of Contract at Instance of Third Person, see INTERJUNCTION, 2.

See also LABOR UNIONS; NEGLIGENCE, 6; PLEADING, 5; TRIAL, 15.

1. One who hires a gang of workmen and furnishes them to a third person, together with a time keeper, who is to impart to them the latter's orders as to the time and place to work, will not be liable for trespasses committed by them in cutting timber upon a stranger's land under direction of such third person, although he is to pay the wages and has power to discharge the men, where he is ignorant of the trespass, is not interested in the work except as security for his advances, and has no voice in directing the laborers when or where to work. *Swackhamer v. Johnson* (Or.) 625

Rules and regulations.

2. A railroad company is guilty of negligence in failing to provide suitable rules and regulations for the control and operation of hand cars used by bridge gangs in going to and from a station to places where they are engaged in the repair and reconstruction of bridges. *Wallin v. Eastern R. Co.* (Minn.) 481

Warning.

3. It is the duty of an electric company to warn of the danger an employee who is hired to dig holes, repair poles, and to do other work on the ground, and who to its knowledge is unacquainted with the dangerous character of the work of a lineman, upon ordering him to ascend a pole and scrape a wire, and it cannot relieve itself from liability for injuries caused by non-compliance with such duty by delegating its performance to a foreman who is in a general sense a fellow servant of the person injured. *Tedford v. Los Angeles Electric Co.* (Cal.) 85

Safe place and appliances.

4. One engaged in constructing a bridge owes to his employees the duty of furnishing material for the temporary structure, which is reasonably sufficient to bear the

weight to which it will be subjected; and for that purpose he is required to make proper inspection of the material furnished, to ascertain its soundness. *Lafayette Bridge Co. v. Olsen* (C. C. A. 7th C.) 33

5. The duty owing by one engaged in constructing a bridge, to his employees, of inspecting the material furnished for the temporary structure to see that it is reasonably sufficient for its intended use, is not performed by directions to the workmen to pick out the best of mingled suitable and unsuitable material furnished. *Id.*

6. A shed of a third person under which a railroad company runs a spur track is within the rule that the working place furnished by the master must be reasonably safe, to the extent that the company is bound to see that the roof does not fall upon brakemen who are required to go there for cars. *Doyle v. Toledo, S. & M. R. Co.* (Mich.) 461

7. The master's liability for injury to a servant by a defective tool furnished for his use is not defeated by the fact that the defective condition was known to a fellow servant who procured the tool for use by himself and the injured one, and who was therefore negligent with regard to such use. *Noble v. Bessemer S. S. Co.* (Mich.) 456

Assumption of risk.

8. A servant employed in deepening a canal assumes the risk of the fall of standing trees, in complying with the request of his foreman to assist in extinguishing a fire spreading through swamp and underbrush towards property of the employer on the canal bank, the danger of which is as obvious to him as to any other person engaged in saving the property. *Maltbie v. Belden* (N. Y.) 52

9. A minor employed as a servant assumes, to the same extent as an adult, the ordinary dangers and risks of his employment which he actually knows and appreciates, and those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them. *Cudahy Packing Co. v. Marcan* (C. C. A. 8th C.) 258

10. A minor who for four weeks has been working upon a block 14 inches square and 5 inches in thickness, placed upon a wet, greasy, and slippery floor by himself, assumes the risk and danger of the slipping of the block upon the greasy floor, by means of which his hand is involuntarily thrown into the cylinders of a chopping machine. *Id.*

Liability to third person.

See also CARRIERS.

11. A railroad company is not liable for damages resulting from an assault and battery inflicted by its station agent and another upon a third person, when it appears that the difficulty which gave rise to the beating arose out of a personal quarrel, 54 L. R. A.

and that the agent, so far as related to his participation therein, was acting upon his individual responsibility, and not within the scope of the business of his agency as an employee of the company. *Lynch v. Florida, C. & P. R. Co.* (Ga.) 810

Fellow servants or vice principal.

See also *supra*, 3, 7.

12. A foreman and servant engaged in deepening a canal are fellow servants in attempting to extinguish a fire spreading over adjacent land towards property of the master on the canal bank, so that the master is not liable for injuries to the servant from the negligence of the foreman in failing to warn him of the impending fall of burning trees. *Maltbie v. Belden* (N. Y.) 52

13. A foreman of water supply of a railroad, whose duty requires him to be carried from place to place along the road to supervise water tanks and pumping machinery, is, when riding on a detached engine to a place where machinery needs repairs, a fellow servant of the engineer in charge of the engine carrying him, within the rule exempting the employer from liability for injuries negligently inflicted upon an employee by his fellow servant. *Louisville & N. R. Co. v. Stuber* (C. C. A. 6th C.) 696

14. Members of a bridge gang at work in repairing and reconstructing railroad bridges are employees of the railroad company and engaged in their duties as such, within the meaning of Wis. Laws 1893, chap. 220, entitling them to recover for damages caused by negligence of fellow servants, while riding on hand cars going to and from their work, when as a part of their contract it is the business of the railroad company to transport them by regular trains to the nearest station and from there to the place of their work by hand cars. *Wallin v. Eastern R. Co.* (Minn.) 481

15. A section foreman in charge of a crew on a hand car, with power to determine where the car should be stopped, is not, in the act of applying the brakes, a fellow servant of one of the crew, so as to relieve the railroad company from liability for injuries to the latter by his negligent application of the brakes. *Illinois C. R. Co. v. Josey* (Ky.) 78

16. A foreman authorized to purchase, inspect, and direct the use of lumber for the temporary structure of a bridge which his employer is engaged in constructing represents the master in respect to the duty of inspecting to ascertain if the lumber used is reasonably suitable for the purpose intended, so as to render the master liable for injuries to other employees due to failure to perform that duty. *Lafayette Bridge Co. v. Olsen* (C. C. A. 7th C.) 33

17. One operating a body maker in a can manufactory, having authority to direct the actions of the machine tender, and therefore representing the master in directing the tender to remove a can body which has caught in the machine, does not, by

reason of the fact that it is his duty to start the machinery with his own hand, become the fellow servant of the tender in so doing, so as to relieve the master from liability for injuries to the tender caused by his starting the machinery before the tender has withdrawn his hand from within it. *Norton Bros. v. Nadebok* (Ill.) 842

18. A master is not liable for injury to an employee by reason of failure of his foreman to keep cleaned and oiled an automatic stop designed to prevent the trolley from running off the end of the track of a traveler used to convey metal plates from one place to another in the shop, because of which the stop fails to work and the trolley falls upon the employee. *Quigley v. Levering* (N. Y.) 62

19. It is negligence for a section foreman in charge of a crew on a hand car to apply the brakes when the car is running at a high rate of speed, and he sees a member of the crew standing without support, so that suddenly checking the speed of the car will be likely to throw him off from it. *Illinois C. R. Co. v. Josey* (Ky.) 78

20. One in charge of a locomotive engine is negligent in running it at 20 miles an hour without warning past a place where he knows it is the duty of an employee to cross the track to receive the report of a train then passing, and whose view along the track is obstructed by posts and weeds. *Indianapolis Union R. Co. v. Houlihan* (Ind.) 787

21. That an injury was caused, by the negligent use of an engine by a servant in charge thereof, to another servant of the same corporation, both being at the time in the line of duty as employees, is sufficient to render the employer liable under a statute imposing liability where injury is caused by the negligence of any person in the service of such corporation who has been given charge of any engine, or where such injury is caused by the negligence of any servant acting in the place of the corporation in that behalf, and the person injured is obeying at the time of such injury the order of some superior having authority to direct, without showing that the negligent servant represented the employer, or that the injured one was obeying the order of a superior. *Id.*

22. The negligence of a fellow servant is the cause of injury to an employee by the fall of the trolley from the traveler used for conveying metal plates across the shop, where, in disregard of orders, he pulls the trolley towards the end of the track without looking to see whether or not the stop designed to prevent it from running off the end is working,—and not the failure of the stop to work. *Quigley v. Levering* (N. Y.) 62

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See also APPRENTICES; CORPORATIONS; INTERJUNCTION; JUDGMENT.

Master and servant; duty as to safe 54 L. R. A.

place to work; protection of employees; delegation of duty; employee's right to presume performance of duty; assumption of risk; by minor; obvious danger. 259

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regulations, how far absolute; generally; (m) duty to carry out regulations with respect to the movements of trains; (n) duty to impart information as to permanent dangers normally incident to the work at the time it is entered upon; (o) duty to impart information as to permanent dangers superadded to the environment after the work has begun; (p) duty to warn as to dangers of the transitory class occasionally supervening during the progress of the work; (q) duty to inspect instrumentalities; generally; (r) duty to inspect instrumentalities at the time they are first brought into use; (s) duty to inspect instrumentalities during the time they are kept in use; (t) duty to inspect instrumentalities belonging to another person, but temporarily used by the master; (IV.) non-liability of the master for negligence of co-servants in respect to the details of the work: (a) generally; (b) supervision of details not a master's duty; (c) merely transitory perils; master not bound to protect the servant against; (d) dangers caused by the progress of the work; master not bound to protect servant against; (e) preparation or care of instrumentalities; master not responsible for, where these functions are a part of the work to be done; (f) negligent use of safe appliances by fellow servant; master not responsible for; (g) *rationale* of doctrine exempting master from liability for negligence in carrying out the details of the work; (h) pleading; (i) instructions; (j) functions of court and jury in passing upon evidence; (k) explanation of classification of the cases cited in the ensuing sections; (V.) negligence of coservant involving merely the use of the instrumentalities; master not responsible for: (a) orders respecting the use of the instrumentalities; (b) choice of particular methods of work; (c) disposition of the force of employees available for the work in hand; (d) assigning servants to work for which they are unfitted; (e) negligence in sending servants into abnormally dangerous places without warning; (f) failing to warn servants as to dangers arising from the execution of the details of the work; (g) absence from the post of duty; (h) selecting an imperfect appliance from the stock available; (i) failing to use the instrumentalities furnished by the master; (j) negligence in failing to discard a defective for a suitable instrumentality; (k) using instrumentalities in a manner not contemplated nor authorized by the master; (l) giving of signals; (m) negligence in carrying out the express orders or regulations of the master; (n) failure to give instructions; (o) negligence in manipulation of the instrumentalities during the progress of the work; (p) negligence in the transmission of the master's orders to other servants; (VI.) negligence of coservant in respect to the preparation or structural modification of instrumentalities or their parts; when not imputed to the master: (a) introductory; (b) negligence which produces struc-

tural unsafety of a temporary character; (c) negligence in failing to adjust or secure instrumentalities or their parts while in use; (d) negligence in the preparation of temporary structures or other instrumentalities as a part of the work; general rule; (e) *rationale* and limits of a master's exemption from liability for the adjustment or preparation of instrumentalities; (f) special circumstances not affecting the extent of the master's liability; (g) when the delinquency is deemed not to be in respect to the details of the work; (VII.) negligence of coservants whose duty it is to keep the instrumentalities in proper condition; when not imputed to the master: (a) theory that a master is never liable for negligence in regard to inspection and repairs; (b) theory that the liability of the master depends on the subject-matter of the inspection or repairs neglected; (c) master liable where the delinquent servant was engaged in a different class of work; (d) negligence in failing to replace an unsound by a sound appliance, when master not liable for; (e) all employees engaged in repairing regarded as coservants of each other; (VIII.) doctrine as to the details of work not a protection to the master when his own negligence or that of a vice principal was an efficient cause of the injury: (a) master liable where he or his vice principal directed the details of the work; (b) master liable where his own negligence intervenes as a proximate cause between a delinquent coservant's negligence and the injury; (c) master liable where his own antecedent negligence and a subsequent delinquency of a coservant are both efficient causes of the injury; (d) illustrative cases as to concurrent negligence; (e) master's liability determined with reference to the question whether the coservant's delinquency did or did not break the chain of causation: (1) no break in the chain of causation; (2) chain of causation deemed to have been broken: (a) legal cause of the injury held not to be an official act of negligence on the part of a vice principal; (b) defects in structures or other dangers of the place of work; (c) defects in machinery; (d) unfitness of the delinquent coservant; (e) inadequate number of servants; (f) defective regulations. 33

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De minimis non curat lex. *Delisle v. Bourriague* (La.) 421

Expressio unius exclusio alterius. *Newton v. The Carrie L. Tyler* (C. C. A. 4th C.) 236

MECHANICS.

See CONSTITUTIONAL LAW, NOTES AND BRIEFS.

MEMORANDA.

See FORGERY, NOTES AND BRIEFS.

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See ASSUMPSIT, NOTES AND BRIEFS.

MORTGAGE.

Of Ward's Estate, see GUARDIAN AND WARD, 2.

See also NEW TRIAL, 1.

1. A power of sale inserted in a real-estate mortgage is a power coupled with an interest, and is not revoked or suspended by the death of the mortgagor. *Grandin v. Emmons* (N. D.) 610

2. Advantage of a clause in a mortgage covering several parcels of land, by which any parcel may be released upon payment of a certain sum, cannot be taken after foreclosure of the mortgage, by a purchaser of a parcel who has unsuccessfully sought to cast the whole burden of the mortgage upon subsequent purchasers of the remaining parcels who purchased before the prior conveyance was recorded. *Gray v. H. M. Loud & Sons Lumber Co.* (Mich.) 731

3. One obtaining a contract which he fails to record, for the conveyance of a parcel of a tract of land the whole of which is subsequently mortgaged, cannot cast the burden of the mortgage upon subsequent purchasers of the remainder of the tract, who have no notice of his rights, he not having taken possession so as to charge the subsequent purchaser with constructive notice. *Id.*

4. A purchaser of mortgaged property cannot take advantage of usury in the mortgage contract. *Id.*

NOTES AND BRIEFS.

See also JUDGMENT.

Mortgage; order of alienation as affecting sale to satisfy; acts of grantee as affecting relative liabilities of grantees. 732

Defense of duress or undue influence; effect of foreclosure by advertisement against minors or heirs of mortgagor; redemption by heirs of mortgagor's wife. 611

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Liability for Injury to Child in Street, see HIGHWAYS, 2, 3.

Requirement, in Construction Contract of Maintenance and Repair of Highways, see PUBLIC IMPROVEMENTS.

See also BURIAL; EMINENT DOMAIN; NUISANCES, 2, 4; WATERS, 12.

1. A municipal corporation may make the mere possession of a lottery ticket a misdemeanor, where by the Constitution it 54 L. R. A.

has power to make and enforce such police and other regulations as are not in conflict with general laws, and the suppression of lotteries is part of the public policy of the state as evidenced by its penal laws. *Ex parte McClain* (Cal.) 779

2. Under statutory authority to prevent the running at large of dogs, a municipal corporation may exact a fee of \$1.50 for the privilege of keeping a dog, and in case of its nonpayment impose a fine upon the owner and provide for the killing of the dog. *Gibson v. Harrison* (Ark.) 268

3. An ordinance providing that no vehicle which, together with its load, weighs more than 2,000 pounds, and which is in use for carrying goods, merchandise, building material, manure, dirt, earth, or other article or commodity, and which has tires less than 6 inches in width, shall pass or enter upon any park or parkway, is void as applicable to a parkway, because unreasonable, and in its effect prohibitive of traffic thus classified. *State v. Rohart* (Minn.) 947

4. Failure of a municipality to attempt to enforce its ordinance limiting the speed at which bicycles may be ridden on its streets will render it liable for injuries to a pedestrian knocked down by a bicycle which is being ridden at an immoderate rate of speed. *Hagerstown v. Klotz* (Md.) 940

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Exemption of Officer's Salary, see OFFICERS.

See also HIGHWAYS.

Municipal corporations; power to subscribe for or deal in stock of private corporation; bonds in aid of private enterprise; validity of statutes authorizing; what business public. 243

Power to declare burials within, nuisances; power to exclude slaughterhouse; burials, etc.; reasonableness of ordinance. 637

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NEGLIGENCE.

Judgment for Conductor Precluding Recovery against Railroad, see JUDGMENT, 1.

See also ANIMALS; CARRIERS; DEATH; DRUGGISTS; JUDGMENT, 2; MASTER AND SERVANT; PLEADING, 5, 7; PROXIMATE CAUSE, 2; RAILROADS; STREET RAILWAYS; TRIAL, 9, 10.

1. One who by negligence puts another under a reasonable apprehension of personal physical injury, and, in a reasonable effort to escape, the latter sustains physical injury, is subject to a right of action for the physical injury and the mental disorder naturally incident to its occurrence. *Tuttle v. Atlantic City R. Co.* (N. J. Err. & App.) 582

2. A woman, seeing a car which had been derailed while a flying drill was being

made coming out of the limits of a freight yard and across a public street at great speed towards the place where she was standing, is entitled to recover damages for an injury which she sustained by falling as in fright she ran for safety. *Id.*

3. Negligence, to be actionable, must result in damage to someone, which result, in the absence of wantonness or *malice animus*, might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act. *Cleghorn v. Thompson (Kan.)* 402

4. A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced person fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow if they had occurred to his mind. *Wallin v. Eastern R. Co. (Minn.)* 481

5. One who beats a horse in violation of the statute for the prevention of cruelty to animals cannot escape liability for an injury caused by a blow falling on a bystander, on the ground that he used reasonable care to avoid the accident, which was caused by the shying of the horse and the slipping of his own foot, and that such result of his acts was not anticipated. *Osborne v. Van Dyke (Iowa)* 367

6. The accidental shooting of a man upon a highway by an employee in a slaughterhouse, who was shooting at dogs that had caused annoyance and trouble about the place, and who had been instructed to kill the dogs if they returned, does not render either employer or employee liable, where the shooting of the man was entirely accidental and was due to the deflection of the course of the bullet in some manner, except for which it could never have reached the highway. *Cleghorn v. Thompson (Kan.)* 402

7. A merchant who fills a jug with gasoline for a customer without complying with the statute providing that no gasoline shall be sold until the package containing it has been marked "gasoline" is liable for injuries to a member of the customer's family by its explosion when she attempts to use it believing it to be kerosene. *Ives v. Welden (Iowa)* 854

8. A child injured by explosion of gasoline which she attempts to use believing it to be kerosene is not, in an action to hold the merchant who sold it liable for the injury, affected by the negligence of her father, who, with knowledge of its character, permits her to use it, or fails to warn her of the danger. *Id.*

Premises.

9. One who goes upon the premises of another by express or implied invitation of the owner may recover damages for an injury caused by a failure on the part of 54 L. R. A.

such owner to keep the premises in a reasonably safe condition. *Tucker v. Draper (Neb.)* 321

10. One who leaves an open well upon his premises, where he knows that children of tender years, without any notion of their danger, are continually playing, although he can obviate the danger with very little trouble and without injuring the premises or interfering with his own free use thereof, is guilty of negligence which renders him liable for the drowning of a child in the well,—especially when he knows that other children have very nearly fallen into the well and he has been warned of the danger. *Id.*

11. The owner of an uninclosed lot adjacent to a highway in a thickly populated part of a city, who leaves unguarded thereon a heavy section of cement pipe of unstable equilibrium, which, because of its large diameter, is an attractive plaything for children to roll about, and who knows that they resort there for that purpose, is liable to a child who, not having arrived at years of discretion and judgment, is injured by the pipe toppling over onto him while he is playing with it. *Kopplekom v. Colorado Cement Pipe Co. (Colo.)* 284

12. One who makes an excavation upon his land is not bound to so guard it as to prevent injury to children who come upon it without his invitation, express or implied, but who are induced to do so merely by the alluring attractiveness of the excavation and its surroundings. *Savannah, F. & W. R. Co. v. Beavers (Ga.)* 314

Contributory.

13. The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. *Western & A. R. Co. v. Ferguson (Ga.)* 802

14. Failure to exercise ordinary care on the part of the person injured, before the negligence complained of is apparent or should have been reasonably apprehended, will not preclude a recovery, but will, in Georgia, authorize the jury to diminish the damages in proportion to the fault attributable to the person injured. *Id.*

15. The modification of the rule that one guilty of contributory negligence cannot recover for injuries negligently inflicted, which permits a recovery in case defendant might, after discovering plaintiff's peril, have avoided the injury by the exercise of due care, is not applicable where plaintiff, in attempting to put a parcel on the front platform of a street car, negligently stood on the side towards the other track, and, upon perceiving a car approaching on it and receiving and assenting to instructions from its motorman as to reaching a place of safety, became confused and got caught

between the cars and injured. Baltimore
Consol. Railways Co. v. Armstrong (Md.) 424

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See also EVIDENCE; FOOD; HIGHWAYS;
MASTER AND SERVANT; STREET RAIL-
WAYS.

Negligence; dangerous premises attract-
ive to children; liability for injuries. 284

As to premises; dangerous agency; at-
tractive to children; duty to guard; im-
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Dangerous premises; near highway;
ponds; limitation of *Turntable Cases*; duty
to guard against licensees or trespassers;
children; contributory negligence to defeat
statutory action. 322

Defective premises of another used by
master. 461

Duty of owner of premises to mere licen-
see; contributory negligence of inmate. 397

Contributory, proximately causing in-
jury. 775

Contributory; of parent as affecting re-
covery by child; negligence in failure to
comply with statutory requirements; con-
curring cause as affecting liability. 854

Liability for injury to one seeking to es-
cape danger; contributory negligence; er-
ror in judgment. 582

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Failure to look before going on track;
error in judgment in case of danger. 184

Liability for consequences of act in viola-
tion of law; unexpected consequences. 367

NEWSPAPERS.

See LIBEL AND SLANDER, NOTES AND
BRIEFS.

NEW TRIAL.

1. A new trial in a foreclosure action will
not be granted under N. Dak. Rev. Codes,
§ 5630, providing that the supreme court,
if it deem such a course necessary to the
accomplishment of justice, may order a new
trial of an action, where, although the de-
fendant introduced no evidence on the trial
because the court held at the close of plain-
tiff's testimony that the notice of sale was
insufficient and the foreclosure void, there
is not even the suggestion of the possibil-
ity of establishing facts which would alter
the conclusions already reached. *Grandin*
v. Emmons (N. D.) 610

2. The judgment should be reversed and
a new trial granted in a criminal case
where the solicitor general, in his address
to the jury, uses highly improper language,
not authorized by the evidence or any fair
deduction therefrom, and the court fails to
rebuke him or charge the jury with refer-
ence to the matter, and, upon motion of the
counsel for the accused, refuses to declare a
mistrial. *Ivey v. State* (Ga.) 959

NOTARY.

Document Acknowledged before, see
EVIDENCE, 5.
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NOTICE.

Of Agent's Acts, see EVIDENCE, 3.
See also ATTACHMENT, 7; PUBLICA-
TION.

NUISANCES.

See also CONTEMPT; INJUNCTION, 4, 5;
LIMITATION OF ACTIONS, 4.

1. A blacksmith shop or a machine shop
is not a nuisance *per se*. *Chambers v.*
Cramer (W. Va.) 545

2. Charter power to declare what shall
constitute nuisances will not authorize a
municipal corporation to declare generally
that to inter a dead body in any portion
of the inhabited district of the city shall be
a nuisance, when such interment may be
made in the usual way in some of such sec-
tions without giving offense to the senses of
any human inhabitant, or endangering in
the least measure the health of the com-
munity. *Wygant v. McLauchlan* (Or.) 636

3. Jurisdiction to abate nuisances exist-
ing in the cities having a population of
20,000 or more, in a summary manner, un-
der the laws of the state of Georgia, re-
sides alone in the police court of the city
where it is claimed such nuisance exists,
except as to things or acts which are by the
common or statute law declared to be nu-
sances *per se* or which are in their very na-
ture palpably and indisputably such.
Western & A. R. Co. v. Atlanta (Ga.) 294

4. Save and except as to those things
which are by the common or statute law de-
clared to be nuisances, *per se*, or which are
in their very nature palpably and indis-
putably such, neither the municipal au-
thorities of any city of this state, nor any
department thereof which has been given
the power to abate nuisances, has the legal
right summarily to compel the abatement
of a particular thing or act as a nuisance,
without reasonable notice, to the person al-
leged to be maintaining or doing the same,
of the time and place for hearing and de-
termining whether such thing or act does
in law constitute a nuisance. *Id.*

5. The fact that all places where intoxi-
cating liquors are sold or kept for sale, or
places where persons are permitted to re-
sort for the purpose of drinking the same,
are declared by statute to be common nu-
sances, does not justify their abatement by
any person or persons without process of
law; and the destruction or injury to prop-
erty used in aid of the maintenance of such
nuisances, except in the manner provided
by the statute, is a trespass. *State v.*
Stark (Kan.) 910

6. A private individual cannot abate a
public nuisance consisting of a fence across
a navigable stream, unless he has some spe-
cial interest in the abatement different
from and greater than the interest of the
community. *Griffith v. Holman* (Wash.)
178

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See also EVIDENCE; INJUNCTION; LIMITA-

TION OF ACTIONS; MUNICIPAL CORPORATIONS.

Nuisances; private, what are; blacksmith and horseshoeing as a nuisance. 545

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Public, obstructing highway; legalization by lapse of time. 522

Liability of individual for abatement of public nuisance not specially injuring him. 179

Necessity of judicial determination before abatement; power of city to define; summary remedy. 295

OFFICERS.

Authority to Purchase Vaccine Matter, see COUNTIES.

1. The official acts of a *de facto* officer are recognized as valid on the high ground of public policy, and for the protection of those having official business to transact; and the acts of such *de facto* officer cannot be collaterally attacked. *Morford v. Territory* (Okla.) 513

2. Where an office exists under the law, and a person is elected to fill such office, and duly qualifies and enters upon the discharge of his official duties, he is a *de facto* officer, and his acts are valid, notwithstanding the fact that he may not possess all the necessary qualifications as prescribed by the statute to fill such office. *Id.*

3. Public officers receiving no more than \$5,000 per year for their services should not, on grounds of public policy, be required by the courts to set apart any part of their salaries for the payment of their debts. *Dickinson v. Johnson* (Ky.) 566

4. Investments of salary by a public officer in real estate are not exempt from the claims of antecedent creditors, even though the conveyance has been taken in the name of his wife. *Id.*

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Exemption of officer's salary from claims of his creditors:—(I.) Creditors' bills and supplementary proceedings; (II.) on the ground of public policy; (III.) statutory provisions; (IV.) school teacher's salary; (V.) officers of municipal corporations in Kentucky; (VI.) summary. 566

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Custody of Minor, see HABEAS CORPUS; INFANTS.

See also INSURANCE, 4-6, NOTES AND BRIEFS.

PARKS.

Regulation as to Tires, see MUNICIPAL CORPORATIONS, 3.

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PARTNERSHIP.

See also SUBROGATION.

The members of an insolvent partnership, if in good faith, and all the partners consent, may appropriate their own interest in the partnership property to the payment of their individual debts in preference to those of the partnership. *Kincaid v. National Wall Paper Co.* (Kan.) 412

NOTES AND BRIEFS.

See also JUDGMENT.

Partnership; payment of individual debts with partnership assets; insolvency as affecting; good faith; rights of partnership creditors; preference of creditors by sale or mortgage. 412

Right of partner who pays firm debt to subrogation against copartner:—(I.) In general; (II.) after dissolution: (a) in general; (b) debts assumed by one or more partners; (c) death of partner; (III.) conclusion. 614

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Payment; application to mortgage debt of payment in excess of legal interest. 731

PENALTY.

In Bond, see INTOXICATING LIQUORS, NOTES AND BRIEFS.

PERJURY.

Perjury cannot be assigned upon the alleged false testimony of a witness, given in the course of a trial, where the court has no jurisdiction of the offense charged or of the defendant; but if the proceedings are merely erroneous or voidable, even if there be such irregularities or defects as would require a reversal of the cause on appeal, false testimony given in the course of such trial, if material, does constitute perjury. *Morford v. Territory* (Okla.) 513

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Perjury; as affected by invalidity of proceeding in which testimony is taken. 513

PHYSICAL EXAMINATION.

See also APPEAL AND ERROR, 23.

NOTES AND BRIEFS.

Physical examination; right to, in an action for personal injuries; error in refusing. 397

PHYSICIANS AND SURGEONS.

Privileged Communications, see EVIDENCE, 20, 21.

See also CONSTITUTIONAL LAW, NOTES AND BRIEFS.

A statute authorizing the state board of health to revoke a physician's license for grossly unprofessional conduct likely to deceive or defraud the public, without fixing any standard by which such fact shall be

determined, is void. *Mathews v. Murphy* (Ky.) 415

PILOTS.

A vessel having no propelling power of her own, and in charge of a tug having on board a licensed pilot, is subject to the provisions of a state statute requiring vessels entering a certain port to take a licensed pilot, or, in case of refusal, to pay his regular fee. *Newton v. The Carrie L. Tyler* (C. C. A. 4th C.) 236

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Pilots; state regulation of; refusal of pilotage; tug and tow; exemptions. 237

PLEADING.

See also **LIBEL AND SLANDER**, 3.

1. The presumption of the regularity of the proceedings in the courts of another state resulting in a decree of divorce will dispense with an allegation, in a bill to enforce the decree, that the cross complaint on which the decree was based was duly served. *Trowbridge v. Spinning* (Wash.) 204

2. Allegation of the fact of jurisdiction to grant a divorce in a court of another state, whose decree is sought to be enforced, is not necessary where it is alleged to be a court of general jurisdiction, and the local statutes empower it to pass such decrees. *Id.*

3. Knowledge of the falsity of a warranty that an acetylene gas machine is safe need not be alleged in an action to recover for its breach. *Tyler v. Moody* (Ky.) 417

4. A petition by an administrator to recover for the death of an intestate sufficiently alleges the necessary pecuniary injury to the widow or next of kin, as against a general demurrer, by an allegation that "by reason of the death of the intestate, and the loss of the service and society and fellowship of the said intestate, the plaintiff has been damaged in the sum of \$5,000." *Tucker v. Draper* (Neb.) 321

5. Where a railway company is by statute made liable for the negligence of its engineer, an averment that its negligence was the cause of an injury will include the negligence of the engineer. *Indianapolis Union R. Co. v. Houlihan* (Ind.) 787

6. An amendment of pleadings is more readily allowed than refused. There is no substitution of a new plaintiff when the original plaintiff amends his petition in order to make it clearly appear that his children, in whose name he sued, were the parties actually in interest. *Delisle v. Bourriague* (La.) 420

7. Sustaining a demurrer to a plea in an action for negligent injuries, which alleges that they were committed by a third person, is not error where there is also a plea of the general issue, since the plea demurred to amounts merely to the general issue. *Hagerstown v. Klotz* (Md.) 940

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See also **ACTION OR SUIT; LIBEL AND SLANDER**.

Pleading; necessity of allegation of authority of foreign court. 205

Amendment changing capacity but not person of plaintiff as affecting time when suit commenced; permitting administrator to sue as administrator with will annexed as change of form of action. 681

Amendment showing cause of action not originally shown; alteration of substance of demand. 420

Necessity of allegation of special damage from words not libelous *per se*; words libelous *per se*. 856

POLICE.

See also **STATUTES**, 2.

Promotion of a police officer for acts of personal heroism is not prohibited by a constitutional provision that promotions shall be made, when practicable, upon competitive examination. *People ex rel. Leary v. Knox* (N. Y.) 589

NOTES AND BRIEFS.

Police; promotion; effect of, on civil service rules. 589

POLICE POWER.

See **BURIAL**, 1; **CONSTITUTIONAL LAW**, 10, **NOTES AND BRIEFS**.

POWERS.

See also **MORTGAGE**, 1.

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Powers; construction; power to purchase; to mortgage. 408

PRINCIPAL AND AGENT.

Declarations and Acts of Agent, see **EVIDENCE**, 14-16.

Presumption as to Notice, see **EVIDENCE**, 3.

Lodge Secretary as Agent of Supreme Lodge, see **BENEVOLENT SOCIETIES**, 4.

See also **ADVERSE POSSESSION**, 1; **BONDS**, 2; **INSURANCE**, 1.

1. The holder of a promissory note, taken for him of the maker by an agent upon a condition not disclosed to such holder and outside the scope of the agency, cannot repudiate the condition and insist upon holding and enforcing the note. He is bound, if he does not intend to abide by such condition, to restore or offer to restore the note within a reasonable time after discovering the facts. *Andrews v. Robertson* (Wis.) 673

2. The owner of a theater cannot be held liable for the unauthorized acts of his manager in obstructing the service of process upon an actor employed in the theater. *Paulton v. Keith* (R. I.) 670

3. One who signs a promissory note in the name of another, by himself as attor-

ney in fact, but who, to the knowledge of the payee and a subsequent indorsee, has no authority to use the other's name, and who refuses their solicitation to sign his own name and bind himself personally, is not liable upon the note as his contract, notwithstanding the fact that it is given in a transaction of his own, and that he is generally using the name signed to the note as a tradename. *Kansas Nat. Bank v. Bay* (Kan.) 408

NOTES AND BRIEFS.

See also CORPORATIONS; EVIDENCE.

Principal and agent; acts of agent in full control of property; theater owner's liability for manager's obstruction of service of process. 670

Imputing notice to principal from agent's knowledge. 920

Collection agent's authority as to medium of payment; unauthorized acts of special or general agent. 677

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See also BONDS, 2.

NOTES AND BRIEFS.

See also JUDGMENT.

Principal and surety; disregard of terms of agent's employment as affecting his surety's liability. 945

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PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 20, 21.

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PROPERTY.

NOTES AND BRIEFS.

Interference with Right to Sell, see CONSTITUTIONAL LAW.

PROXIMATE CAUSE.

See also MASTER AND SERVANT, 22; NEGLIGENCE, 2; STREET RAILWAYS, 4.

1. The failure of an officer who has entered the outer doors of a theater to serve process on an actor, to force an entry to the stage, which is necessary to effect the service, and not the act of the owner's servants in obstructing the officer, is the cause of injury resulting from the failure, so that the owner of the theater cannot be held liable for such injury. *Paulton v. Keith* (R. I.) 670

2. The failure to exercise due care for the protection of a drunken passenger on the part of a carrier having knowledge of his inability to realize the danger from an exposed position which he has assumed, and not the passenger's incapacity which results from his voluntary intoxication, nor his placing himself in such position, is the legal cause of his falling from the 54 L. R. A.

train and being injured. *Wheeler v. Grand Trunk R. Co.* (N. H.) 955

3. A defective handle of a hand car may be the proximate cause of an injury to a person on another hand car which is derailed by the force of the other car which comes up against it and strikes it with one handle only, when, if both handles were in proper condition, it might have been pushed forward without being derailed. *Wallin v. Eastern R. Co.* (Minn.) 481

NOTES AND BRIEFS.

Proximate cause; of injury to servants from defective tools; hand cars. 481

PUBLICATION.

A notice of mortgage foreclosure sale by advertisement, which is published six times, once in each week, for six successive weeks before the sale, is sufficient, being a literal compliance with N. D. Rev. Codes, § 5848, regulating the publication of notices, although there is less than six full weeks between the first and last publications. *Grandin v. Emmons* (N. D.) 610

PUBLIC IMPROVEMENTS.

See also CONSTITUTIONAL LAW, 8, NOTES AND BRIEFS.

A requirement of a guaranty to maintain and repair a street on which paving is done for five years thereafter is not *ultra vires* on the part of a city contracting for such pavement. *Barber Asphalt Paving Co. v. French* (Mo.) 492

PUBLIC LANDS.

NOTES AND BRIEFS.

Public lands; right of railroad under grant; extent of grant; right of way; alienation of; construction of grant against grantee. 526

PUBLIC MONEY.

Public Purpose for which Tax Authorized, see COURTS, 1.

See also BONDS, 3; TAXES, 1.

The promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup is a private, and not a public, purpose. *Dodge v. Mission Twp.* (C. C. A. 8th C.) 242

PUBLIC PRINTING.

See CONSTITUTIONAL LAW, 5; STATUTES, 1.

PUBLIC PROPERTY.

See TAXES, 4, 5.

PUBLIC PURPOSE.

See PUBLIC MONEY.

RAILROADS.

Intervention by Purchaser of, see ACTION OR SUIT, 6.

As Carriers, see CARRIERS.

Regulation Interfering with Commerce, see **COMMERCE**.

Compelling Domestication as Denial of Equal Protection, see **CONSTITUTIONAL LAW**, 3.

Statute Making Railroad Liable for Fellow Servant's Negligence, see **CONSTITUTIONAL LAW**, 12.

Impairment of Obligation, see **CONTRACTS**, 13.

Estoppel as to Title to Right of Way, see **ESTOPPEL**.

Appointment of Administrator of One Negligently Killed, Attack on, see **EXECUTORS AND ADMINISTRATORS**, 2, 3.

Judgment for Conductor Precluding Recovery against Railroad, see **JUDGMENT**, 1.

As to Master and Servant, see **MASTER AND SERVANT**.

See also **ACTION OR SUIT**, 3, 4; **ADVERSE POSSESSION**, 2, 3; **ESTOPPEL**; **JUDICIAL SALE**, 1; **LIMITATION OF ACTIONS**, 1; **PLEADING**, 5; **PROXIMATE CAUSE**, 3.

A railroad company is liable to one who at night, without right and while in a drunken and helpless condition, boards a train standing in a cut, and is immediately ejected from the train with knowledge on the part of the trainmen that a passenger train will soon pass through the cut, for injuries by the latter train, which its superintendent and nearest station agent, who have been informed of his peril, make no effort to avoid. *Waldron v. Louisville & N. R. Co.* (Ky.) 919

NOTES AND BRIEFS.

Liability to Intending or Departing Passenger, see **CARRIERS**.

See also **EASEMENTS**; **MASTER AND SERVANT**; **TRIAL**.

Railroad; as public highway; dedication to public use; grant of land for right of way; conclusiveness of grant as to width of; abandonment of right of way; alienation. 522

Contributory negligence; duty to stop, look, and listen; negligence of defendant after plaintiff's danger known. 803

REAL PROPERTY.

NOTES AND BRIEFS.

Real property; application of registry act to liability of grantees in order of alienation. 732

RECEIVERS.

See also **ASSIGNMENT FOR CREDITORS**, 3; **INSURANCE**, 2.

NOTES AND BRIEFS.

See also **COSTS AND FEES**; **INSURANCE**.

Receivers; duty to protect valid preference and priorities; rights in insurance money; tracing property into. 348
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RECORDS.

See **REAL PROPERTY**, **NOTES AND BRIEFS**.

RELEASE.

Consideration for, see **EVIDENCE**, 10.
See also **ACCORD AND SATISFACTION**.

RELIGIOUS LIBERTY.

See **BENEVOLENT SOCIETIES**, 1-3.

RESIDENCE.

See **VOTERS AND ELECTIONS**, 1.

RÉSUMÉ.

For *Résumé of Contents of Book*, see p. 961.

SAFE DEPOSIT COMPANY.

See **GARNISHMENT**.

SALE.

Tender of Performance, see **CONTRACTS**, 4, 5.

See also **DAMAGES**, 5; **PLEADING**, 3.

1. The title to personal property reserved for securing the payment of a debt by the terms of a promissory note for the purchase money is divested by a transfer of the note by the payee for value to a third person, without recourse, and, unless at the time of such transfer of the note the title to the property is not also transferred to the purchaser of the note as security, it vests in the maker, and the transferee of the note becomes an ordinary creditor of such maker. *Burch v. Pedigo* (Ga.) 808

2. When time is made of the essence of a contract for the shipment of oranges under a contract of sale, acceptance of them when shipped after the stipulated time will not waive a right to damages caused by the delay. *Redlands Orange Growers' Assn. v. Gorman* (Mo.) 718

3. Taking the purchaser's worthless notes in payment for goods shipped will not defeat the right of stoppage *in transitu*. *Brewer Lumber Co. v. Boston & A. R. Co.* (Mass.) 435

4. The negotiation of notes taken in payment for property shipped will not defeat the right of stoppage *in transitu*, if they are recovered and tendered back to the maker or his representative before the right is exercised. Id.

5. The right of stoppage *in transitu* of a carload of lumber is not lost by the storage of the lumber by the carrier for failure to unload within the time required by its rules, when the freight charges remain unpaid, and the carrier has made no agreement to hold the property for the consignee. Id.

NOTES AND BRIEFS.

Right to Dividends on Stock, see **CORPORATIONS**.

See also **DAMAGES**.

Sale; offer of seller to perform; what necessary; tender of delivery; place of delivery; demand of payment; right of pur-

chaser to await; waiver of performance by subsequent recognition of existence of contract. 249

Stoppage in transit; termination of transit; storage by carrier; accepting notes as affecting right. 436

Representations amounting to a warranty; warranty of fitness on sale for particular purpose. 418

Effect of acceptance of goods as a waiver of damages for delay in delivery. 718

SCHOOLS.

Exemption of Officer's Salary, see OFFICERS, NOTES AND BRIEFS.

Power to make vaccination a condition to admission to the schools is not conferred by statutory authority to determine the qualifications for admission thereto, to do all things needful and desirable for their prosperity and success, and to make and enforce suitable rules and regulations for their government and management, where the children are in good health, there is no smallpox in the town, although there are some cases in other parts of the state, and the statute makes failure to send children to school, and failure on their part to attend, a penal offense. *Mathews v. School Dist. No. 1 Bd. of Edu. (Mich.)* 736

SEDUCTION.

See LIMITATION OF ACTIONS, 3.

SEPARATION.

See DESCENT AND DISTRIBUTION, 1; HUSBAND AND WIFE, 3, 4.

SET-OFF AND COUNTERCLAIM.

Of Homestead Right, see BANKRUPTCY, 1.

1. A creditor of an insolvent debtor, who bids in the debtor's property at an execution sale for an amount in excess of the judgment, cannot set off his claim against the amount of his bid to which the debtor is entitled. *Meherin v. Ambrose (Cal.)* 272

2. Any right which a creditor of an insolvent has to set off his claim against the surplus of his bid at an execution sale of the debtor's property must be exercised when he proves his claim in the insolvency proceedings against the debtor, and is waived by proving for and receiving a dividend on the whole amount of his claim. *Id.*

3. A claim against an insolvent which has been proved in the insolvency proceedings has ceased to be an existing cause of action so as to be a valid counterclaim against a demand by the insolvent's assignee, where the statute provides that no creditor proving his debt shall be allowed to maintain any action therefor against the debtor. *Id.*

SHEEP.

See CONSTITUTIONAL LAW, 11.
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SHERIFF.

See BONDS, 1; DAMAGES, 2.

SHIPPING.

Jurisdiction on Appeal from Award, see APPEAL AND ERROR, 4.

Insurer's Right in Damages for Collision, see INSURANCE, 15.

See also PILOTS; TAXES, 3.

NOTES AND BRIEFS.

See also INSURANCE.

Shipping; steam vessel and tow one vessel for purposes of navigation. 237

SPECIFIC PERFORMANCE.

See also CONTRACTS, 9.

1. Relief must be denied to both complainants in a suit to enforce specific performance of a contract to convey land, if one cannot maintain his suit because he is in possession of the property as tenant. *Davis v. Williams (Ala.)* 749

2. One entitled to specific performance of a contract to convey land is precluded from maintaining a suit therefor by the fact that after obtaining the contract he took a lease of the property, since such suit involves a denial of the landlord's title. *Id.*

3. Persons who have conveyed property for a college campus upon condition that it shall be used for no other purpose, have, after they have disposed of all land in the vicinity which can be benefited by performance of the covenant, no standing in a court of equity to enforce such performance. *Los Angeles University v. Swarth (C. C. A. 9th C.)* 262

STARE DECISIS.

See COURTS, 2, 3.

STATUTES.

For Revocation of License without Fixing Standard, see PHYSICIANS AND SURGEONS.

1. That portion of a statute providing for county printing, which requires the supervisors to fix the price and allow the procurement of the needed amount and certification of the bill to the board, is separable from the part which prohibits the employment for the purpose of a paper established less than a stated time, and may be upheld, although the latter part is unconstitutional. *Van Harlingen v. Doyle (Cal.)* 771

2. A statute authorizing municipal authorities to promote police officers for personal heroism is not repealed by a general statute regulating appointments and promotions in the civil service, which provides that the statute shall not take from any policeman any right or benefit conferred by law or existing under any lawful regulation of the department in which he serves. *People ex rel. Leary v. Knox (N. Y.)* 589

NOTES AND BRIEFS.

Statutes; as to Revocation of Physician's License, see CONSTITUTIONAL LAW.

STOPPAGE IN TRANSITU.

See SALE, 3-5.

STREET RAILWAYS.

As Carriers, see CARRIERS.

See also DAMAGES, 1, 6; NEGLIGENCE, 15; TRIAL, 7, 8.

1. A street railway company is negligent in operating an electric car with a defective controller handle, so that the car cannot be stopped with the same facility as if the appliance was sound. *Roberts v. Spokane Street R. Co.* (Wash.) 184

2. The duty of a street car company, in the exercise of ordinary care in respect to the management of a car approaching a person crossing its tracks, cannot be measured by the condition of the equipment and apparatus of the car at the time, without considering the effect of the fact that the appliances for stopping the car were defective. *Id.*

3. Failure to look and listen before crossing an electric street railway is not negligence *per se*. *Id.*

4. If the negligence of a street car company with respect to the condition or management of its car is the proximate cause of a collision with a traveler on the highway, it will be liable for the injury, although want of ordinary care on the part of the traveler was a condition of the accident. *Id.*

NOTES AND BRIEFS.

Street railways; rule of comparative negligence; contributory negligence; failure to look and listen before crossing tracks; defective apparatus; error in judgment in case of danger. 184

SUBROGATION.

Of Insurer, see INSURANCE, 15.

See also PARTNERSHIP, NOTES AND BRIEFS.

A partner who, not being in arrears to the firm upon dissolution of the partnership and exhaustion of the social assets, pays judgments subsequently recovered against it on partnership debts, is entitled to be subrogated to the rights of creditors whose judgments he has satisfied against the real estate of his copartner in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional part of the liability as shown by a settlement of the partnership account. *Sands v. Durham* (Va.) 614

SUFFICIENCY.

See DEEDS.

SUICIDE.

See INSURANCE, 14.

SUPPLEMENTARY PROCEEDINGS.

See OFFICERS, NOTES AND BRIEFS.

TAXES.

Determination of Public Purpose, see COURTS, 1.

See also INJUNCTION, 6.

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1. The power of a legislature to levy or to authorize the levy of a tax, and to create or authorize the creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose. *Dodge v. Mission Twp.* (C. C. A. 8th C.) 242

2. A farmer who, to give his children school facilities, takes a house in town, in which he places some of his household effects and lives with his family, is not subject to taxation there, where he keeps his country house at all times in readiness to receive the family when the purpose of their sojourn in town shall have been accomplished, and performs his duties as a citizen where his country house is located, claiming that as his home. *Montgomery v. Lebanon* (Ky.) 914

3. Ocean-going tugboats are not exempt from taxation by the state in whose waters they are exclusively employed, by the fact that they are registered and taxed at a port in another state where their owner is domiciled. *Northwestern Lumber Co. v. Chelalis County* (Wash.) 212

4. A statute enacting that each armory "owned" and occupied by any command of the volunteer military forces of the state "shall be to all intents and purposes public property . . . and as such public property . . . shall be exempt from any taxation, state, county, or municipal" (Ga. Pol. Code, § 1156), is in violation of the state Constitution authorizing the exemption from taxation of "public property," since that exemption extends only to property owned by the state or some political division thereof. *Board of Trustees of Gate City Guards v. Atlanta* (Ga.) 806

5. Public property within the meaning of that clause of the Constitution which authorizes the general assembly to exempt from taxation "all public property" embraces only such property as is owned by the state or some political division thereof, and title to which is vested directly in the state or one of its subordinate political divisions, or in some person holding exclusively for the benefit of the state or a subordinate public corporation. *Id.*

NOTES AND BRIEFS.

Taxes; exemptions must be express; strict construction; public property; declaration of legislature. 806

Of boats of nonresident licensed under Federal law; situs for the purpose of; interference with commerce. 213

No inherent power of municipality; power limited to legislative grant; dogs as subject of. 369

TELEGRAPHS.

See also DAMAGES, 4.

1. A telegraph company is liable for losses caused by a false telegram wilfully transmitted by an operator employed in its office, directing a bank to pay money on account of a correspondent bank. *Pacific*

Postal Teleg. Cable Co. v. Bank of Palo Alto (C. C. A. 9th C.) 711

2. Mental anguish resulting from failure to promptly deliver a telegram will not support an action against the telegraph company for such failure. *Western U. Teleg. Co. v. Ferguson* (Ind.) 846

NOTES AND BRIEFS.

Telegrams; right of action to recover for damages from negligent falsity of telegram. 712

THEATER.

Declarations of Manager, see EVIDENCE, 14, 15.

Proximate Cause of Damages from Obstruction by Manager of Service of Process, see PROXIMATE CAUSE, 1.
See also PRINCIPAL AND AGENT, NOTES AND BRIEFS.

TIME.

See PUBLICATION.

TOWNSHIP.

See BONDS, 3.

TRESPASS.

In Abatement of Nuisance, see NUISANCES, 5.

See also CRIMINAL LAW; MASTER AND SERVANT, 1.

TRIAL.

Remarks of Counsel, see APPEAL AND ERROR, 6.

See also JUDGMENT, 2.

1. A statute providing that three fourths of the jurors sitting in a civil case may concur in and render a verdict, and that such a verdict shall have the same force and effect as though found and returned by all the jurors, is not authorized by Wyo. Const. art 1, § 9, which provides that the right to trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, since the legislature is given no power to dispense with the unanimity of a verdict. *First Nat. Bank v. Foster* (Wyo.) 549

2. The conviction of a person of a crime which La. Const. 1898, art. 116, requires should be tried by a jury of twelve, though nine jurors concurring may render a verdict, is not a legal conviction, though twelve jurors are physically present during the trial, and all concur in a verdict of guilty, if one member of the jury is in a drunken condition during the trial. *State v. Ned* (La.) 933

Questions for court or jury.

3. What facts will create the contract relation of carrier and passenger is a question of law. *Chicago & E. I. R. Co. v. Jennings* (Ill.) 827

4. Whether or not the measure of care which a railroad company owed to a drunken passenger dancing and staggering be-

tween the open doors of the baggage car was such that by its exercise he could have been prevented from falling out to his injury is a question for the jury. *Wheeler v. Grand Trunk R. Co.* (N. H.) 955

5. The jury must determine whether or not a railroad company could have prevented a drunken passenger staggering and dancing between the open doors of a baggage car, without capacity to appreciate the danger, from falling out and being injured. Id.

6. Whether or not the intoxication of a passenger renders him incapable of understanding the danger of a position which he has assumed or from protecting himself from its hazards, although he is able to talk, laugh, sing and dance about, is a question for the jury. Id.

7. Two and a half miles an hour cannot, as matter of law, be said not to be an excessive speed for an electric street car, when it meets, at a busy street crossing, another car on a parallel track, where its mechanism for controlling the current is defective. *Roberts v. Spokane Street R. Co.* (Wash.) 184

8. The question of negligence in permitting electric cars to meet and pass at a street crossing is one of fact in the light of all the evidence in the case. Id.

9. The question of an implied invitation on the part of the owner of premises on which there was an uncovered well, for children to come upon the lots to play, is for the jury, where there is evidence that children were accustomed to play there, that public entertainments were sometimes given on the premises, and people invited to hitch their teams there, and that there was a saloon on one corner of the tract. *Tucker v. Draper* (Neb.) 321

10. The question whether or not a boy ten years old is guilty of negligence contributing to his injury is for the jury, where at a street crossing he attempts to ride a bicycle across the tracks, and in so doing passes behind one car and comes immediately in front of another approaching from the opposite direction, which, because of its defective condition, cannot be stopped in time to avoid collision with him. *Roberts v. Spokane Street R. Co.* (Wash.) 184

Instructions.

11. A requested instruction not true in its application to the case on trial should not be given, although stating a proposition true in general. *Wheeler v. Grand Trunk R. Co.* (N. H.) 955

Taking from jury; directing verdict.

12. At the close of the evidence there is always a preliminary question for the judge before the case can be properly submitted to the jury, and that is whether or not there is any substantial evidence upon which the jury can properly return a verdict in favor of the party who produces it; and, if there is no such evidence, it is the duty of the court to direct the jury to re-

turn a verdict against him. *Cudahy Packing Co. v. Marcan* (C. C. A. 8th C.) 258

13. A verdict must be directed for defendant in the absence of anything to show ill will or malice, in an action for the publication in a newspaper of an article ridiculing in exaggerated and uncomplimentary terms a public entertainment which is not only childish, but ridiculous in the extreme. *Cherry v. Des Moines Leader* (Iowa) 855

14. Suicide of the insured is not so conclusively shown as to require the taking of an action on the policy from the jury, by evidence that, having been upon a train, he was found by the side of the track mortally wounded, that for some time he had been in straitened financial circumstances, his property being heavily encumbered and about to be sold, that he had failed in an attempt to effect a loan, had been guilty of forgery and false representations for which he was threatened with prosecution, and had recently been making efforts to secure as much accident insurance as possible, where it also appears that he had four daughters dependent upon him for support, for whom he had a strong affection, was a man of sanguine temperament, accustomed to carry considerable insurance, and that his property sold for enough to pay all his debts. *Fidelity & C. Co. v. Freeman* (C. C. A. 6th C.) 680

15. An action for injuries to an employee of one engaged in constructing a bridge, which is caused by the breaking of defective material used in the temporary structure, cannot be taken from the jury where there is no evidence of inspection on the part of the master to ascertain whether or not the material furnished was suitable, and evidence produced indicates that proper inspection would have disclosed the defect. *Lafayette Bridge Co. v. Olsen* (C. C. A. 7th C.) 33

Verdict.

16. For the purpose of overthrowing a general verdict in favor of a child who, while playing on a sand pile in a public street, fell into an open manhole and was injured, the court will not assume from the fact that he was six and a half years old, that he was so advanced in knowledge as to be able to know when he was in a place where he ought not to be, and to appreciate the evidences and presence of danger. *South Bend v. Turner* (Ind.) 396

17. To overthrow a general verdict by answers to special interrogatories they must be of such a nature as to exclude the possible existence of other controlling facts provable under the issue relating to the same subject. *Id.*

NOTES AND BRIEFS.

Trial; constitutional right to jury trial; number of jurors. 514

Right of state to provide for other than common-law jury. 549

Question of negligence for jury. 775
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Want of care of one injured by railroad train, for jury. 803

Question of care of passenger at time of injury for the jury. 827

Question for jury; due care by child on dangerous premises, negligence as to premises. 314

Question of law or fact as to dependency of one suing for debt. 936

Privilege of libelous publication; question of law; bona fides question of fact; whether occasion rebuts inference of malice, for the court. 856

Direction of verdict; what will warrant; question for jury; what inference other than contributory negligence can be drawn. 250

TRUSTS.

See also WILLS, 4.

A person charged with the duty of selling corporation stock in order to raise a fund with which to pay encumbrances upon the property of the corporation, and who is himself the owner of one of the encumbrances, junior in time to the others, and acquired by him before he became obligated to sell the stock, is not a trustee as to the property of the corporation covered by the encumbrances, and forbidden to protect his own interests in it by buying the prior liens on it, merely because he was under obligation to sell the corporation stock to raise a fund to discharge the corporation indebtedness. *Harrison v. Mulvane* (Kan.) 405

NOTES AND BRIEFS.

See also ASSIGNMENT FOR CREDITORS.

Trusts; duty of trustee of corporate stock; position of purchaser from trustee with notice. 405

Who bound by note signed by one as trustee. 355

USURY.

See also BUILDING AND LOAN ASSOCIATIONS, 3; CONFLICT OF LAWS, 1; JUDGMENT, NOTES AND BRIEFS; MORTGAGE, 4.

A percentage payable to a building and loan association indefinitely and at fixed periods is interest, although it be called premium, and, being in addition to the legal rate of interest already charged, is usurious. *Gray v. Baltimore Bldg. & L. Asso.* (W. Va.) 217

VACCINATION.

Authority of Officers to Purchase Vaccine Matter, see COUNTIES.

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VENDOR AND PURCHASER.

See DEEDS, NOTES AND BRIEFS; MORTGAGE, 2, 3; SPECIFIC PERFORMANCE, 1.

VICE PRINCIPALSHIP.

See MASTER AND SERVANT, NOTES AND BRIEFS.

VOTERS AND ELECTIONS.

1. A constitutional provision which provides that, "for the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while kept at the almshouse or other asylum at public expense," preserves the voting status of the inmates of a soldiers' home at the time of their entry thereto, and such inmates cannot acquire, by reason of their presence in such soldiers' home, and while kept at public expense, the right to vote in the county and precinct in which such institution is located. *Powell v. Spackman* (Idaho) 378

2. Constitutional requirements of a written vote, and provisions for sorting and counting, will not preclude the use of a voting machine by which the result is effected by a system of wheels, cogs, and indexes in connection with written or printed names of the candidates,—at least if the action of the machine in registering each vote cast is visible to the voter casting it, and the work of the machine in adding the votes is done under the supervision of someone duly charged with counting the votes cast. *Re House Bill No. 1,291* (Mass.) 430

NOTES AND BRIEFS.

Voters and elections; residence or domicile; intention; inmate of public institution; of soldiers' home. 378

WAIVER.

Of Exception by Introduction of Evidence, see **APPEAL AND ERROR**, 15.

Of Privilege as to Communications, see **EVIDENCE**, 20.

See also **SALE**, 2; **SET-OFF AND COUNTERCLAIM**, 2.

NOTES AND BRIEFS.

Waiver; what constitutes. 550

WAREHOUSEMEN.

Burden of Proof as to Leakage, see **EVIDENCE**, 4.

Receipts of, see **FORGERY**, 2.

1. A notice printed plainly on the face of a warehouse receipt, to the effect that loss by leakage shall be at the risk of the owner of the goods, is a part of the contract. *Tausig v. Bode* (Cal.) 774

2. A provision in a warehouse receipt, that loss by leakage shall be at the risk of the owner of goods, exempts the warehouseman from the duty of watching the packages to detect leakage resulting from any cause other than improper handling or storage. *Id.*

3. A warehouseman to whom are delivered spirits in defective casks is under no obligation to exercise any care to discover and cure the defect or prevent loss by leakage, where by the storage contract the risk of loss by leakage is placed on the owner of the spirits. *Id.*

4. Improperly piling casks of spirits in a warehouse in double tiers, so as to prevent

convenient inspection to discover leakage, will not render the warehouseman liable for leakage in the absence of any attempt at inspection on the part of the owner of the casks, where the storage contract places the duty of inspection on him. *Id.*

NOTES AND BRIEFS.

See also **EVIDENCE**.

Warehousemen; provision in receipt against liability for leakage; mere notice stamped on, as part of contract. 774

WARRANTY.

See **DAMAGES**, 5, **INSURANCE**, **PLEADING**, 3, **SALE**, **NOTES AND BRIEFS**.

WATERS.

See also **COSTS AND FEES**, 3; **FISH-ERIES**; **INJUNCTION**, 3; **NUISANCES**, 6.

1. A stream 100 feet wide and 3 feet deep, which, during annually recurring freshets for a period of twenty-five years, has been profitably used for floating logs to market, is a public highway for that purpose. *Watkins v. Dorris* (Wash.) 199

2. A stream 40 feet wide and 4 feet deep at high water lasting about three months of the year, and at other times from 6 inches to 2 feet deep, and which has never been used for purposes of navigation except by row boats to a limited extent for pleasure, is not a navigable stream. *Griffith v. Holman* (Wash.) 173

3. The provision of the Constitution reserving to the state the title to the beds of the navigable waters of the state does not apply to streams which are valuable only for floating logs to market during periods of annual freshets. *Watkins v. Dorris* (Wash.) 199

4. The owner of the land on both sides of a non-navigable stream has a right to maintain a fence across it. *Griffith v. Holman* (Wash.) 178

5. Where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time necessary to establish a prescriptive right to perpetually maintain the same, the riparian owners along such stream of water, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed; and the person who placed the obstruction in the stream, or caused the diversion of the waters, and all those claiming under or through him, are estopped upon principles of equity from restoring the waters to their natural channel or state to the injury of such riparian owners. *Kray v. Muggli* (Minn.) 473

6. Water cannot be taken from a stream to irrigate riparian land, in such quantities as to materially injure lower proprietors in the stream. *Jones v. Conn* (Or.) 630

7. A lower riparian proprietor cannot complain of the use by an upper proprietor of water for irrigating purposes, if the amount taken is not sufficient to materially injure him or to interfere in any substantial way with his right as a riparian proprietor. Id.

8. The right of a riparian proprietor to use the water for irrigating purposes is not limited to the tract of land bordering on the stream, as first segregated and sold by the government, but extends to lands lying back of such tract and purchased by him from other persons. Id.

9. Irrigation of riparian land cannot be prevented by the fact that it is divided from the stream by a natural ridge over which the water will not flow through ditches wholly on the proprietor's own land, and which will prevent its return to the stream. Id.

10. One attempting to float logs down a stream is liable to the abutting owner for injuries to his land by jams caused by the careless manner of driving the logs. *Watkins v. Dorris* (Wash.) 199

11. The right to appropriate the water of a spring which has no natural stream flowing therefrom exists under a statute providing that all ditches constructed for the purpose of utilizing the spring waters of the state shall be governed by the same laws as ditches constructed for the purpose of utilizing the waters of running streams. *Brosnan v. Harris* (Or.) 628

12. A municipal corporation owning land on a navigable lake and its non-navigable outlet cannot appropriate the waters of the lake for a municipal water supply, even under permission of the state, to the injury of a riparian owner whose rights vested before the adoption of the state Constitution, which asserted ownership in the state of the beds of all navigable lakes, but provided that it should not debar any person from asserting his claim to vested rights. *New Whatcom v. Fairhaven Land Co.* (Wash.) 190

13. Neither an individual desiring to use a stream for floating logs to market, nor a corporation formed to take advantage of a statute authorizing the improvement of floatable streams, can interfere with the soil in the stream without the consent of the abutting owner, or by operation of law, with due compensation made. *Watkins v. Dorris* (Wash.) 199

NOTES AND BRIEFS.

See also ESTOPPEL.

Waters; meandered lakes; interference with rights of the public; rights in artificial condition of watercourse; prescription of rights as to; artificial navigable stream as highway. 474

Appropriation of water of spring on other land; appropriator's rights against one subsequently acquiring title; appropriation of spring water by appropriation of streams 54 L. R. A.

fed; what constitutes valid appropriation; reasonable time for completion. 628

Riparian rights in running streams and inland lakes; right indivisible; who is a riparian owner; extension to nonriparian lands; riparian right as part of soil; restoration to channel; effect on riparian rights of law of appropriation; riparian right to divert for irrigation of nonriparian lands. 631

What waters are navigable; ownership of shores and bed of navigable waters; power of Congress to grant shores and bed of navigable streams on public lands; what law governs riparian rights; public rights on navigable stream; right of state in beds of streams merely floatable. 201

What is a navigable stream; artificially navigable stream as highway; right of navigation; fishing; trespass in exercise of; private ownership; liability for fish taken. 179

State ownership of bed and shore of navigable lake; diversion of waters of; public rights in public waters; dam or bridge across, as affecting riparian rights; property rights of riparian owner below low-water mark; riparian right to flow of stream; municipal supply as paramount necessity; right to compensation on diversion of waters; rights of city as riparian proprietor. 191

WHARF.

See EMINENT DOMAIN.

WILLS.

Parol Evidence to Show Execution, see EVIDENCE, 11.

See also HUSBAND AND WIFE, 1

1. A paper is a will where it is duly executed as such and reads: "This is good to Miss Rubie Ferris for eight hundred dollars for care and attendance rendered by her to me in my last sickness. This eight hundred dollars is to be collected out of my estate after my death, provided, however, I die a bachelor." *Ferris v. Neville* (Mich.) 464

2. A valid bequest may be made by name to an unincorporated educational society, which has an existing organization composed of certain known members, governed by a constitution and by-laws, and having officers chosen to conduct its business affairs and carry out its objects. *Re Winchester* (Cal.) 281

3. A bequest to an unincorporated educational society may be received by a corporation subsequently formed by its members to carry out the objects of the former society. Id.

4. An absolute gift, and not a trust, is created by a will bequeathing a fund to a church, and "suggesting" that it be used to complete the spire, or invested and the income used to carry on a church mission or for the benefit of the church poor,—especially in view of the fact that the objects designated are so vague as to render the trust void if established, and permit the

property to revert to the next of kin, and the word "trust" is used in other parts of the will, where there was a plain intent to create a trust. *Williams v. Committee of Baptist Church of Baltimore (Md.)* 427

NOTES AND BRIEFS.

Wills; what constitutes intention of maker. 464

Validity of bequest to unincorporated society; taking by subsequent corporation. 281

Trust or gift; precatory words; perpetuities; trust for poor. 428

WITNESSES.

Discretion as to Cross-Examination, see *APPEAL AND ERROR*, 9.

See also *PERJURY*.

1. A woman suing to recover damages for the negligent killing of her husband, for the benefit of herself and her minor children by him, cannot be compelled to testify on cross-examination to the fact that she has given birth to an illegitimate child since his death, for the purpose of affecting her credibility as a witness. *Kolb v. Union R. Co. (R. I.)* 646

2. A party is not concluded by the statements of any witness, but has the right to

introduce other competent testimony to show the real facts, although such testimony may incidentally contradict or tend to impeach the testimony of a previous witness. *Derring & Co. v. Cunningham (Kan.)* 410

NOTES AND BRIEFS.

Witness; cross-examination as to past life to discredit or impeach; as to chastity to impeach credibility; discretion of judge to rule out or admit such question; privilege against self-accrimination; admissibility of evidence as to bad character of female witness. 646

WRIT AND PROCESS.

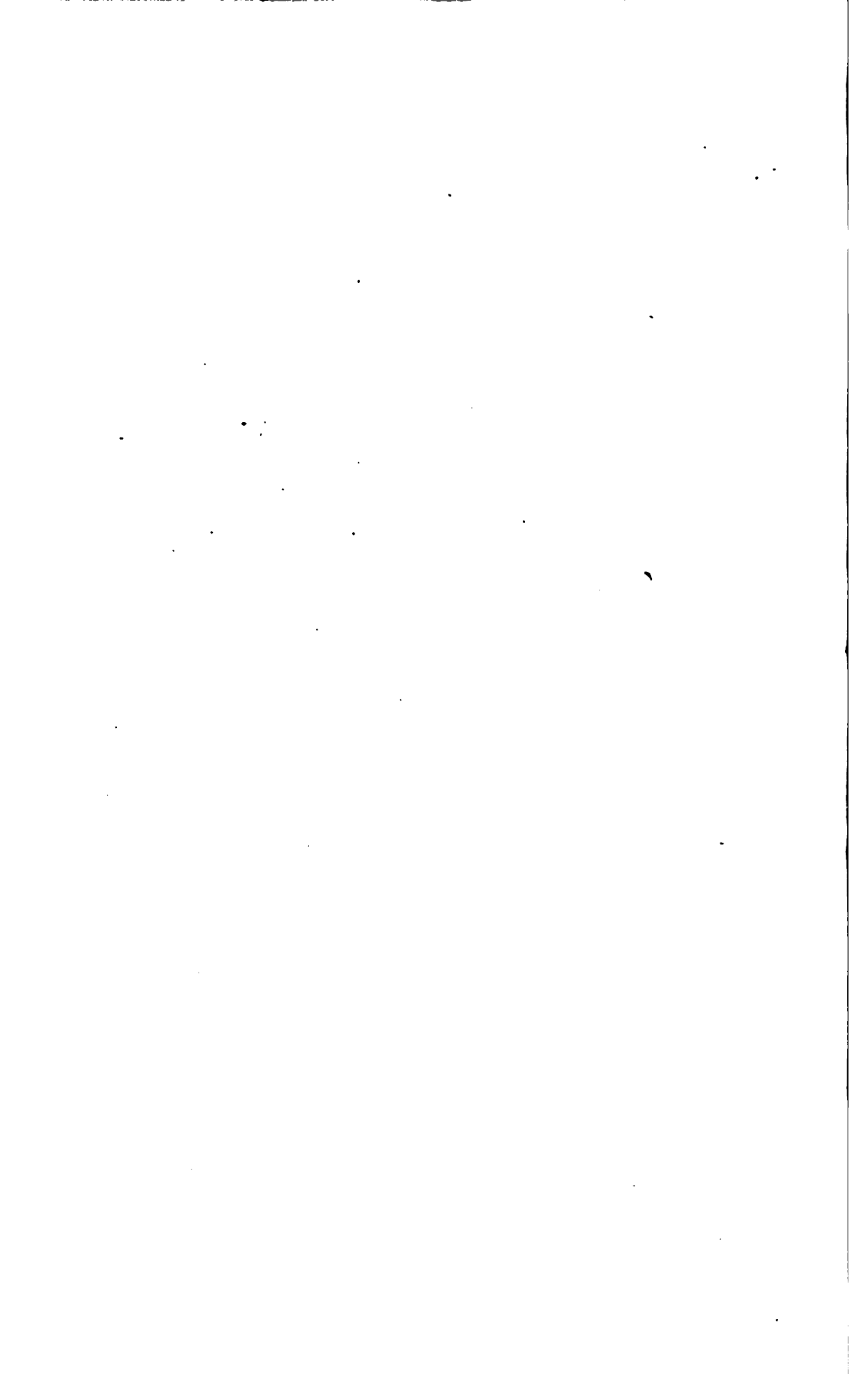
Damages from Obstructing Service, see *PROXIMATE CAUSE*, 1.

See also *PRINCIPAL AND AGENT*, 2.

A state may provide for bringing before the court by publication nonresidents claiming liens upon a railroad located within its jurisdiction, in a suit to wind up the railroad corporation and free its property from liens. *Connor v. Tennessee C. R. Co. (C. C. A. 6th C.)* 687

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Writ and process; service by publication. 690







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